Testimony of

Joseph T. Plesha

Chief Legal Officer
Trident Seafoods Corporation

Before the House Natural Resources Committee

March 13, 2013

Thank you Mr. Chairman, members of the Committee, for the opportunity to testify on the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Magnuson-Stevens Act has been remarkably successful in achieving the goals established by Congress when it was first enacted in 1976 and as it has been amended throughout the years. I would like to specifically acknowledge the work of one of the Committee members in this regard. Congressman Don Young was not only instrumental in the writing of the initial legislation back in the mid-1970s, he has been a constant champion for Alaska's, and our Nation's, seafood industry since passage of the legislation. Throughout his career Don Young has been a leader in Congress for our fisheries and I would like to express my sincere appreciation and gratitude.

I am testifying on behalf of Trident Seafoods Corporation. Trident was founded in 1973 by Chuck Bundrant, one of the true pioneers in "Americanizing" the fishery resources off Alaska. The company started in 1973 with a single boat that harvested crab in the Bering Sea. Chuck is one of the most focused, intelligent and driven individuals whom you will ever meet. He literally worked seven days a week, took unbelievable physical and financial risk, and invested all that was earned back into Trident and the seafood industry. As one of countless examples, in the very early 1980s, when foreign factory trawler fleets still harvested virtually all of the groundfish off Alaska, Trident was the first shorebased processing company to buy and process large volumes of pollock and cod from U.S. fishermen at a plant located on the remote Aleutian Island of Akutan. It was difficult to find markets for these groundfish products because foreign countries that consumed pollock and cod already had ample supplies from their allocation of fish in U.S. waters. Akutan struggled financially. Then the Akutan plant burned down in 1983. To the surprise

of many others in the industry, Chuck immediately began to rebuild at Akutan. Trident now employees over 1,000 people at its Akutan plant and the plant is the largest seafood processing facility in North America, if not the world.

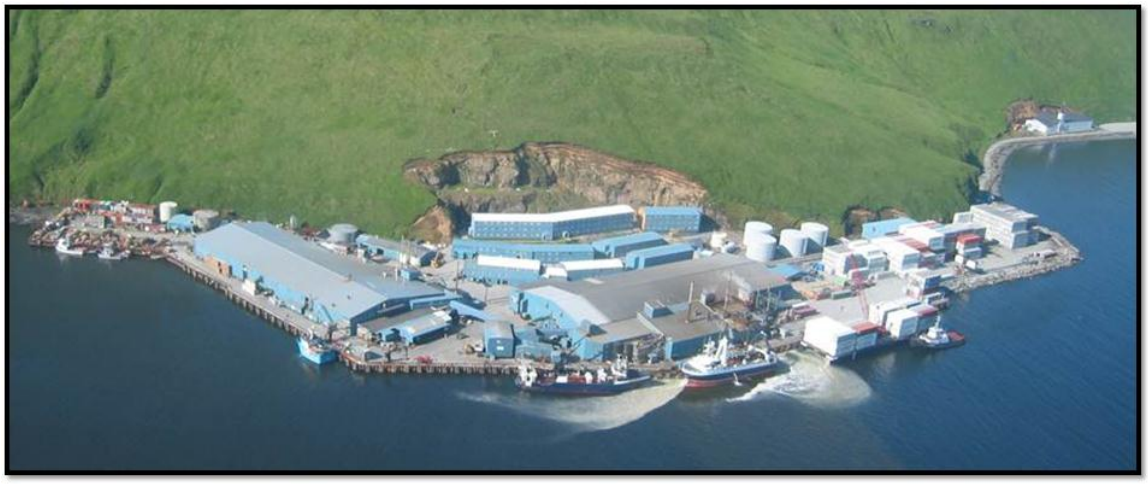

Figure 1. Trident's Akutan Plant in 2012

Trident currently has processing plants in ten different coastal communities in Alaska, as well as primary and secondary processing plants in Washington State, Oregon and Minnesota. We operate five floating processors, three catcher processors, fourteen trawl catcher vessels, four crab catcher vessels and various tender and freight vessels. Trident is one of the largest seafood companies in the United States. It is still a family-owned business, however, and Chuck remains its chief executive officer. His son, Joe Bundrant, will take over as president of Trident in 2014.

Trident's story is a great example of how the fisheries off our coasts, which previously had been used exclusively by foreign fishing fleets, are now fully utilized by the United States fishing industry under the policies of Magnuson-Stevens Act.

Catch-Share Programs and the Issue of Inclusion of Processors

My comments regarding fishery rationalization programs are focused on the industrial fisheries in the United States. Rationalization is known by many names: Individual Fishing Quotas, Individual Transferable Quotas, Catch Shares, Limited Access Privilege Programs, and others. But the basic idea is to allocate the privilege to utilize a certain portion of a fishery resource so that, as a result, the fishery becomes more economically efficient, or "rational" than the open access race-for-fish. The North Pacific and Pacific councils have spent a great deal of time on the issues surrounding rationalization, but the fisheries they manage tend to be relatively large and with capital intensive harvesting and processing sectors.

1. Benefits of rationalization.

Open access fisheries under-perform rationalized fisheries in every relevant criterion by which performance can be measured. These include: conservation of the resource, efficient bycatch avoidance, safety at sea, gross value of products produced from the resource, and the cost of harvesting and processing the resource. Open access fisheries systematically destroy the ability of society to collect net benefits from the fisheries.

This dissipation of benefits in open access fisheries occurs because uncontrolled entry into the fishery results in overcapitalization. A simple example of overcapitalization is as follows: Imagine a fishery that is fished at the maximum sustainable yield, and produces one million dollars worth of fish per year with the services of five boats, at a total cost per boat of one hundred thousand dollars per year per boat. This results in a private and societal profit of five hundred thousand dollars per year. In this case each boat is earning one hundred thousand dollars of revenue above its total cost which includes a return on invested capital. These excess profits (rent) induce entry into the fishery despite the fact that the new capital investments do not add anything to the total catch. Entry continues until all the rent is dissipated. This occurs when the fishery contains ten boats for a total cost that exactly equals the value of the catch. If the price of fish doubled this would attract ten additional boats. The open access fishery squanders whatever societal benefits a fishery is otherwise biologically and technically capable of providing. If the cost of managing the fishery is not totally borne by the industry, then any fishery managed under open access becomes a net cost to society.

2. Does it matter who receives allocations under Catch Share programs?

The benefits attributed to rationalized fisheries occur regardless of whom receives allocations of the privilege to utilize the fish.[1] From the standpoint of efficient utilization of the resource, it is unimportant who receives allocations of quota. No matter whether initial allocations are granted exclusively to the owners of harvesting vessels, the owners of processing plants, fishermen (i.e., "crew"), processor workers, or taxi cab drivers in Anchorage, Alaska, the rationalized fisheries will be utilized by the most efficient industry participants.

As an example, the pollock Community Development Quota (CDQ) program allocates ten percent of the Bering Sea pollock TAC to villages in Western Alaska. When the CDQ program was initially implemented in 1991, the CDQ communities had no involvement in the pollock industry whatsoever. The pollock resource was

[1] Coase, Ronald, *The Problem of Social Cost*, Journal of Law and Economics, 3 (Oct. 1960) 1-44.

already being efficiently utilized by the existing industry. The pollock quota allocated to CDQ communities was simply leased by those communities to companies involved in the pollock fishery. It was very similar to an auction, as the CDQ communities generally leased their pollock quotas to the highest bidder. Because the fishery was rationalized—albeit into the hands of entities that were complete outsiders to the fishery—the harvesting and processing of CDQ pollock was as efficient as if the a pollock company itself owned the quota.

3. Why not auction the privilege to utilize fishery resources?

At first blush, there appear to be good reasons to auction the privilege to use fishery resources. Our Nation's fishery resources belong to the general public.[2] It would be very simple to allocate all the benefits of rationalized fisheries to the general public through a simple auction of quota. The federal treasury can certainly use the revenue. If auctioned by the federal government, the fisheries will be utilized just as efficiently as if the privileges were instead allocated directly to industry participants.

Looked at another way, if a large un-exploited stock of cod were suddenly discovered off a remote U.S.-owned island in the Pacific ocean, for example, and fishery managers wanted to rationalize it prior to the resource being exploited, the federal government would likely auction the privileges to this undeveloped resource rather than allocate the privileges to utilize the fishery to processing plant owners or fishing vessel owners based in Alaska, Washington State or Oregon.

The typical progression of fisheries, however, is that we tend to wait until a fishery is overcapitalized through the uncontrolled entry process inherent in an open access fishery before attempting to rationalize the fishery. The fact that we tend to wait until a fishery is overcapitalized complicates the initial allocation process enormously.

4. Why fishing vessel and processing plant owners must be included in rationalized fisheries.

In a fully capitalized, open-access fishery, where the harvest is controlled by a single quota (TAC) that the participants race to exploit, the investments in fishing vessels and processing plants that are specific to the fishery being rationalized (and that are also relatively durable and non-malleable) will be lost as a result of rationalization. This lost investment value reappears in the value of the quota to utilize the resource. Wealth is unavoidably transferred from the fixed capital of processing plants and

[2] The United States claims sovereign rights over all fish within the United States Exclusive Economic Zone. 16 U.S.C §1853a.

fishing vessels to the holders of quota.[3] In other words, after an open access fishery is rationalized, rationalization fishing vessels and processing plants have little value, potentially even negative value, especially in Alaska where these assets may have on other productive uses.

When such fisheries are rationalized, owners of fishing vessels and processing plants can suffer enormous financial losses. The amount of the loss depends upon three factors: (1) The extent the fishery is overcapitalized; (2) the durability (or how long it lasts with routine maintenance) of the physical capital in harvesting and processing; and (3) the degree that the capital is non-malleable (or has no alternative uses of near or equal financial benefit to the owner).

5. How do these losses occur?

The mechanism at work that causes investors in fishing and processing capacity to lose the value of their capital investments is that, by definition, the overcapitalized fishery has much more capital, and hence daily harvesting and processing capacity, than is necessary to prosecute the fishery once it is rationalized. A quota holder would not need to own a boat or a processing plant in order to participate in a fishery. When a quota holder decides to participate in the fishery, he or she could simply hold a reverse auction[4] among fishing vessel owners. The vessel owners would bid down to the point where the winning boat just covered its variable costs. The quota holders would then proceed to secure processing services with the same result. The winning bid for processing services would cover only the variable costs[5] of production.

As long as the price agreed upon by vessel and plant owners allows for any return above variable costs, processing and vessel owning companies have an incentive to make a more competitive offer until they cover only their variable costs of operation and make no return on their capital investments. This is a difficult concept for many to appreciate. Why would any rational businessman invest tens or hundreds of millions of dollars into an industry and later allow others to use that investment for

---

[3] Plesha, Joseph T., and Riley, Christopher C., *The Allocation of Individual Transferable Quotas to Investors in the Seafood Industry of the North Pacific*, (Jan. 1992). See also, Matulich, S.C., Mittelhammer, and Reberte, *Toward a More Complete Model of Individual Transferrable Fishing Quotas*: *Implications of Incorporating the Processing Sector,* Journal of Environmental Economics and Management, Vol. 31(1) 112-28 (1996).

[4] In a reverse auction, the sellers compete to obtain business from the buyer and prices will typically decrease as the sellers undercut each other.

[5] Variable costs are those expenses that increase with production. For processors, variable costs would include things like direct processing labor, packaging, and increased utility charges. For vessel owners, variable costs would include things like fuel.

free? When an overcapitalized, open access fishery is rationalized there is far more harvesting and processing capital than is necessary because instead of the fishery lasting, for example, one month in an open access race, under rationalization it can be efficiently utilized in six months; meaning there is six times more existing harvesting and processing capacity than necessary. Not all of this physical capital can remain busy during the new six-month fishery, but its owners will all have an incentive to keep the physical capital operating throughout this period. If this millions of dollars of excess physical capital earns one penny above the variable costs of its operation, its owner is better off than under the alternative of earning nothing. Thus, starved for production through their facilities, vessel and plant owners bid for product until the price reaches a level at which they no longer can cover their variable cost.

The holders of quota thereby will effectively own not only the fish in the fishery, but also usufructuary[6] rights to all the non-malleable physical capital used to harvest and process those fish. This situation, where the quota holders enjoy free-of-charge use of physical capital, continues until the capital stock wears out to the point where only the appropriate amount remains.

Immediately upon beginning operations under a rationalized fishery, therefore, owners of fishery-related capital will see the return on their investment fall to zero. This cannot be avoided and is, in fact, *absolutely necessary* in order to de-capitalize an overcapitalized industry. The owners of this physical capital cannot expect to realize any return on their investment until the excess capital stock leaves the industry to the point where it is at the optimal level for the rationalized fishery.

In industrial fisheries like the groundfish fisheries off Alaska, the financial losses described above are suffered by *owners* of fishing vessels and processing plants. Virtually every vessel and plant owner is a corporation; an entity invented by lawyers with the purpose of accumulating and investing capital for the financial benefit of its shareholders.[7] These corporations are not "fishermen." The corporate owners of fishing vessels and processing plants do not themselves fish or process. They are not crew aboard fishing vessels or workers in processing plants. (Although it is possible some of the shareholders might be.)

The allocation of quota to vessel and plant owners in industrial, fully capitalized open access fisheries is essential to compensate those owners for the losses they suffer to the value of their vessels and plants as a result of rationalization. Some vessel owners may lament the fact that processing plant owners seek to be part of rationalized fisheries, but the rationale for including processing plant owners in the

---

[6] A usufructuary right is the right of enjoyment, enabling a holder of the right to derive profit from property that is owned by another person.

[7] Micklethwait, John and Wooldrige, Adrian., *The Company, A Short History of a Revolutionary Idea* (2003).

allocation of quota is also the *only* rationale for including vessel owners in the allocation of quota. If a corporation that owns a fishing vessel does not suffer losses in the value of its boat as a result of rationalization, there is no rational basis upon which it can be allocated quota.

6. One of the reasons there is industry opposition to Catch Share management.

Despite the potential benefits of rationalization, it remains controversial. Recently Congress has considered placing a moratorium on the development of any new rationalization programs. There are many who fear they will be negatively impacted by fishery rationalization. Certainly owners of processing plants in Alaska and along the Pacific coast collectively have well over a billion dollars at risk if the open access fisheries in which they have invested—and upon which they depend—are rationalized and processing plants are not included in the program.

In the North Pacific, however, the process of developing rationalized fisheries tends to be inclusive of the stakeholders who are most impacted by rationalization. Given the potential benefits of rationalization, it is appropriate for the "tool" of Catch Shares to be in the "tool box" of options for the regional councils and Secretary to consider. The National Oceanic and Atmospheric Administration (NOAA) is a strong proponent of allowing Catch Share management to be one of the tools available to manage fisheries.

One of the potentially effective ways to rationalize a fishery that includes both vessel and plant owners is through fishery cooperatives. Under this cooperative approach both vessel and processing plant historical participation in the fisheries is preserved. Despite the success of fishery cooperatives that include both vessels and plants, NOAA has taken the legal position that such management systems are not "authorized" under the Magnuson-Stevens Act. These cooperatives are a tool not available in the councils' toolbox.

7. History of harvester-processor cooperatives.

With passage of the American Fisheries Act (AFA) in October of 1998, Congress rationalized the Bering Sea pollock fishery, the largest commercial fishery in the United States. The inshore fishing vessels and processing plants were rationalized based on the concept of protecting both vessel and processing plant market shares. The AFA allowed cooperatives to be formed and pollock quota was allocated to each cooperative based on the catch history of the vessels that are members of the cooperative. But the AFA protected a pollock processor's market share by requiring that each vessel in a cooperative deliver at least 90% of its harvest of pollock to its historical market. A fishing vessel that was allocated quota could not deliver anywhere else without their historical processor's approval. Thereby, each processing plant's market share in the fishery was protected, as was each vessel's. A

vessel could move to a different processor without its historical processor's agreement only by fishing in the open access pollock fishery for a year and delivering a majority of its harvest to the different processor. In addition, the AFA included "limited entry for pollock processors." No new processors are allowed to enter the Bering Sea inshore pollock fishery.

The AFA's inshore cooperative system was controversial and immediately after its enactment some pollock vessel owners petitioned the North Pacific Council to amend the AFA by removing the requirement that a vessel deliver its pollock to a particular processor. To quote one of the proposal's sponsors:

> Under the language of the American Fisheries Act, pollock vessels which enter into co-ops and deliver into shorebased processors are prevented from forming a co-op if the processor doesn't bless it first. They're inhibited in their ability if a co-op is formed to get the *best fair price*. They are prevented from entering into a co-op with a different processor in the following year. And, last, they are prevented from freely moving between competing buyers. We are requesting that the Council consider and analyze regulations which would support reasonable vessel/plant negotiations. *Our proposed change would allow vessels in a co-op to deliver their catch history to the market of their choice*. For example, if one plant would pay nine cents a pound because they are producing fillets and another would pay eight cents because they are producing surimi, we feel that we should be able to deliver to the plant with the highest price, even though we may not have been in the co-op delivering to them with that processor in the previous year.
>
> Margaret Hall, Testimony before the NPFMC, (Feb. 13, 1999).

The North Pacific Fishery Management Council did not adopt the proposal, instead choosing to keep the AFA's inshore cooperative intact while it watched how the system worked for the industry.

The AFA's inshore cooperative structure was implemented by regulation in 2000 and has proven to be remarkably successful. Whether measured in price per pound or percentage of finished product sales price paid for a vessel's harvest, pollock vessel owners receive considerably more for their catch now than they did prior to passage of the AFA.

Below is a historical review of the average ex-vessel prices Trident paid for pollock delivered to Akutan from 1993 to 2012. (See Figure 2, below.)

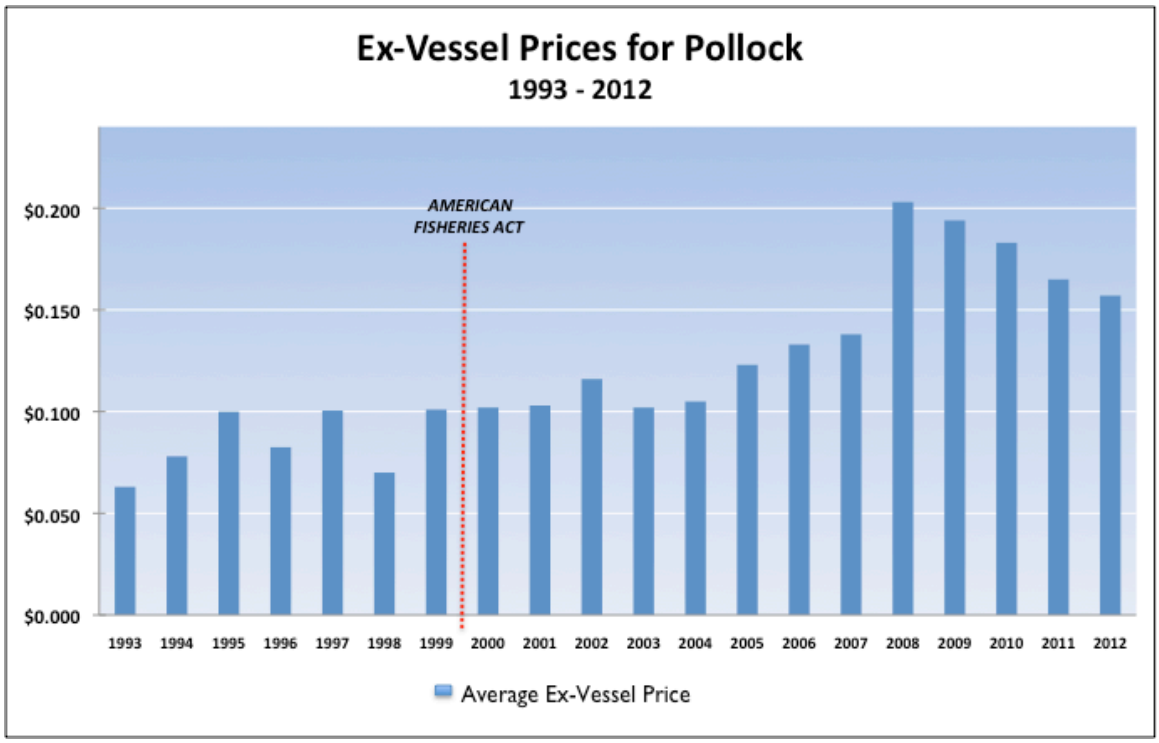

Figure 2. Ex-Vessel Prices for Pollock 1993-2003

Not only have ex-vessel pollock prices increased since passage of the AFA, but the value of pollock vessels has increased. But since passage of the AFA vessels are now bought and sold not on the value of the hull, but based primarily on the harvesting quota associated with the vessel. In 2001, for example, inshore pollock harvesting vessels sold at price from $1,225 to $1,250 per metric ton of quota assigned to the vessel. Now AFA pollock vessels sell for a price of about $1,950 per metric ton of quota assigned to the vessel. The value of shorebased vessels in the pollock fishery is currently far greater than prior to passage of the AFA.

The success of the AFA did not go un-noticed. By the early 2000's Pacific Ocean Perch, as well as Northern and Pelagic shelf rockfish were fully utilized by the commercial trawl industry in the Central Gulf of Alaska. The entire rockfish total allowable catch for these species was harvested in two weeks in a true race-for-fish. There was a statutory moratorium in place at that time which prevented the Secretary from approving any new Individual Fishing Quota programs. By 2002, representatives of the trawl vessel owners and processing plants that utilized Gulf of Alaska rockfish were urging Congress to legislatively authorize rationalization of rockfish.

In 2003 Congress passed the Rockfish Pilot Program directing the Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, to rationalize the rockfish fisheries in the Central Gulf of Alaska. Congress required the Secretary to develop a program that protected the *harvesting and processing*

histories of the existing participants. The legislation, however, did not direct the Council or the Secretary how to protect each sector.[8]

In June of 2005 the Council took final action to implement the Rockfish Pilot Program. The program developed by the Council was similar to the AFA's inshore cooperative structure. A vessel was eligible to join a cooperative only in association with the processing facility that the harvester delivered the most pounds of rockfish to during the years 1996 through 2000. The associated processor was expected to negotiate an agreement with vessel owners that contractually limited the vessels from delivering to any other processor.[9] Thus a vessel was allocated its historical market share and the processing plant was assured of its historical market share.

The Rockfish Pilot Program, however, expired after 2011and the Council was required to take action to renew the program. Stakeholders in the program initially supported rolling-over the existing program as evidenced by the following testimony from the same individual who initially opposed the AFA cooperative structure:

> Thank you. Good afternoon members of the Council. I am Margaret Hall, here today representing the vessels Progress and Vanguard.
>
> The Rockfish Pilot Program has been a wonderful benefit to the community of Kodiak and the Kodiak processors. Currently 100% of the CV rockfish and secondary species are landed in Kodiak to associated processors. These processors hence, are protected through coop agreements and the rockfish regulations correlated to landings and processing history. *The Council action of choice preferred by many of us independent catcher vessels would be to roll-over the existing program*, with minor changes selected after analysis.
>
> Margaret Hall, Testimony before the NPFMC, (June 8, 2008).

---

[8] The Rockfish Pilot Program legislation is short enough to recite in a footnote: "The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the **historic participation of fishing vessels** (1996 to 2002, best 5 of 7 years) and **historic participation of fish processors** (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in Central Gulf of Alaska. Such a pilot program shall (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historical harvesting of such bycatch species."

[9] Final Review Draft, RIR, EA and IRFA for the proposed Amendment 68 to the Gulf of Alaska Fishery Management Plan, June 2005. p. 69.

At its February 2009 meeting the Council chose to initiate an analysis of rolling-over the rockfish program beyond the statutory sunset date.[10] At the Council's October 2009 meeting, however, the alternative of extending the existing Rockfish Pilot Program was removed from the options for analysis as a result of a legal opinion from NOAA General Counsel for the Alaska Region. NOAA's legal opinion ("2009 Opinion") concluded that the Magnuson-Stevens Act did *not* authorize extension of the Rockfish Pilot Program.

NOAA's 2009 Opinion is wrong. The Rockfish Pilot Program legislation itself did not provide statutory authority beyond that which already existed in the Magnuson-Stevens Act and the Rockfish Pilot Program's cooperative structure was developed by the Council and approved by the Secretary. As a matter of policy, it is nonsensical for NOAA to limit its authority to develop rationalization programs, like harvester-processor cooperatives, that have proven to be successful for a broad group of stakeholders. NOAA's 2009 Opinion seems to ignore the 2006 amendments to the Magnuson-Stevens Act that require consideration of "employment in the harvesting and processing sectors," and "*investments* in, and *dependence* upon, the fishery."[11] Certainly the 2009 Opinion unnecessarily removes a potentially useful tool from the toolbox.

NOAA's odd legal position on this issue originates from a 1978 NOAA General Counsel memo that concluded the Magnuson-Stevens Act did not authorize the Secretary to disapprove foreign processing vessels applications to operate in U.S. waters just because domestic shorebased processors had the capacity and intent to utilize the same U.S. fishery resources. Congress quickly passed the so-called "processor preference" amendment giving statutory preference to U.S. processors over foreign operations.[12] In doing so, Congress believed it clarified the fact that domestic processors were part of the fisheries. As the Chairman of the House Merchant Marine and Fisheries Committee, Congressman John Murphy, explained during consideration of the amendment by the House of Representatives:

> In the course of our discussions of the bill, some question was raised about whether the definition of "fishing" under section 3 of the [Magnuson-Stevens Act] includes "processing." This question is important because the [Magnuson-Stevens Act] uses the term "fishing" so that the statute applies to the processing industry in the same situations only if "fishing" includes processing… In the end, we decided to leave the [Magnuson-Stevens Act's] definitions unchanged

---

[10] CGOA Rockfish Program Motion, NPFMC February 9, 2009.

[11] 18 U.S.C. § 1853a(c)(5).

[12] P.L. 95-354 (1978).

> on this point while, at the same time, making clear the Act was intended to benefit the entire fishing industry… *[I]t is the understanding of the House that "fishing" in section 3 of the [Magnuson-Stevens Act] does include "processing"* and that, for that reason, the proposed clarification is unnecessary."[13]

Because of NOAA's 2009 Opinion, however, a rationalization program was adopted by the Council that did not include processors and instead granted all the benefits of retionalization to the harvesters. The ex-vessel prices paid in the newly rationalized rockfish fisheries, compared to prices prior to and during the Rockfish Pilot Program, show the impacts of a rationalization program that does not balance the interests of both sectors of the industry. Prices paid to fishermen in 2012 nearly doubled from the previous three years. (See Figure 3, below.)

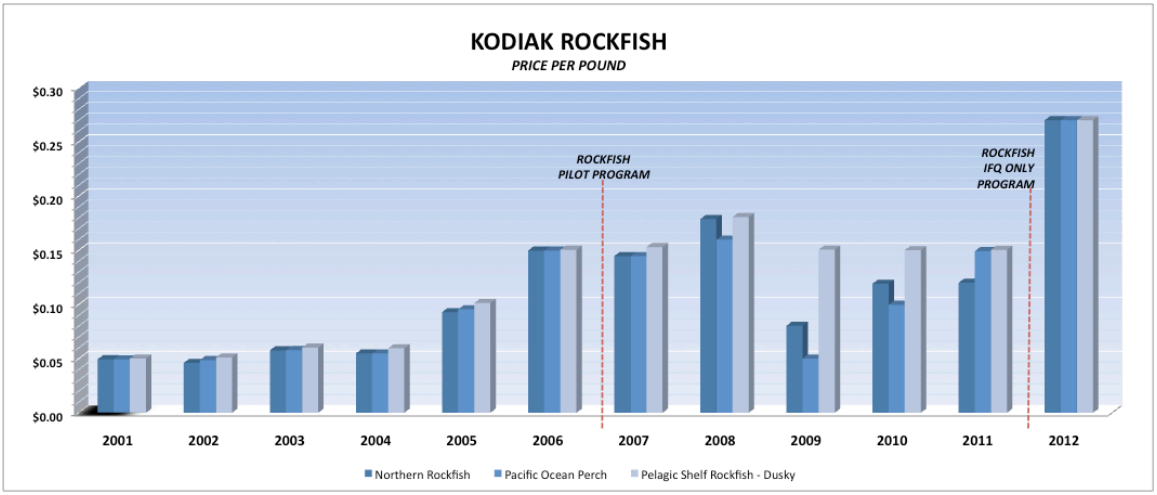

Figure 3. Ex-Vessel Rockfish Prices 2001 - 2012

8. Need for Magnuson-Stevens Act amendment.

The Central Gulf of Alaska rockfish fisheries are very small compared with the other groundfish fisheries in the region. The North Pacific Council will begin exploring whether and how to rationalize *all* of the trawl groundfish fisheries in the Gulf of Alaska as early as June of this year. Vessel owners and processing plant representatives have been negotiating potential rationalization programs that contain harvester-processor cooperatives. There are also members of the Council who would prefer to have the option of considering some form of harvester-processor cooperatives as a way to include both sectors in the rationalized fisheries.

---

[13] Statement of Congressman John Murphy, 124 Cong. Rec. H8266, Aug. 10, 1978.

It is not an option available to the Council at this time, however, due to the NOAA legal opinion.

Shorebased processors in the Gulf of Alaska have tens of millions of dollars at risk and fear that they will not be included in the rationalized groundfish fisheries unless there is the legal authority to develop rationalization programs with harvester-processor linkages. Despite the overall benefits of rationalized fisheries, processors are understandably anxious about proceeding with any effort to rationalize the fisheries if there is a chance they may be excluded as they were in the most recent rockfish program.

There are other Magnuson-Stevens Act issues I would also like to raise.

State of Alaska Jurisdiction Over Salmon Management in the EEZ

The North Pacific Fishery Management Council is considering updating its salmon Fishery Management Plan (FMP). The Council's salmon FMP was last updated in 1990. The FMP does not contain some provisions now required under more recently adopted provisions of the Magnuson-Stevens Act and national standards guidelines; including Annual Catch Limits (ACLs) and accountability measures (AM).

Under an agreement with the federal government, the State of Alaska manages the salmon fishery in state waters. The salmon FMP also covers salmon harvest in the EEZ, outside of state waters. There are four salmon fisheries in the EEZ. They are: (1) the commercial troll fishery in Southeast Alaska; and net fisheries in (2) Prince William Sound; (3) Cook Inlet; and, (4) the South Peninsula area near False Pass. All of these EEZ salmon fisheries are managed by the State of Alaska under the existing salmon FMP.

Given its long history of sustainable fishery management, the Alaska salmon fishery is arguably the best managed fishery in the world. The State of Alaska manages the salmon fishery based on escapement goals, so it is not clear how ACLs and AM can be adopted for the Alaska's salmon management.

Because it would be extremely complicated to revise the salmon FMP to meet the new Magnuson-Stevens Act and national standards requirements, and because the federal government has no real role in salmon management in the EEZ, the Council might prefer to simply repeal the salmon FMP for the net fisheries west of Southeast Alaska, and allow the State of Alaska to continue management. The problem with repealing the salmon FMP, however, is that the State of Alaska has no authority to regulate vessels in the EEZ that are not registered with the State. If the salmon FMP were repealed, it would be possible for unregulated salmon fishing in the EEZ.

One option to resolve this problem would be to slightly modify section 306(a)(3)(C) of the Magnuson-Stevens Act to allow the State of Alaska to retain management of

the salmon fishery in the EEZ if the Council chose to repeal the FMP.

The following simple modification of 306(a)(3)(C) would achieve the goal of allowing the State of Alaska to continue management of the salmon fisheries in the EEZ if the Council chose to repeal the salmon FMP.

> 306 State Jurisdiction
>
> (a) In General —
> ….
> (3) A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances:
>
> (C) The fishing vessel is not registered under the law of the State of Alaska and is operating in a fishery in the exclusive economic zone off Alaska for which there <u>is</u> ~~was~~ no fishery management plan in place ~~on August 1, 1996~~, and the Secretary and the North Pacific Council find that there is a legitimate interest of the State of Alaska in the conservation and management of such fishery. The authority provided under this subparagraph shall terminate <u>while</u> ~~when~~ a fishery management plan under this Act is approved and implemented for such fishery.

Overfishing Definition and Rebuilding Requirements

One issue that has been faced in the Pacific coast groundfish fishery is the application of fishery rebuilding requirements and how they relate to coastal communities. Unlike many other fisheries, all of the species that have been designated as "overfished" within the Pacific groundfish complex have biological characteristics that require more than ten years to rebuild the stocks. Under section 304(e)(4)(A)(i) of the Magnuson-Stevens Act, the council—in this case, the Pacific Fishery Management Council—must specify a rebuilding period that is as short a time as possible while taking into account a number of factors including the needs of fishing communities; in other words, balance biology and social/economic needs. Unfortunately, the courts have ignored this balance. In the case of *NRDC v Evans*, the 9th Circuit Court of Appeals ruled in 2005 that Congress' use of the word "possible" meant that the Council must use the absolute minimal time to rebuild. From a practical standpoint, this means that a council has to start with zero fishing. To give a real life example, at one point the Pacific Council had a choice between a harvest level that would rebuild canary rockfish in January of a particular year, or a slightly higher harvest level that would rebuild the stock in December of that same year. According to NOAA's lawyers, under the court decision, the Pacific Council had to use the lower harvest level.

A similar, almost humorous, problem exists in Alaska. The North Pacific Council has no overfished groundfish stocks, but one species of crab, the Pacific Island Blue King

crab, is considered overfished and in need of a rebuilding plan, even though no directed fisheries have occurred for nearly two decades and the species is only occasionally taken as bycatch in other fisheries. The North Pacific Council is facing the prospect of curtailing certain groundfish fisheries because that is the only source of mortality it can affect even though the analysis shows that the expected bycatch savings will not impact rebuilding success.

In summary, Congress should consider amendments to the Magnuson-Stevens Act that allow some flexibility in its rebuilding requirements when a stock is considered "overfished" under the Act.

Reconciling the Magnuson-Stevens Act with the National Environmental Policy Act

The 2006 amendments to the Magnuson-Stevens Act directed the Secretary to update agency procedures so that the Magnuson-Stevens Act and the National Environmental Policy Act (NEPA) align and that such procedures "shall conform to the time lines for review and approval of fishery management plans and plan amendments under this section."[14] These procedures were to be developed in consultation with the regional councils and the Council on Environmental Quality. On February 19, 2013, NOAA presented its policy directive regarding NEPA compliance to the councils.

NOAA's policy directive does not seem to coordinate NEPA and Magnuson-Stevens Act policies, nor improve efficiencies. Instead it seems to subsume the Magnuson-Stevens Act process and the councils' prerogatives, within NEPA.

The regional councils cannot be exempt from following NEPA requirements. But the key provisions of NEPA should be incorporated within the framework of the Magnuson-Stevens Act and the Magnuson-Stevens Act remain the guiding law for fisheries management.

Thank you very much for your consideration of these comments.

---

[14] 16 U.S.C. § 1854(i).