TESTIMONY OF DAVID E. FRULLA ON BEHALF OF THE FISHING COMPANY OF ALASKA BEFORE THE SENATE SUBCOMMITTEE ON OCEANS, ATMOSPHERE, FISHERIES AND COAST GUARD ON FISHING SAFETY: THE POLICY IMPLICATIONS OF COOPERATIVES AND VESSEL IMPROVEMENTS

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My name is David E. Frulla. I am a partner in Kelley Drye & Warren, LLP, in Washington, D.C. Since 2006, we have served as counsel to The Fishing Company of Alaska, Inc. ("FCA") with respect to certain matters pending before the U.S. Department of Commerce, the North Pacific Fishery Management Council, and the Congress. I would like to thank Chairwoman Cantwell on behalf of FCA for extending this opportunity to provide testimony on rationalization in the North Pacific freezer longline fishery for Pacific cod. FCA was a pioneer in developing the Pacific cod freezer longline fishery in the 1980s. This testimony will touch first upon concerns that FCA has with the private cooperative proposal put forth by some members of the Freezer Longline Conservation Cooperative ("FLCC"). Next, I will set forth in general terms an alternative that better fits the legal requirements under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and is consistent with recent rationalization programs authorized by Congress and the North Pacific Fishery Management Council. Finally, this testimony will touch on issues related to vessel replacement and vessel safety.

I. FCA's Position on the Legislative Proposal for a Pacific Cod Freezer Longline Cooperative

Some FLCC members are seeking congressional authorization for the formation of a freezer longline cooperative to harvest Bering Sea/Aleutian Island ("BSAI") Pacific cod. The proposal would allow for formation of this cooperative upon agreement by eighty percent of the sector participants. Any vessels not choosing to participate in the cooperative would be allocated the percentage of the total cod quota landed by those vessels, on average, for the years 2003 to 2005. However, such allocation is not exclusive to the non-participating vessels, but would be placed in a common pool subject to a "race-for-fish." The FLCC proposal does not purport to allocate Pacific cod beyond this split between the cooperative and "open access" components of the sector, such as on an individual vessel basis, and does not allow for the formation of other cooperatives. Accordingly, it is an incomplete solution to the safety issues about which this hearing is concerned.

The terms of the legislative proposal (as we understand it) are, of course, a bit of a formality as more than eighty percent of the sector participants have negotiated an agreement that could be implemented upon passage. FCA has participated in these discussions, but has objected to the terms offered, particularly the awarding of significant amounts of the cooperative share to new and recent entrants. FCA also objects to the proposal's use of 2003 to 2005 as the baseline for determining the split between the cooperative and "open access" components of the sector. In sum, while rationalization of a sector may have a salutary impact on vessel safety, the imperative to increase safety should not be used as an excuse to drive an unfair allocation.

A. The Truncated Allocation Period is Inconsistent with Law and Recent Allocation Programs

First, the legislative proposal's use of such a brief and recent qualification period, 2003-05, is inconsistent with allocative decisions by both Congress and the North Pacific Fishery Management Council. For instance, when allocating cod among sectors in Amendment 85 to the BSAI groundfish plan, that Council considered a range of years from 1995 to 2003, ultimately choosing allocations falling within this range. Currently, the Council is considering 1995 to 2005 (best 5 or 7 years) as the basis for allocating Gulf of Alaska cod. Likewise, when Congress established the Rockfish Pilot Program in 2004, it chose 1996 to 2002, best 5 years, as the qualifying period. Similar ranges were utilized in Amendment 80 to the BSAI groundfish plan and the Bering Sea crab rationalization plan. In fact, FLCC itself used a five year period to justify the amount of capacity purchased for the $35 million freezer-longline Capacity Reduction Program authorized by Congress in section 219 of the Consolidated Appropriations Act of 2005.

More inclusive timeframes are consistent with the MSA, which requires a council to take into consideration "historical fishing practices in, and dependence on, the fishery" when developing a limited access system. 16 U.S.C. § 1853(b)(6)(B). Likewise, the new standards contained in the MSA Reauthorization Act governing limited access privilege programs require consideration of **both** "current and historic harvests." *Id.* § 1853a(c)(5). By comparison, the qualifying period recommended by FLCC is not only an outlier with respect to other Council plans and recent statutory allocations, it entirely omits consideration of historical participation.

Congress correctly instituted a policy of honoring historical catches to avoid rewarding speculative entry into fully utilized fisheries, like that for Pacific cod. Indeed, there have been five new entrants into this sector this decade (although two of these new vessels were just bought out in the buy-back program), even as cod TACs have been steady or declining relative to 1990 levels. This recent capitalization, which FCA understands is continuing, runs counter to efforts by the Council and Congress to reduce capacity in this sector and others in the North Pacific.

B. The FLCC Proposal Undermines Capacity Reduction Efforts

The pre-existing Pacific cod freezer longliner capacity control policy is reflected in the North Pacific Council's 1995 vessel moratorium, and its institution of the license limitation program ("LLP"), which became effective in 2000. Further, in 2002, Amendment 67 to the BSAI groundfish plan was adopted to stabilize the Pacific cod fisheries by creating gear endorsements designed to define the universe of eligible vessels. 67 Fed. Reg. 18129 (Apr. 15, 2002). To qualify for the freezer longline sector, a vessel must have had a catcher-processor endorsed LLP groundfish license and harvested at least 270 tons of Pacific cod in at least one year between 1996-1999, inclusive, on the vessel that gave rise to the LLP.

Yet, as explained above, despite the moratorium and LLP program, a total of 5 new vessels entered the fleet as full-time participants between 2000 and 2006, including the new-built *Bering Leader*. Although it is not clear how these vessels became qualified, it is likely that they are using LLPs that arose from one of the ten vessels that fished only one year during the qualification period (five of which only fished in 1996).

During this post-LLP timeframe, Congress also became concerned with the amount of capacity in this (and other) BSAI groundfish sectors, and so authorized a publicly subsidized buy-back program in 2005 (Section 219 of the Consolidated Appropriations Act of 2005). To date, the freezer longline sector is the only sector to have proposed and consummated a buy-back under the capacity reduction program.

This history is relevant to FCA's main concerns with the FLCC proposal. For one, all problems relating to excess capacity in this sector, which cooperative legislation is supposed to address, are entirely of the sector's own making. Although the Council at least attempted a good first few steps in moderating capacity, what happened in fact was that part-time and sporadically used LLPs (which only had to land 270 metric tons in one year for a cod endorsement) were placed on new, full-time vessels, most now catching between 2,000 and 3,000 metric tons per year. Nor has the buy-back been particularly effective in reducing capacity. The buy-back, as privately administered by the proponents of this legislative cooperative, only purchased three vessels and an unaffiliated permit for $35 million; however, two of the vessels purchased were new vessels that began fishing in 2000 and 2001. All this new capitalization has had the effect of eroding FCA's recent overall share of the Pacific cod catch.

The result has been far from the salutary effect Congress and the Council sought through the license limitation program and the vessel buy-back. Indeed, the desire to add capacity to the freezer longline sector continues. In fact, we understand that one of the participants in the buy-back has attempted to use buy-back funds to purchase an otherwise non-qualified vessel and a currently unused freezer longline-endorsed LLP to put *new* capacity back into the fishery. If this attempt were successful, then this buy-back will have repeated the failures of the original New England groundfish buy-back program, which the Government Accountability Office found has led to an increase in capacity, rather than the intended decrease.

This history is relevant to the qualification period being advocated by FLCC because it underscores that the proposed legislation is more designed to garner new entrants' support and solidify existing, private arrangements among the members of FLCC, than it is to ensure equitable treatment of historical participants like FCA. Basing allocations on fishing patterns in 2003-2005 locks in the aberrations that arose from the well-intentioned, but flawed LLP qualification program and rewards those who added capacity at a time when the Council and Congress were trying to stabilize this fishery by protecting "long-time participants." 67 Fed. Reg. at 18129.

FLCC's proposal is thus not only ill-advised as a matter of policy, but it is legally doubtful as well. It in no way comports with existing law, which is geared towards both protecting historical participants and discouraging speculative entrants in fully-utilized fisheries.

C. The Proposal Fails to Fully Allocate the Pacific Cod Fishery

Aside from the skewed allocation proposal, the FLCC legislative proposal is flawed in that it does not fully allocate Pacific cod among all sector participants, as do all recent rationalization programs. Rather, the proposed legislation merely seeks to establish an allocation as between the cooperative that it authorizes and those vessels which do not choose to join the cooperative. This means that if the parties in this typically fractious sector were to dissolve the

cooperative, the sector would revert to the status quo and the legislation would have accomplished nothing.

Under a typical rationalization program involving cooperatives, such as Amendment 80 to the BSAI groundfish plan, allocations are made to individual vessels, which can then either bring their allocation into a cooperative or into an open access pool. As the FLCC proposal does not purport to allocate fishing privileges on an individual basis, if the cooperative were to fail, the sector would revert to a race-for-fish. The former, more common, approach of fully allocating a fishery and allowing formation of cooperatives is a more rational and durable approach.

II. FCA's Recommended Alternative

Since this issue was initially raised before Congress, FCA has consistently maintained that the Council is the appropriate body to develop fishery management measures such as the one FLCC proposes. It has become apparent, however, that given FLCC's persistence and the Council's increasingly heavy workload, it would be constructive to offer an alternative that would meet the desire of the proponents of rationalization for cooperative-style management, while respecting established legal standards for such a limited access privilege program.

Therefore, FCA could agree to program structured either as an individual fishery quota ("IFQ"), with authorization to form a cooperative, or a program structured along the lines of the Rockfish Pilot Program. Each program would allocate the sector's Pacific cod quota to individual vessels based on their historical catch. The latter differs from an IFQ only in that it allows any two or more vessels to form a cooperative or to join their allocation with others in a common pool where a vessel is not guaranteed its individual allocation of fish.

In order to be consistent with other programs, however, the qualification years should range from 1995 to 2005. This would both respect historical participation, as well as respect the Council's and Congress's intent in limiting access and instituting the vessel buy-back program. To use just recent history, as FLCC proposes, sends a counter-productive message that building up capacity in a speculative manner can be rewarded. FCA would be pleased to work with staff to develop the details of such a program.

III. FCA's Perspective On the Need for Vessel Replacement

Finally, given the focus of this hearing on safety and, in particular, the details of the American Fisheries Act ("AFA") sector's vessel rebuild language adopted by the House in the Coast Guard Reauthorization Act, FCA would like to speak briefly about the need for more generalized relief. As you may be aware, its groundfish trawl catcher-processor, the *Alaska Ranger*, tragically sank in the Bering Sea on Easter morning this year. Under the regulations then governing the non-AFA trawl catcher-processor sector (also known colloquially as the "head-and-gut" fleet), no vessel not originally qualified for the sector could ever be used to harvest the head-and-gut sector's allocation of groundfish. In other words, the fleet was consigned to fish in increasingly aging and unsafe steel.

Fortunately, that element of the regulations was sensibly vacated by a federal district court. Presumably, pending implementation of the court's order by the National Marine Fisheries Service, replacement vessels will be allowed to be used. That, however, is only a partial solution. The *Alaska Ranger* was 203-feet length overall, and many vessels in this fleet exceed 165-feet. Under current law, no new vessel over 165-feet can be given a fisheries endorsement unless:

> the owner of the vessel demonstrates to the Secretary that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)) has recommended after October 21, 1998, and the Secretary of Commerce has approved, conservation and management measures in accordance with the American Fisheries Act (Public Law 105-277, div. C, title II) (16 U.S.C. 1851 note) to allow the vessel to be used in fisheries under the council's authority.

46 U.S.C. § 12113(d)(2)(B). Astonishingly, neither the National Marine Fisheries Service, the Department of Transportation, nor the U.S. Coast Guard has ever implemented a regulatory process an owner can follow in order to make such a demonstration.

In essence, it appears that in order to replace the *Alaska Ranger*, or any other vessel greater than 165-feet, an owner would have to petition a regional fishery management council for a special rulemaking to authorize the replacement. Given the councils' already stressed workload and their lack of any practical experience or guidance for undertaking such a rulemaking, this is an unreasonable proposition. Of course, this would not be an issue with AFA vessel replacement, at least as proposed in the Coast Guard bill, because that is structured as a new special exemption to the limitation on fishery endorsements under section 12113(d)(2).

Vessel replacement is not a matter confined to one sector, but is a general safety imperative. Without the ability to replace aging vessels, the likelihood of more tragedies like the *Alaska Ranger* continues to increase. Moreover, without the ability to replace vessels, it will be increasingly difficult to meet heightened safety standards, such as those called for in the House version of the Coast Guard bill. Finally, modernization and the ability to upgrade are important to helping vessels become both more fuel efficient and better able to meet the increasingly stringent retention standards the Council has set for the head-and-gut sector by allowing for upgraded vessels that can create more product forms and more fully utilize their catch.

All companies in the head-and-gut sector agree on the need for vessel replacement, although there are differences of opinions on the specific details. It may not be prudent to wait for perfect unanimity, which, in any event, is unlikely to ever emerge. As a first step, it would seem only right to allow replacement up to the size of the vessel being replaced, with proper assurances that vessel being replaced cannot be used in other fisheries.

IV. Conclusion

FCA looks forward to continuing to work with this Subcommittee on these important issues. We would also be pleased to provide any additional information. Thank you again for this opportunity to testify on FCA's behalf.

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