Testimony of

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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). I am testifying on behalf of Trident Seafoods Corporation, a seafood harvesting, processing and marketing company with operations throughout Alaska, and in the states of Washington, Oregon, Minnesota and soon Georgia.

When the so called "200-mile bill" was first enacted in 1976, Congress was concerned about foreign fishing fleets operating without restriction off our coasts, depleting fishery resources, preventing development of the American seafood industry and harming traditional inshore fisheries because of the unregulated bycatch of species like salmon, crab and halibut. The Magnuson-Stevens Act has been remarkably successful in addressing the concerns raised by Congress since its passage.

One of the innovative provisions of the Magnuson-Stevens Act is the eight regional fishery management councils which recommend fishery management measures to the Secretary of Commerce. The regional council system allows stakeholders, along with State and Federal fishery managers, and non-governmental council members who are knowledgeable about the fisheries, to actively participate in a highly public process which shapes national fishery policy. The regional council system has proven effective in promoting the development of management measures tailored to the unique characteristics of vastly diverse fisheries across the United States.

The theme of my testimony is that the Magnuson-Stevens Act is working well, and any changes to the law should focus on giving regional councils the tools necessary to better accomplish the purposes of the legislation.

Rationalization Programs With Harvester-Processor Cooperatives

In an effort to provide greater incentives to achieve bycatch avoidance for trawl vessels operating in the Gulf of Alaska, the North Pacific Fishery Management Council has begun consideration of a rationalization program for the pollock and Pacific cod fisheries. The rationalization options being analyzed by the Council[1] include harvester-processor cooperatives similar in many respects to the extremely successful American Fisheries Act, which rationalized the Bering Sea pollock fishery. Unfortunately, it is not certain that rationalization programs with harvester-processor cooperatives are authorized under the Magnuson-Stevens Act because of past NOAA legal opinions. Understanding why this issue is important requires an explanation of the impacts of rationalization on the highly industrial fisheries found in Alaska.

Rationalized fisheries out perform open-access managed 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 reducing the cost of harvesting and processing the resource.

The benefits attributed to rationalized fisheries, however, occur regardless of who receives allocations of the privilege to utilize the fish.[2] 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 eventually come to 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. Because the fishery was rationalized—albeit into the hands of entities that were complete outsiders to the fishery at the inception of the program—the harvesting and processing of CDQ pollock became as efficient as if the a pollock company itself was allocated the quota.

Given that the resource will be utilized efficiently regardless of who is allocated quota in a rationalized fishery, at first glance there may appear to be good reasons to auction the privilege to use fishery resources. After all, fishery resources

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[1] http://www.npfmc.org/wp-content/PDFdocuments/bycatch/GOAtrawlDesignMotion1013.pdf.

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

managed under the Magnuson-Stevens Act belong to the government[3] and the federal treasury can certainly use the revenue.

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

Fishery managers, unfortunately, seldom have this opportunity. They typically 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 wait until a fishery is overcapitalized complicates the initial allocation process of rationalization.

In a fully capitalized, open-access fishery where the harvest is limited by a Total Allowable Catch that the participants race to exploit, the value of investments in fishing vessels and processing plants 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 fishing vessels to the holders of quota. When such fisheries are rationalized, owners of fishing vessels and processing plants can suffer enormous financial losses. This is especially true in the capital-intensive fisheries of Alaska, where the plants and boats are both durable and have few, if any, alternative uses.

The mechanism at work that causes owners of 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 has been 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 conduct a reverse auction[4] among fishing vessel owners. The vessel owners would bid down to the point where the winning boat, now desperate for quota in order to operate, 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.

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

[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.

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 free? When an overcapitalized, open-access fishery is rationalized, instead of the fishery lasting, for example, one month in an open access race, under rationalization it may be far more efficiently utilized over a six month period. This means there is six times more existing harvesting and processing capacity than necessary when the fishery is rationalized. 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 these millions of dollars of excess physical capital earn just one penny above the variable costs of its operation, its owner is better off than under the alternative of earning nothing. Thus, starved for raw material to run 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.

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, 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 excess capital stock leaves the industry. If the owners of that physical capital do not receive rights in the rationalized fishery to compensate them for the loss, in essence they have had the value of their investments expropriated. As an example, when the individual quota system was implemented in the Alaska halibut fishery in the mid-1990s, over seventy percent of existing halibut processors were driven from the fishery without compensation.

The allocation of quota to vessel and plant owners in industrial open access fisheries is essential if they are to be compensated for the losses they suffer due to the devaluation 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 reason for including processing plant owners in the allocation of quota is the same reason 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, then there is no basis upon which it should be allocated quota.)

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. Harvester-processor cooperatives were first used in the North Pacific under the American Fisheries Act. That legislation proved extremely successful in rationalizing the Bering Sea inshore pollock fishery

The success of the American Fisheries Act did not go un-noticed. By the early 2000's rockfish in the Gulf of Alaska were being harvested by the trawl fleet in a two-week 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. Representatives of the trawl vessel owners and processing plants that utilized Gulf of Alaska rockfish urged Congress to legislatively authorize rationalization of rockfish.

In 2003 Congress passed a short, one-paragraph, provision 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 both 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.

In June of 2005 the Council developed the Rockfish Pilot Program which utilized harvester-processor cooperatives similar to the American Fisheries Act's inshore cooperative structure. A vessel was eligible to join a cooperative only in association with the processing facility to which that harvester historically delivered the most pounds of rockfish during the qualifying years. The associated processor was expected to negotiate an agreement with vessel owners that contractually limited the vessels from delivering to any other processor.[6] Thus, a vessel was allocated its historical market share and the processing plant was assured of its historical market share.

The Rockfish Pilot Program expired after 2011 and the Council was required to take action to renew the program. Stakeholders in the program supported rolling-over the existing program and the Council chose to initiate an analysis of only one primary option: extension of the existing harvester-processor cooperatives beyond the sunset date.[7]

At the Council's October 2009 meeting, however, the alternative of extending the existing Rockfish Pilot Program was removed from consideration because of a legal opinion from NOAA General Counsel for the Alaska Region. NOAA's 2009 legal opinion concluded that the Magnuson-Stevens Act does *not* authorize harvester-processor cooperatives.

NOAA's 2009 legal 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

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

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

developed by the Council and approved by the Secretary under the Magnuson-Stevens Act. NOAA's 2009 opinion ignored (and did not even reference) the 2006 amendments to the Magnuson-Stevens Act requiring consideration of "employment in the harvesting and processing sectors," and "*investments* in, and *dependence* upon, the fishery." Certainly the 2009 Opinion unnecessarily removes a potentially useful tool from the toolbox of potential management measures for council consideration.

NOAA's legal position on this issue results from a 1978 NOAA General Counsel memo that concluded the Magnuson-Stevens Act did not authorize the Secretary to disapprove foreign processing vessel 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. Taken on its face, the 1978 legal opinion means that shorebased processors cannot be regulated under the Magnuson-Stevens Act. As a result of this 1978 opinion, Congress quickly passed the so-called "processor preference" amendment giving statutory preference to U.S. processors over foreign operations.[8] In doing so, Congress believed it clarified the fact that domestic processors are 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 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] <u>does include</u> "processing"* and that, for that reason, the proposed clarification is unnecessary."[9]

Because of NOAA's 2009 Opinion, however, the option of continuing harvester-processor cooperatives in the rockfish program was removed from potential consideration.

The North Pacific Fishery Management Council is now exploring whether to rationalize the pollock and Pacific cod trawl fisheries in the Gulf of Alaska. The Council's current option for analysis again has elements of a harvester-processor

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

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

cooperative. It is not certain whether NOAA will allow the Council's current rationalization plan to be implemented. In the view of Alaskan processors, NOAA should reconsider its position, but if the agency continues its rather tortured legal position on this issue, Congress should again clarify that shorebased processing is part of the fishery and thereby allow the North Pacific Council the option of using harvester-processor cooperatives in future rationalization plans.

The Overfishing Definition and Rebuilding Requirements

We strongly support managing our Nation's fishery resources on a sustainable basis, and depleted stocks (whether caused by overfishing or other environmental factors) should be managed in a manner that allows them to recover. We do not want to see amendments to the Magnuson-Stevens Act that would result in stocks of fish to be managed in a non-sustainable manner. Our experience is that the current mandates of the Magnuson-Stevens Act on this issue can be overly prescriptive.

An almost humorous example has occurred in Alaska. The North Pacific Council has no overfished groundfish stocks, but one species of crab, the Pribilof 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 rarely taken as bycatch in other fisheries. The North Pacific Council curtailed certain groundfish fishing because that was the only source of possible crab mortality it could affect, even though the analysis shows that this action 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," while still assuring all U.S. fisheries are managed sustainably.

Data Collection and Confidentiality

There are two provisions in the Magnuson-Stevens Act reauthorization draft circulating by the other body upon which I would like to comment. That draft would not allow electronic monitoring devices to be used for fishery enforcement and also requires that virtually all data provided to NOAA under the Magnuson-Stevens Act be confidential and not subject to disclosure.

Human observers are used in most every fishery off Alaska in which Trident participates. Typically there is one observer on the harvesting vessel and another at the processing plant. Electronic monitoring—the use of video cameras—is a relatively new concept. It may provide a more cost efficient way to accurately monitor the harvest of fish. We can see no good reason, however, why electronic monitoring cannot be used in fishery enforcement. Certainly human observers can be, and have been, involved in helping document fishery violations. If a council chooses to allow electronic monitoring in its fisheries, we believe that the

observations made under such a program should be allowed in enforcement actions just as the observations of human observers can be so used.

In the North Pacific the harvest data of vessels in rationalized fisheries is currently public knowledge. For each Bering Sea pollock trawl vessel, for example, its harvest of pollock and bycatch is provided to the Council. The fact that a vessel's bycatch data is public information adds pressure for vessels to avoid that harvest of non-target species and is useful in shaping bycatch avoidance policies. We support the concept that financial information that is provided to the NOAA be confidential, however, the harvest data of at least rationalized fisheries, should be available to the public.

Thank you very much for your consideration of these comments.