OVERSIGHT HEARING ON UNITED STATES OWNERSHIP OF FISHING VESSELS

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS

OF THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

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OVERSIGHT HEARING ON UNITED STATES OWNERSHIP OF FISHING VESSELS

THURSDAY, JUNE 4, 1998

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE, AND OCEANS, COMMITTEE ON RESOURCES, *Washington, DC.*

The Subcommittee met, pursuant to other business, at 10:43 a.m., in room 1324, Longworth House Office Building, Hon. Jim Saxton (chairman of the Subcommittee) presiding.

Mr. SAXTON. I ask you now, with consent, that Mr. Pombo and Mrs. Chenoweth be invited to sit on the panel, inasmuch as they are not members of the Subcommittee.

The Subcommittee on Fisheries Conservation, Wildlife, and Oceans will come to order for purposes of a hearing.

STATEMENT OF HON. JIM SAXTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. SAXTON. Today we are discussing the American ownership of fishing vessels under the Magnuson-Stevens Fishery Conservation and Management Act and the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987.

The Magnuson-Stevens Act has largely achieved the goal of eliminating foreign fishing in the EEZ and in developing domestic fisheries. In addition to this primarily successful legislation, Congress has taken other steps to foster further Americanization of the fleet. One bill to achieve this was the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987. This legislation created a new ownership standard, required that vessels engaged in the U.S. fishery be built in the United States, and required that specific manning requirements by American crews be maintained.

Two primary principles of this legislation, the American ownership standard and the American built standard, included grandfather or savings clauses. This was to allow vessel owners who were already in the fishery, or those who had made substantial investments to rebuild vessels in foreign shipyards, to maintain their eligibility to participate in U.S. fisheries.

The Coast Guard, under the jurisdiction of the Department of Transportation, was charged with the implementing of these new requirements for fishing vessels. Differences in the interpretation of the two grandfather clauses by the Coast Guard has led to unfulfilled goals for the legislation. And that is why the Subcommittee is meeting today to analyze this issue.

I am especially interested in the subject of U.S. ownership after this Subcommittee's scrutiny of the ATLANTIC STAR.

Welcome to our many distinguished witnesses, and I look forward to their testimony.

[The prepared statement of Mr. Saxton follows:]

STATEMENT OF HON. JIM SAXTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Good morning. Today we are discussing the American ownership of fishing vessels under the Magnuson-Stevens Fishery Conservation and Management Act and the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987.

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Two primary principles in the legislation, the American ownership standard and the American built standard, included grandfather or "savings" clauses. This was to allow vessel owners who were already in the fishery—or those who had made substantial investment to build or rebuild vessels in foreign shipyards—to maintain their eligibility to participate in U.S. fisheries.

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Mr. SAXTON. Before I turn to Mr. Young to introduce our first witness, let me ask Mr. Pallone if he has any opening statement.

STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Mr. Chairman. I want to thank you for having this oversight hearing today. You mentioned the Commercial Fishing Industry Vessel Anti-Reflagging Act which was signed into law in 1988. And that required that only vessels which are owned by a majority of U.S. interests can be U.S. flagged and eligible to fish in the U.S. Exclusive Economic Zone. And the law also required that fish processing vessels entering the U.S. fishery be U.S. built, and that vessels rebuilt abroad be prohibited from participating in the U.S. Fishing industry. The Coast Guard was given the responsibility for enforcing these requirements. Unfortunately, loopholes in the law have allowed several large vessels to be rebuilt overseas, thereby circumventing the law and going against congressional intent.

According to a 1990 GAO report, the Anti-Reflagging Act's American control provisions have had little impact on ensuring that U.S. fishery operations are controlled by U.S. citizens. And this is a result of the Coast Guard's interpretation allowing the grandfather exemption to remain with a vessel even if the vessel is subsequently sold to a foreign-owned company. Consequently, should the Congress desire another result, it may wish to consider changes to the existing legislation.

Now I understand that Senator Stevens will testify before us, and he has introduced the American Fisheries Act in the Senate, S. 1221, which would increase the minimum U.S. ownership requirement for U.S. flagged fishing vessels to 75 percent in order to

fly the U.S. flag and qualify for fishery endorsements. This bill would also phaseout the use of fishing vessels greater than 165 feet in length and prohibit vessels rebuilt abroad from participating in the U.S. fishing industry.

As I understand it—and the Senator will probably talk more about it—his bill is primarily a fisheries allocation bill for the North Pacific U.S. EEZ. And while the bill would likely have a limited impact on fishing vessels off the Atlantic Coast, it could dramatically change the make-up of fishing vessels on the West Coast and the Bering Sea.

I believe that U.S. flagged vessels should be primarily U.S. owned. The American citizens, not foreign interests, should be the ones to catch fish in our waters. And we should ensure that our important fishery resources are adequately protected for the current and future generations.

I understand that today's hearing is not meant to debate the merits of the Senator's bill, but rather to shed light on what progress has been made, if any, in increasing the American control of fishing vessels in our EEZ.

And again, I just want to thank you for holding this hearing, and I certainly look forward to the statement that Senator Stevens will be making.

[The prepared statement of Mr. Pallone Jr., follows:]

STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman,

Thank you for holding this oversight hearing today on United States Ownership of Fishing Vessels. As you know, our Committee has jurisdiction over responsibly managing our fishery resources under the Magnuson-Stevens Act.

The Commercial Fishing Industry Vessel Anti-Reflagging Act was signed into law in 1988. It required that only vessels which are owned by a majority of U.S. interests can be U.S. flagged and eligible to fish in the U.S. Exclusive Economic Zone. The law also required that fish processing vessels entering the U.S. fishery be U.S. built and that vessels rebuilt abroad be prohibited from participating in the U.S. fishing industry. The Coast Guard was given the responsibility for enforcing these requirements. Unfortunately, loopholes in the law have allowed several large vessels to be rebuilt overseas, thereby circumventing the law and going against Congressional intent.

According to a 1990 General Accounting Office report, "The Anti-Reflagging Act's American control provisions have had little impact on ensuring that U.S. fishery operations are controlled by U.S. citizens. This is a result of the Coast Guard's interpretation allowing the grandfather exemption to remain with a vessel even if the vessel is subsequently sold to a foreign-owned company. Consequently, should the Congress desire another result, it may wish to consider changes to the existing legislation."

Senator Stevens who will testify before us shortly, has introduced the American Fisheries Act in the Senate. S. 1221 would increase the minimum U.S. ownership requirement for U.S. flagged fishing vessels to 75 percent in order to fly the U.S. flag and qualify for fishery endorsements. The bill would also phase out the use of fishing vessels greater than 165 feet in length and prohibit vessels rebuilt abroad from participating in the U.S. fishing industry.

As I understand it, S. 1221 is primarily a fisheries allocation bill for the North Pacific U.S. EEZ. And while the bill would likely have a limited impact on fishing vessels off the Atlantic Coast, it could dramatically change the make up of fishing vessels on the West Coast and Bering Sea. I believe that U.S. flagged vessels should be primarily U.S. owned. American citizens, not foreign interests, should be the ones to catch fish in our waters. We must also ensure that our important fishery resources are adequately protected for the current and future generations.

Today's hearing is not meant to debate the merits of the Stevens Bill, but rather to shed light on what progress has been made, if any, in increasing the American control of fishing vessels in our EEZ.

Thank you again, Mr. Chairman, for holding this hearing. I look forward to hearing from Senator Stevens, the Coast Guard, National Marine Fisheries Service, and others today on this matter.

Mr. SAXTON. Thank you, Mr. Pallone.

I ask unanimous consent that all Subcommittee members be permitted to include their opening statements in the record; without objection. And for purposes of introduction of our colleague from the Senate and an opening statement——

Mr. MILLER. I just want to ask——

Mr. SAXTON. The gentleman from California.

Mr. MILLER. I just want to join with Mr. Pallone and others to say that I believe that this hearing raises very, very serious issues about the goal of the Americanization of this resource and other issues about the capitalization of the fishing resources here.

And I want to thank you for holding this hearing. It's an important hearing.

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Chairman YOUNG. Mr. Chairman, I appreciate you holding these hearings, and I will go through my opening statements as quickly as possible.

Mr. SAXTON. May I just interrupt you——

Chairman YOUNG. Yes.

Mr. SAXTON. [continuing] long enough to ask unanimous consent that Mr. Smith be permitted to sit on the panel as much as he's not a member?

Chairman YOUNG. That's fine.

Mr. SAXTON. Thank you.

Chairman YOUNG. Now, may I continue?

Mr. SAXTON. Please.

Chairman YOUNG. Thank you.

[Laughter.]

I appreciate it.

Before I introduce our esteemed witness and the author of S. 1221—which we're not holding the hearing on today—I just thank you, Mr. Chairman, for holding this hearing. It's deeply important to me, and I believe the fisheries, itself.

There are many who may not know the Magnuson-Stevens Act originated in this Committee. Of course, now it's named the Magnuson-Stevens Act, and it was enacted in 1976. This Act gives Americans control of the fisheries. That was the first step; it was the right step.

And then we passed the Commercial Fishing Industry Vessel Anti-Reflagging Act in 1987 to make sure that American owned and controlled vessels harvested our fishery resources. I specifically supported this bill because I believed it was important to have U.S. owned and U.S. manned vessels harvesting U.S. resources.

While we thought both laws were successful in Americanizing the fisheries, it appears we weren't as successful as we thought. In trying to be fair to those vessel owners who had already made substantial investment in fishing vessels—either those vessels already

in the fisheries or those being rebuilt in foreign shipyards—Congress created grandfather clauses which the Coast Guard has now misinterpreted and which have potentially allowed the opposite results to occur.

It now appears the Coast Guard has ruled that any vessel which was already in the fishery at the time of the passage of the Act could be sold to foreign interests. I'm deeply disappointed in the Coast Guard, although I have always been a strong supporter of it. Someone needs some better legal advice. And according to the GAO report in 1990, that Coast Guard ruling could lead to 29,000 fishing vessels that were in the fisheries at the time of the Anti-Reflagging Act's passage to be sold to foreign interests. This is clearly not what we intended.

I was the sponsor of the ownership amendment at the Merchant Marine and Fisheries Committee markup. Existing law at the time allowed foreign entities to set up American corporations, even if they were foreign controlled, and own fishing vessels harvesting fish in U.S. waters. The intent of my amendment was to require a majority of voting stock to be in the hands of individuals who are American citizens. The Coast Guard ruling has created an opposite effect.

In addition, the interpretation of the grandfather clause which allowed a certain number of vessels to be rebuilt in foreign shipyards and retain their eligibility to fish in U.S. waters may have had unintended consequences. There have been allegations that a number of speculative contracts were written to allow vessels to be rebuilt and brought to the U.S. fisheries when there had been no intent to do so prior to the grandfather clause, and the Coast Guard's interpretation of that clause.

I am also concerned that the Coast Guard did not seem to think that changes in the specifications of the vessels being rebuilt mattered. In several documented cases, vessels went to shipyards with the intent of being converted to fish tender vessels which do not harvest fish. And when they came out of that shipyard, low and behold, they were large factory trawlers certain to harvest fish.

I also believe the Coast Guard missed the boat on interpreting the ownership requirement by allowing vessels which entered foreign shipyards as U.S.-owned projects to leave the shipyard and enter U.S. fisheries as totally foreign-owned projects.

Most of the vessels which entered the U.S. fisheries through these grandfather clauses are now involved in the Bering Sea groundfish fishery. There is an overcapitalization problem in this fishery. I don't think anyone, including the witnesses, will debate that issue. I have tried not to assess blame nor have I claimed that eliminating all factory trawlers is the solution to that problem. There is an overcapitalization problem.

Having said that, it is important that bycatch be further reduced in this fishery. Now I've talked to all sides in this issue, urged them to set down, stop the free-for-all, and stop the bycatch. So far, I've not had a proposal other than from the CDQ community. And by the way, I want to remind the people, the CDQ program was adamantly opposed by certain people in this audience when we tried to pass it. And now they're hiding behind the program. Very frankly, I might want to look at the CDQ program, and maybe we

ought to CDQ the whole fishery. Let's really get working together where we don't have a free-for-all, and where we do maintain the shots, and we protect this fishery.

This is not about allocation; this is about protecting the Bering Sea. I'm deeply disturbed that some people would think that the current situation is perfectly alright. That we don't have to worry about the sea; we can continue to catch these fish. We can continue to do harm to other species other than what they're targeted. I think this is terribly incorrect.

Again, most of you in this room have talked to me some time or other, and I've suggested you sit down and talk this over. You have not done so. Now I'm going to tell you right now, this issue is not going away. This issue is going to be with us. We're not talking about S. 1221, but we're talking about legislation that will be supported universally.

This trawl fleet has to understand they're small in numbers; they're not large in numbers. Yes, they have a few dollars, and they have a lot of ships. But, in fact, the American public wants this industry to clean its act up.

I'm hoping that the witnesses today will take and address the issues I've just suggested—and even those issues in S. 1221, although we're not debating that bill today.

And the last issue, may I say one thing? For those honored guests in this Committee today, this is not a property taking. Fishing has always been at the privilege of a State or the Federal Government. It has never been a right in any coastal area in the United States. It has always been a prerogative of the State or the prerogative of the Federal Government, and it is not a taking. And to have someone that has been a hired gun write a legal opinion deeply disturbs me. A hired gun, not one that doesn't have an interest, but somebody that's been employed, has been hired, and now writes an opinion saying it's a taking. I also have another little group of people called the National Public Policy Research. And I don't know who in the world they are. God help us; there are so many of these people around that say, "the bill in Congress, S. 1221, the American Fisheries Act managed to, all by itself, to violate the first three of the four abuses above." And I won't read those. "The bill sponsored by Alaska's Ted Stevens would throw 1,500 Americans in Washington State out of work." Are we worried about jobs, or are we worried about the species? Are we worried about jobs, or are we worried about a continued ability not only to harvest but do it correctly?

That's the role of this Committee. If we continue to do what's been done, we'll destroy the fisheries. The jobs will be lost, and we'll lose a great part of our history if we don't do something.

And, Mr. Chairman, I want to compliment you again for having this hearing today. And I'm a little bit excited now, but if you think I'm excited, watch my Senator.

[Laughter.]

[The prepared statement of Mr. Young follows:]

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Mr. Chairman, I appreciate you holding this hearing today on the American ownership of fishing vessels. This is an issue that has been debated and addressed by Congress since the 1970's.

The Magnuson-Stevens Fishery Conservation and Management Act, enacted in 1976, gave first preference to American-flag vessels for the harvesting of fishery resources in U.S. waters. This was the first step in replacing foreign fleets in U.S. waters with our own fishing vessels.

We then passed the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 to make sure that American owned and controlled vessels harvested our fishery resources. I specifically supported this bill because I believed it was important to have U.S. owned and U.S. manned vessels harvesting U.S. resources.

While we thought both laws were successful in Americanizing the fisheries, it appears we weren't as successful as we thought. In trying to be fair to those vessel owners who had already made substantial investment in fishing vessels—either already in the fisheries or being rebuilt in foreign shipyards—Congress created grandfather clauses which the Coast Guard has now mis-interpreted which has potentially allowed the opposite results to occur.

It now appears that the Coast Guard has ruled that any vessel which was already in the fishery can be sold to foreign interests. According to a GAO report in 1990, that could lead to 29,000 fishing vessels that were in the fishery at the time of the Anti-Reflagging Act's passage to be sold to foreign interests. That is clearly not what Congress intended. I was the sponsor of the ownership amendment at the Merchant Marine & Fisheries Committee markup. Existing law at the time allowed foreign entities to set up American corporations, even if they were foreign controlled, and own fishing vessels harvesting fish in U.S. waters. The intent of my amendment was to require a majority of voting stock to be in the hands of individuals who are American citizens. The Coast Guard ruling has created the opposite effect.

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I am also concerned that the Coast Guard did not seem to think that changes in the specifications of the vessels being rebuilt did not matter. In several cases, I understand vessels went into shipyards with the intent of being converted to fish tender vessels which do not harvest fish. When they came out of the shipyard they were large factory trawlers which certainly *do* harvest fish.

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Most of the vessels which entered the U.S. fisheries through these grandfather clauses are now involved in the Bering Sea groundfish fishery. There *is* an overcapitalization problem in this fishery. I don't think anyone here will debate that issue. I have tried not to assess blame nor have I claimed that eliminating factory trawlers is the solution to that problem.

Having said that, it is important that bycatch be further reduced in this fishery. I am not happy that in some years this fishery is closed not because the target species quota is met, but rather because the bycatch quota is reached. The amount of salmon, crab and halibut that are wasted in this fishery is criminal. I understand the CDQ vessels are required to meet more stringent conservation requirements when they fish in this fishery. That is something else we need to look into.

I suspect we will hear more about these issues from the witnesses and I expect the Coast Guard will detail why they followed the interpretations that allowed these things to happen.

A number of people have attempted to turn this hearing into a debate on S. 1221, introduced by Senator Stevens. This is not a hearing on that legislation and, at this point, no legislation has been introduced on the House side. It is clear that the Stevens bill does raise some interesting questions about why the goals of Americanizing the fisheries were not realized, but this hearing is not on that bill.

In addition, some people have questioned whether fishing permits and licenses are considered property and have tried to turn this into a debate on property rights. *Let me very clearly state that fishing permits and licenses do not give the permit holder any right to fishery resources in U.S. waters. Permits are a privilege that*

allow the permit holder to attempt to harvest fish. There are no guarantees beyond that. No one here should question my leadership in the area of defending personal property rights but in this case there is no claim of property associated with fishing permits or licenses.

I look forward to hearing today's witnesses and engaging in a frank discussion of why the goals of Americanizing the U.S. fisheries has not been fully realized.

Thank you, Mr. Chairman.

Chairman YOUNG. At this time, I'd like to introduce my dear and good friend that has been with me for many, many years, that knows this issue probably better than anybody in this room—including myself—and that works very hard to try to make sure, not only Alaska, but all of the seas are protected. This is our Senior Senator. To look at him, I'm beginning to wonder if he's not taking something—well, there's new drugs out on the market nowadays——

[Laughter.]

[continuing] but I tell you——

[Laughter.]

He is the person that has introduced the legislation. He'd like to talk about this issue. It's my honor to introduce our Senior Senator, Senator Ted Stevens.

Senator, welcome.

Mr. SAXTON. Senator, thank you for being here. Why don't you proceed as you see fit. And we've allocated enough time for you to make your case thoroughly. So why don't you proceed?

STATEMENT OF HON. TED STEVENS, A U.S. SENATOR IN CONGRESS FROM THE STATE OF ALASKA

Senator STEVENS. Mr. Chairman, thank you very much. And, Congressman Young, Mr. Chairman, I appreciate your comment. You know as I look around this room I've been sort of——

Chairman YOUNG. Senator, pull that mike just a little closer to you.

Senator STEVENS. I've been reminiscing a little bit because 40 years ago, as legislative counsel to the Interior Department, I came up here and spent many hours, many days, in this room as we fought for statehood. And to now appear once again before you and know that our Congressman is the chairman of this Full Committee, it's just something that is hard to believe. Those days of 40 years ago are too bright in my mind really. I'm liable to start reminiscing about them, but I hope I won't.

And I do thank you all for your statements. Mr. Pallone, I'd like to hear your comments. And Mr. Miller, George, I hope you will go into this very deeply because it's a very serious issue. It's of great importance, I think, to the United States fisheries as a whole. And it's obvious, from what Congressman Young has said, it's extremely important to the fisheries off our shore. And I hope by the time you conclude these hearings, Mr. Chairman, you will be convinced—as I was—that legislation in this area is very much needed.

I brought a series of charts that my staff has prepared to illustrate why Congress passed the Anti-Reflagging Act. And I've got to tell you, ladies and gentlemen, I've just returned from a flight to California and back in less than 24 hours because of a serious illness of one of my children—which was a very successful operation, thank God. But if I'm a little slow this morning and not as hot as

Congressman Young would like to have me be, it's because I'm slightly restrained by a little lack of sleep.

From 1984 to 1987, the foreign-flag fishing was phased out under the Magnuson Act. In 1986, we realized that nothing in our Federal law prevented foreign-flag vessels from simply reflagging to become U.S. flags. So, we introduced and proceeded with the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987. Its goals were to require the U.S. control of fishing vessels that fly the U.S. flag, and to stop foreign construction of U.S. flag vessels under the existing interpretation of the term "rebuild," and to require U.S. flag fishing vessels to carry U.S. crews.

Of these goals, only the U.S. crew requirement was achieved. We did not stop foreign interests from owning and controlling U.S. vessels. In fact, as Congressman Young has stated, over 29,000 of the 33,000 U.S. flag fishing vessels in existence are not subject to any controlling interest requirement. Let me say it again: 29,000 of the 33,000 are not required to be controlled by the United States even though they fly—by United States citizens—even though they fly the U.S. flag.

We also failed to stop the massive Norwegian ship-building program, which took place between 1987 and 1990, that allowed 20 of the world's largest fishing vessels ever built to come into our fisheries and fish in our exclusive zone as American ships. Today, half of the Nation's largest fishery, which is the Bering Sea pollock, continues to be harvested by foreign interests on foreign-build vessels that are not subject to the U.S.-controlling interest standard.

Now if you look at this chart, if you look at the later years, you'll see that those are the white bars—they're labeled domestic. If we had it shaded for those that are really foreign controlled, it would be more than half. So, while the Magnuson Act has worked and we have Americanized the fisheries, we have not Americanized the vessels.

So, on September 25, I introduced the American Fisheries Act that some of you have mentioned, S. 1221. Senators from just about every region of the country joined in support of this measure. The co-sponsors now include Senator Breaux from the Gulf, Senator Hollings from the Southeast, Senator Gregg from Northeast, Senator Wyden from the West Coast, and my colleague, Senator Mikulski. This bill would eliminate the foreign ownership loophole that the Coast Guard interpreted into the Anti-Reflagging Act. Congress provided a grandfather clause in that Act to allow vessels whose owners did not meet the new 51 percent standard, to continue to fish until that vessel is sold. Once the vessel is sold, it was intended to have to comply with the controlling interest standard.

The Coast Guard misinterpreted that grandfather clause to run with the vessel—the legal concept of running with the vessel, to go with the vessel as the vessel is sold. And the matter was taken to court, and the DC Court of Appeals upheld the Coast Guard reading, but all sides agreed that the practical result was absurd giving the congressional primary intent of eliminating foreign control over our EEZ fishing.

The next chart I have is chart 2, indicates why I believe the Coast Guard took the position it did. In the 3 months after the Anti-Reflagging Act became law, the Coast Guard Vessel Docu-

mentation Office began issuing letter rulings that granted permanent U.S. ownership waivers. The letter rulings were signed by the Chief of the Vessel Documentation Office, who—according to the Coast Guard at the time—was not required to get any other clearance to issue such letters. About three-quarters of the rulings were issued in response to requests from two attorneys, one who was a former employee of the Documentation Office. As the chart shows, by the time a Coast Guard legal opinion was prepared in December 1988, the Documentation Chief had granted at least nine permanent waivers. This December 1998 legal analysis, prepared by the Chief of the Coast Guard Maritime and International Law Division, correctly concluded that the grandfather provision could only be interpreted to apply to the current owner of a vessel. Nevertheless, the Documentation Office continued to issue letter rulings granting permanent exemptions.

Almost 2 years later, on November 16, 1990, the Chief of the Coast Guard Operational Law Enforcement Division wrote a memorandum asking why the earlier legal opinion was not being followed. By that time, the Documentation Office had issued at least 13 permanent waivers. For reasons still not clear, the Coast Guard ultimately ignored the Maritime and International Law Division memo, the previous legal opinions I have mentioned, and in its final rule 2 years after the letter rulings, the Coast Guard read the grandfather provision once again to run with the vessel. We have since learned that the Coast Guard did not provide the Maritime and International Law Division opinion to either the district or appeal courts during the lawsuits.

At our Senate hearing in March, I called on the General Accounting Office to investigate these Coast Guard actions. The GAO will deliver its report to our committee—the Congress committee and to you—in mid-July, and I expect it will be helpful in ensuring that similar mistakes are not made again by the Coast Guard. For instance, the Coast Guard informed us that the letter rulings were permitted by the Administrative Procedures Act. And I suggest that that might be a subject, Mr. Chairman, you should look into, as we do, as to whether or not that should be changed. For one official to be able to issue a decision which binds the United States forever to recognize a grandfather and running with the ship until it expires, contrary to the intent of Congress, because of a provision that's been misinterpreted in the Administrative Procedures Act, to me, means that Act should be clarified.

S. 1221 does not seek to make those changes, and we will look into that later. This bill seeks to correct the negative effects caused by the Coast Guard's actions which I have mentioned. S. 1221 would eliminate all exemptions to the U.S.-controlling interest requirement and would raise the standard from 51 percent up to 75 percent. Now that happens to be the same standard that applies to all other vessels operating commercially in U.S. waters. There must be at least 75 percent ownership to operate a U.S. flag vessel in U.S. waters.

And unlike the Jones Act, the system under our fisheries law is really a preference system for U.S. fishing industry interests, not an outright prohibition on foreign boats. The Magnuson Act—and I also note that it's the Law of the Sea concept, too—require that

foreign flag vessels be allowed to harvest the portion of any U.S. catch that U.S. flag vessels cannot harvest. It would be possible, in other words, to bring in a foreign flag vessel to harvest a portion of our EEZ allocations if the U.S. flags could not harvest that portion. That is not the situation, however, in this area that we're talking about because these are foreign vessels that have been flagged as U.S. in order to pose as part of the Americanization effort. Without a meaningful controlling interest standard, there is no way to give U.S. interests the fishing preference envisioned under our law. Our law provides a preference for U.S. vessels, and so does the Law of the Sea. It provides that each nation can give a preference to its vessel.

Under our bill, S. 1221, vessel owners would have 18 months to comply with the new controlling interest standard and could be sold or otherwise transferred to meet those requirements. The Maritime Administration, instead of the Coast Guard, would review company documents for compliance. MarAd has already expertise in this kind of work through the Federal loan and subsidy programs for ocean carriers that it administers. And to my knowledge, we've not had any conflict over their rulings.

Fishing vessels under 100 tons, which tend to be owner-operated, would continue to demonstrate compliance as they do. Now there is a simple form that they file. The fishing vessels over 100 tons, of which there are about 3,500, would be reviewed annually, as well as whenever a new owner acquires more than 5 percent ownership of the vessel.

Gentlemen and ladies, even if we enact that bill, S. 1221, in the Congress today, it would be a quarter of a century before we would achieve Americanization as envisioned by the 1976 Magnuson Act. And again, in my judgment, everything in S. 1221 is in compliance with the Law of the Sea concepts.

Now let me turn to foreign rebuilds. A second, major component of S. 1221 would correct the Coast Guard's misinterpretation of the foreign rebuild grandfather provision. Prior to the Anti-Reflagging Act, Federal law allowed U.S. flag vessels to be rebuilt in foreign shipyards. Under the Coast Guard's interpretation of that rebuild law, a vessel could be essentially built in a foreign shipyard as long as any portion of that vessel came from a U.S. hull. Now to illustrate how extreme the rebuild could be, I want you to look at this next board that's there by my young assistant. It's chart 3; it shows the vessel ACONA, which was a 74-foot, 167-ton vessel fishing in U.S. waters, before being rebuilt in Norway. There it is, that little vessel right in the center tied up—I don't know which dock it is; looks like it's tied up in Cordova. It could be Kodiak.

Now take a look at this next one; this is chart 4, the ACONA after being rebuilt. A 74-foot, 167-ton vessel is now 252 feet, weighs over 5,000 tons, and is now the ACONA. The only thing left of the—and it's now called the AMERICAN TRIUMPH, it was the ACONA. The only thing left of the ACONA is a piece of steel in the side. I'm told there may be two pieces of steels, one in each side. Now that's a rebuild. It really is a totally new Norwegian vessel brought in and now poses as an American vessel. And it is flagged as an American vessel. This is one of about 20 of the so-called rebuilt vessels that now fish in the Bering Sea off our State.

The Anti-Reflagging Act amended Title 46 to prohibit U.S. flag vessels from being rebuilt overseas. Unfortunately, it included this grandfather clause we've mentioned for six vessels which we knew of at the time for which legitimate investments had been made to rebuild those vessels. The grandfather provision allowed a vessel to be rebuilt in a foreign yard and still qualify for the U.S. flag if the U.S. hull was purchased by July 28, 1987; a contract for rebuilding was signed within 6 months after the enactment of the Anti-Reflagging Act; and the vessel was redelivered to the owner by July 28, 1990.

Now, Congress specifically required the rebuilt vessel to be delivered to the owner of the U.S. hull in order to discourage speculators from buying U.S. hulls during the time we were working on this bill. Unfortunately, the Coast Guard did not require the same owner to receive the rebuilt vessel. And the speculation we sought to prevent became quite great. So, we're not talking really about American fishermen. We're not talking about people who have jobs on American boats. We're talking about stealth foreign vessels in our waters flying the U.S. flag.

Now, the next chart, No. 5, shows the speculative contracts for U.S. hulls that were signed between the original House markup which was scheduled for June 9, 1987, and the rescheduled markup which was held on July 28, 1987, which became the cutoff dates for contracts on U.S. hulls that could be rebuilt. Contracts for at least 13 vessels were signed in those 6 weeks, including 4 on the day before the markup.

As you can see on the chart, like the ACONA, these vessels were rebuilt into massive fishing vessels. And the chart shows the extent to which that rebuilding took place. It's just staggering, the changes. A rebuilt vessel, when they first started going overseas—they went overseas primarily because they were putting in new types of accommodations for the fishermen. And they're what we call the hotel rebuilds. They were sent over to have these new rooms added that they redesigned, and they came back, and they're essentially the same hull. If you look at this, you will find what happened to these vessels as they went from 500 tons or less than 500 tons to almost 5,000 tons. I think this is one of the scandals of the fishing industry, what happened during this period.

S. 1221—and incidently, I'm not going to rest until I get to the bottom of that scandal. I believe there was real fraud. I believe there were improper actions taken. And I intend to see that suits are brought and we, under the Freedom of Information, get the information that will show the conspiracy that existed at that time by a group of speculators to take advantage of this delay in the markup, over here in the House side, to just throw paper around and claim that those papers represented vessels that were to be rebuilt.

S. 1221 would correct the problems created by this unintended influx of capacity by requiring some of those vessels to leave. As Congressman Young has said, there is no question—I don't think anyone before you will assert that there is not tremendous overcapacity in the fleet that harvests the area that is still the most productive of all of our fishery areas. Half of the fish that Americans consume is caught off of the State of Alaska. Now, this is not

a bill to deal with allocations between U.S. and foreign vessels. It's not a bill to try to deal with any legitimate ownership. It's to try to deal with the situation that came about because of the actions taken by that Documentation Office that continued to approve pieces of paper that have now been ruled to go with the vessels that were constructed as enormous new vessels overseas, and allow them into our waters as rebuilt vessels.

We do not eliminate all of the foreign factory trawlers, or even all of the foreign factory trawlers that came in through that rebuild loophole. S. 1221 would remove from the fisheries only half of the rebuild vessels that continued to be foreign-controlled on September 25, 1997. I might add, many of them have gone through new devices to try to show they're not foreign-controlled since that date.

From the records we have, it appears that 18 vessels were speculative, where the original owner of the hull did not receive delivery of the rebuild vessel. That's my definition of speculative, where someone stepped in and bought the paper that represented a vessel that was over there like the ACONA and rebuilt it into an enormous factory trawler. It had nothing to do with trawling before that time. It became a factory trawler after the rebuild clause was fused. Of those 18, only 13 appear to be foreign-owned on September 25, 1998. Of the 13 foreign-owned boats, 3 have already left. They went over and reflagged in Russia, and continue to fish there so far as I know. Under S. 1221, the remaining vessels, which we believe to be 10, would have to find a vessel of equal or greater size to surrender its U.S. flag in order to continue flying the U.S. flag. And there are vessels out there that are on the beach; they could be bought if they wish to stay on that basis.

This was a more lenient approach than requiring all of the speculative vessels to leave U.S. fisheries. It would make the current owners of the vessels that caused the overcapitalization problems responsible for fixing the problem, but with the potential for some time to remain in the fishery.

Let me parenthetically tell you one of the things we're working on in the Senate is a new concept of trying to find some way to have a buyout of some of those vessels in the North Pacific. Several of the fisheries have come to us and said they want to have an opportunity to do what has been done in New England and to buy down some of those vessels. And the owners of the vessels would borrow the money from a fund and repay that fund so that it would not be taxpayers' money that would be used. But they're devising ways to try and bring about a voluntary reduction in the capacity in each of these fisheries. But this main fishery, the pollock fishery, the investments are so large and the numbers are so large of the foreign-owned vessels, that that's just not possible to approach this problem on that basis.

The foreign rebuild provisions of S. 1221 would likely result in only five factory trawlers leaving the Bering Sea fisheries. It will allow 50 to 55 factory trawlers to remain, provided they comply with the U.S.-controlling interest standard—which any lawyer will tell you, it's not that difficult. We thought—those of us who designed this bill in the Senate side thought, under the circumstances, that this bill is very fair. I think we bent over backward to be fair. But since September, I have seen clearly that the

people who have brought these vessels in knew what they were doing; they knew they were invading Congressional intent. And they have conducted just a staggering campaign now to try and defeat S. 1221.

And my last chart I have there is chart 6. It shows the foreign rebuild grandfather was implemented by the Coast Guard in much the same way as the ownership grandfather clause. There are two separate grandfather clauses in the Anti-Reflagging Act. At least 13 rebuild waivers were granted before the final rule was promulgated, essentially foreclosing the possibility of correctly interpreting the provision. As with the ownership grandfathers, the letter rulings were issued primarily by the chief of the Vessel Documentation Office, and the majority were issued to two attorneys, again, one of whom was a former employee of the person that issued those letters. When you finish your review today, I hope you will consider whether we should remove all of the speculative vessels that came through the loophole and continue to be foreign-owned.

If we continue to be opposed on a basis of our FARE bill, we're going to have a knock-down, drag-out fight in the Congress to win this issue to protect these fisheries in the North Pacific. We might as well go "whole hog" and get out of the whole area those who have speculated and tried to now destroy our fisheries based upon that speculation.

I know I'm taking a long time, but there are some interesting views on the final major component of the bill. We called it the large vessel phaseout. It provides that no new fishing vessels greater than 165 feet, 750 tons, or 3,000 shaft horsepower would be allowed into these fisheries. Fishing vessels above any of these three thresholds that are already in the fisheries on September 25, 1997, could stay in for the useful life of the vessel, provided they meet the controlling interest standard and don't surrender their fishery's endorsement.

This phaseout could easily be called a moratorium. The measure would not only prevent new boats from entering, it would prevent foreign flag vessels from coming back into the U.S. fleet. I mention that of great importance because many of these large vessels went over to Russia and started fishing there as Russian vessels. And now they want to come back and claim they're still U.S. vessels.

After the Senate hearing, I told many of the people involved I'd be willing to consider allowing the Councils, the Regional Fisheries Councils, to provide a means to override the moratorium even though I've yet to hear a single U.S. fishery that needs or wants any more large fishing vessels. It does seem to me Council created the regional corporations; the regional corporations should be the ones to decide if there is any need for any new vessels that would exceed that standard set by S. 1221.

The bill also includes a special measure for Atlantic herring and mackerel fisheries, in part because a factory trawler recently modified overseas obtained a fishery endorsement before the control date of S. 1221. I believe that's sought by the people in the area very strongly.

I would make one suggestion in closing, Mr. Chairman, and that is on what Congressman Young discussed—the concept of taking. I have practiced law now for almost 50 years, Mr. Chairman, and

I would not draft a bill that would violate the Constitution knowingly. It was not a taking when we phased out the foreign flag vessels in the early–1980's. They were all foreign flag vessels then, and we've set up a provision for Americanization through the joint venture phase. And even the joint ventures were phased out by an act of Congress. And it will not be a taking when we remove the foreign-controlled vessels that purported to be U.S. flags from the U.S. flag registration. In both cases, we are eliminating a privilege the United States granted to those entities.

In the case of foreign-flag vessels, the privilege came as a fishing permit that allowed them to operate in U.S. waters. That was before the Magnuson Act. In the case of foreign-controlled vessels, the privilege is in the form of a fishery's endorsement—a piece of paper issued by an administrative officer that allows them to operate in U.S. waters as U.S. vessels. As with the original Magnuson Act and the 1987 Anti-Reflagging Act, S. 1221 would not take anyone's vessel or prevent them from using it anywhere in the world with the proper fishery's endorsement.

It's ironic to me that some of the same factory trawler owners who now argue that their permits cannot be revoked, 2 years ago told us—when arguing for IFQs, Individual Fishing Quotas—that fishing was a privilege which could be revoked without compensation. These people have gone each way on several issues.

With respect to IFQs, Congress should make clear that there will be no IFQs ever issued to foreign interests in our waters. That ought to be another thing we did not do that you should consider. Put the marker down now and state to everybody that if we go the IFQ route, there will be no foreign fishing IFQs in our water.

Now the last chart I said was the last, but I'm mistaken. There is another chart, chart 7. It showed what happened to the Bering Sea pollock fishery since the foreign rebuilds entered. The allowable biological catch, which is called ABC, has declined by one-third, meaning there are one-third fewer fish to catch. And the Council, now, because of the pressure of all of these vessels, has eliminated what we call the buffer between that allowable biological catch and the total allowable catch, which is the TAC. So now, that if the ABC accidently gets set too high, the fleet will have already exceeded what should be the maximum catch.

All of these mechanisms were designed to protect the fish, the reproductive capability of these fisheries—not to protect fisherman, not to protect who owns the vessel at any length, but to protect the reproductive capability. And because of the pressure of this overcapitalization the Council, now, has been forced to eliminate one of the basic protections for the species themselves, and that was the buffer. The decline in the allowable catch may be part of a normal stock cycle, but the shift to a riskier management practice is probably the direct result of the increased capital and harvesting capacity that go back to these erroneous rulings that I've mentioned.

Now, ladies and gentlemen, you've been very patient with me. I can't tell you how chagrined I am to have to come and confess that when we marked up that bill, we just didn't do a good job. We should have closed that door, and we should have been very plain about what rebuild was. And when we said, "to the owner," we should have said, "to the original owner," to the owner who submit-

ted the papers at the time that the exemption was sought; but we didn't. In other words, this is not something for the courts to deal with; its not something—and by the way, the Court of Appeals said it was something for Congress to deal with. We should have done it more specifically, and we need to now go back and do what we intended to do—assure that only U.S. flag vessels that are built in the United States can, in fact, be flagged as U.S. vessels to harvest a portion, the American portion, of the fisheries within our 200 mile limit.

And I commend you again, ladies and gentleman. I hope that you will pursue it. There are several other things here that I could mention about this issue, but I think, in the interest of time, I'll see if you have any questions of me. It is to me, the most serious thing that faces our great North Pacific fishery, and I'm saddened that it's viewed by some as being Alaska versus the State of Washington issue. It is not. And if anyone's got any solution to help us prove that, I'd be glad to explore any solution. We are not taking any of these vessels out on the basis of where their home port is, or anything. We're looking to take them out on the basis of whether they fraudulently came into the fishery. And I hope that you'll address it from that point of view.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Stevens follows:]

STATEMENT OF HON. TED STEVENS, A SENATOR IN CONGRESS FROM THE STATE OF ALASKA

Thanks to Chairman Young and Subcommittee Chairman Saxton for allowing me to testify today.

The matter you are about to consider is of great importance in the U.S. fisheries, and particularly in the fisheries off Alaska. By the time you conclude today, it is my hope you will be convinced, as I was, that legislation is greatly needed.

My first chart (chart 1) illustrates why Congress passed the Anti-Reflagging Act. From 1984 to 1987, foreign-flag fishing was being phased out of the EEZ under the Magnuson Act. In 1986 we realized that nothing in Federal law prevented the foreign-flag vessels from simply reflagging to the U.S. flag. The goals of the "Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987" were therefore: (1) to require the U.S.-control of fishing vessels that fly the U.S. flag; (2) to stop the foreign construction of U.S.-flag vessels under the existing interpretation of the term "rebuild"; and (3) to require U.S.-flag fishing vessels to carry U.S. crews.

Of these goals, only the U.S. crew requirement was achieved. We did not stop foreign interests from owning and controlling U.S.-flag vessels. In fact over 29,000 of the 33,000 U.S. flag fishing vessels in existence are not subject to any controlling interest requirement. We also failed to stop the massive Norwegian shipbuilding program between 1987 and 1990 that allowed about 20 of the largest fishing vessels ever built to come into our fisheries.

Today, half of the nation's largest fishery—Bering Sea pollock—continues to be harvested by foreign interests on foreign-built vessels that are not subject to the U.S.-controlling interest standard. Therefore, while the white bars in the later years on the chart are labeled "domestic," half of each could still correctly be labeled "foreign."

On September 25, 1997, I introduced the American Fisheries Act (S. 1221) to fix these mistakes. Senators from just about every fishing region of the country have joined me in support of this measure. (Cosponsors include Senators Breaux (Gulf); Hollings (Southeast); Gregg (Northeast); Wyden (West Coast) and Murkowski).

Foreign Ownership

S. 1221 would eliminate the foreign ownership loophole the Coast Guard interpreted into the Anti-Reflagging Act. Congress provided a grandfather in that Act to allow vessels whose owners did not meet the new 51 percent standard to continue to fish until they sold the vessel. Once the vessel was sold, it was intended to have to comply with the controlling interest standard. The Coast Guard misinterpreted this grandfather to "run the vessel." While the DC Court of Appeals upheld this

Coast Guard reading, all sides agreed that the practical result was absurd given Congress' primary intent of eliminating foreign control.

My next chart (chart 2) indicates why I believe the Coast Guard took the position it did. In the three months after the Anti-Reflagging Act became law, the Coast Guard Vessel Documentation Office began issuing letter rulings that granted permanent U.S. ownership waivers. The letter rulings were signed by the Chief of the Vessel Documentation Office, who, according to the Coast Guard, was not required to get any other clearance in issuing the letters. About three-quarters of the rulings were issued in response to requests from two attorneys, one of whom was a former employee of the Documentation Office.

As the chart shows, by the time a Coast Guard legal opinion was prepared on December 19, 1988, the Documentation Chief had granted at least 9 permanent waivers. This December 1988 legal analysis—prepared by the Chief of the Coast Guard Maritime and International Law Division—correctly concluded that the grandfather provision could only be interpreted to apply to the current owner of a vessel. Nevertheless, the Documentation Branch continued to issue letter rulings granting permanent exemptions.

Almost two years later, on November 16, 1990, the Chief of the Coast Guard Operational Law Enforcement Division wrote a memo asking why the earlier legal opinion was not being followed. By that time, the Documentation Office had issued at least 13 permanent waivers. For reasons still not clear, the Coast Guard ultimately ignored the Maritime and International Law Division memo. In its final rule—two years after the letter rulings—the Coast Guard read the grandfather provision to run with the vessel. We've since learned that the Coast Guard did not provide the Maritime and International Law Division opinion to the either the district or appeals courts during the law suit which it won.

At our hearing in March, I called on the General Accounting Office to investigate these Coast Guard actions. The GAO will deliver its report in mid-July, and I expect it will be helpful in ensuring that similar mistakes are not made again by the Coast Guard. For instance, the Coast Guard informed us that the letter rulings were permitted by the Administrative Procedures Act, and perhaps that should be changed.

S. 1221, however, does not seek to make these kinds of changes—it seeks to correct the negative *effects* by the Coast Guard's actions. S. 1221 would eliminate *all* exceptions to the U.S.-controlling interest requirement, and would raise the standard from 51 percent up to 75 percent, the same standard as other vessels operating commercially in U.S. waters.

Unlike the Jones Act, the system under our fisheries law is really a *preference* system for U.S. fishing interests, not an outright prohibition on foreign boats. The Magnuson Act (and Law of the Sea) *require* that foreign-flag vessels be allowed to harvest the portion of any U.S. catch that U.S.-flag vessels can't harvest. Without a meaningful controlling interest standard, there is no way to give U.S. interests the fishing preference envisioned under this law.

Under S. 1221, vessel owners would have 18 months to comply with the new controlling interest standard, and could be sold or otherwise transferred to meet the requirements. The Maritime Administration, instead of the Coast Guard, would review company documents for compliance. MarAd already has expertise in this kind of work through the Federal loan and subsidy programs for ocean carriers that it administers.

Fishing vessels under 100 tons—which tend to be owner-operated—would continue to demonstrate compliance as they do now (with a simple form). Fishing vessels over 100 tons—of which there are about 3,500—would be reviewed annually, as well as whenever a new owner acquires more than 5 percent ownership.

Even if we enact S. 1221 today, it will have taken a quarter century to achieve the Americanization we envisioned in 1976.

Foreign Rebuilds

The second major component of S. 1221 would correct for the Coast Guard's misinterpretation of the foreign rebuild grandfather.

Prior to the Anti-Reflagging Act, Federal law allowed U.S.-flag fishing vessels to be "rebuilt" in foreign shipyards. Under the Coast Guard's interpretation of "rebuild," a vessel could be essentially *built* in a foreign shipyard so long as some portion came from a U.S. hull. To illustrate how extreme a "rebuild" could be, my next board (chart 3) shows the vessel ACONA—which was 74-feet long and 167 tons before being rebuilt in Norway.

Take a good look—the board after (chart 4) shows the "ACONA" upon the completion of its rebuild. It measures 252 feet and over 5,000 tons, and is now called the AMERICAN TRIUMPH. This is no reasonable way to call this the same vessel. This particular vessel is currently under investigation by the Coast Guard because docu-

ments used in obtaining the rebuild waiver may have been back-dated. This is one of about 20 so-called "rebuilt" vessels that now fish in the Bering Sea.

The Anti-Reflagging Act amended title 46 to prohibit U.S.-flag fishing vessels from being rebuilt overseas. Unfortunately, it also included a grandfather provision for 6 vessels for which legitimate investments had been made. The grandfather provision allowed a vessel to be rebuilt in a foreign yard and still qualify for the U.S.-flag if (1) the U.S. hull was purchased by July 28, 1987; (2) a contract for rebuilding was signed within 6 months of the enactment of the Anti-Reflagging Act; and (3) the vessel was "redelivered *to the owner*" by July 28, 1990.

We specifically required the rebuilt vessel to be delivered to the owner of the U.S. hull in order to discourage speculators from buying U.S. hulls during the time we were working on the bill. Unfortunately, the Coast Guard did not require the same owner to receive the rebuilt vessel—and the speculation we sought to prevent became quite great.

My next chart (chart 5) shows the speculative contracts for U.S. hulls signed between the original House markup (June 9, 1987) and the rescheduled markup July 28, 1987 which became the cutoff date for contracts on U.S. hulls that could be rebuilt. Contracts for at least 13 vessels were signed in those six weeks—including 4 on the day before the markup. As you can see on the chart, like the ACONA, these vessels were "rebuilt" into massive fishing vessels (see increases on the chart).

S. 1221 would correct the problems created by this unintended influx of capacity by requiring some of those vessels to leave. S. 1221 would not—as some have suggested—eliminate all of factory trawlers or even all of the factory trawlers that came through the rebuild loophole. It would remove from the fisheries only half of the rebuild vessels *that continued to be foreign-controlled on September 25, 1997* (the day of introduction).

From records we have, it appears that 18 vessels were speculative (where the original owner of the U.S. hull did not receive delivery of the rebuilt vessel). Of those 18, only 13 appear to have been foreign-owned on September 25, 1998. Of the 13 foreign-owned boats, three already have left the fisheries (reflagged to fish in Russia). Under S. 1221, the remaining vessels (we believe 10) would have to find a vessel of equal or greater size to surrender its U.S. flag in order to continue flying the U.S. flag.

This was a more lenient approach than requiring all of the speculative vessels to leave the fisheries. It would make the current owners of the vessels that caused the overcapitalization problems responsible for fixing the problems—but with the potential for some to remain in the fisheries. The foreign rebuild provisions of S. 1221 would likely result in only 5 factory trawlers leaving the Bering Sea fisheries—and allow 50 to 55 factory trawlers to remain, provided they comply with the U.S.-controlling interest standard. We thought this, under the circumstances, was very fair—we bent over backwards to be fair. Since September I have seen clearly that the people who brought these vessels in knew exactly what they were doing—and that they were evading Congressional intent.

As my next chart (chart 6) shows, the foreign rebuild grandfather was implemented by the Coast Guard in much the same way as the ownership grandfather. At least 13 rebuild waivers were granted before a final rule was promulgated—essentially foreclosing the possibility of correctly interpreting the provision. As with the ownership grandfathers, the ruling letters were issued primarily by the Chief of the Vessel Documentation Office, and the majority were issued to two attorneys, one of whom was a former employee. When you finish your review today, perhaps you will conclude that we should remove all of the speculative vessels that came through loophole and that continue to be foreign owned.

Large Vessel Moratorium

There are some interesting views on the final major component of the bill. In S. 1221, we called it the large vessel "phase out." No new fishing vessels greater than 165 feet, 750 tons, or 3,000 shaft horsepower would be allowed into the fisheries. Fishing vessels above any of these thresholds that were already in the fisheries on September 25, 1997 could stay for the useful life of the vessel—provided they meet the controlling interest standard, and don't surrender their fishery endorsement.

This "phase out" could as easily be called a "moratorium." The measure would not only prevent new boats from entering, but would prevent former-U.S. flag vessels from coming back into the U.S. fleet. After the Senate hearing, I said I would be willing to consider allowing the Councils to override the moratorium—even though I've yet to hear of a single U.S. fishery that needs or wants any more large fishing vessels. I should mention that the bill includes a special measure for the Atlantic herring and mackerel fisheries, in part because a factory trawler recently modified overseas obtained a fishery endorsement before the control date in S. 1221.

Closing

Before concluding, I will comment on the suggestion that this bill would constitute a taking. It was not a taking when we phased out *foreign-flag* vessels in the early-1980's, and it will not be a taking when we remove *foreign-controlled* vessels who happen to fly the U.S. flag. In both cases, we are eliminating a privilege the United States granted to those entities.

In the case of foreign-flag vessels, the privilege came as a fishing permit that allowed them to operate in U.S. waters. In the case of the foreign-controlled vessels the privilege is in the form of a fishery endorsement that allows them to operate in U.S. waters. As with the original Magnuson Act and the 1987 Anti-Reflagging Act, S. 1221 would not "take" anyone's vessel or prevent them from using it anywhere else in the world.

It's ironic to me that some of the same factory trawler owners who now argue their permits can't be revoked, two years ago told us—when arguing for IFQs—that fishing was a privilege which could be revoked without compensation. And with respect to IFQs, Congress should make clear that there will be no IFQs issued to foreign entities.

My final chart (chart 7) shows what has happened in the Bering Sea pollock fishery since the foreign rebuilds entered: (1) the "allowable biological catch" (ABC) has declined by a third—meaning there are fewer fish to catch; and (2) the Council has eliminated the buffer between the ABC and the "total allowable catch" (TAC)—so that now if the ABC accidentally gets set too high, the fleet may already have exceeded what should have been maximum catch. The decline in the allowable catch may be part of the normal stock cycles, but the shift to a riskier management practice is probably the direct result of the increased capital and harvesting capacity stemming back to the early-199Os.

Mr. Chairmen and Committee members, I appreciate the time you have taken to listen to me, and commend you for addressing these important issues today.

Chart 1

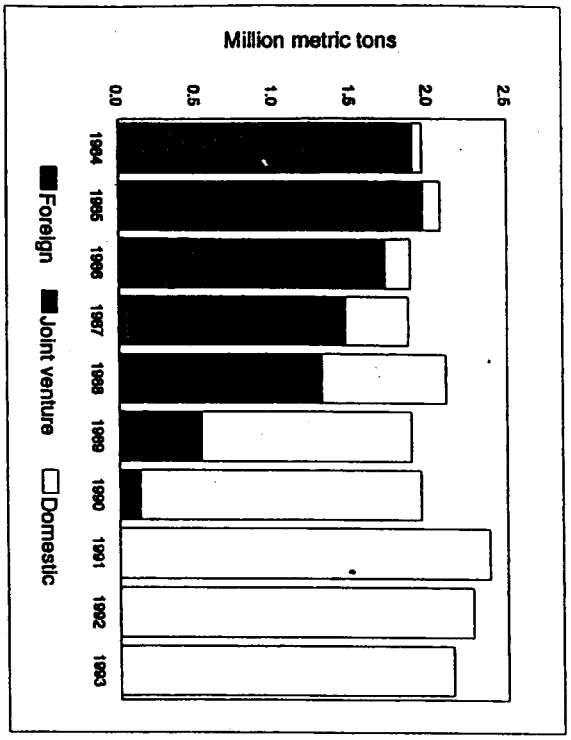


Figure 3-2
Groundfish catch in the commercial fisheries off Alaska by fishery, 1984-93.

Chart 3
U.S. Controlled Vessels Grandfather
Ocean Rover • 3/16/88
Claymore Sea • 3/31/88
Heather Sea • 3/31/88
Rebecca Ann • 4/19/88
Victoria Ann • 4/19/88
American Empress • 6/29/88
Pacific Scout • 7/12/88
Pacific Explorer • 7/12/88
American Dynasty • 11/30/88
Alaska Victory • 1/9/89
Alaska Spirit • 1/19/89
Sage Sea • 1/27/89
American Triumph • 4/4/89
1/11/88
Enactment of Anti-Flagging Act
6/16/88
C.G. Memo: "Grandfather runs w/ the vessel"
12/19/88
C.G. Legal Opinion**: "Grandfather runs only w/ current owner"
11/16/90
C.G. Legal Opinion***: "Grandfather runs only w/ current owner"
12/12/90
Final Rule "Grandfather runs w/ the vessel"
* Signed by same G.G. officer who signed most of letter rulings
** Signed by the Chief of C.G. Maritime and International Law Division
*** Signed by the Chief of the C.G. Operational Law Enforcement Division

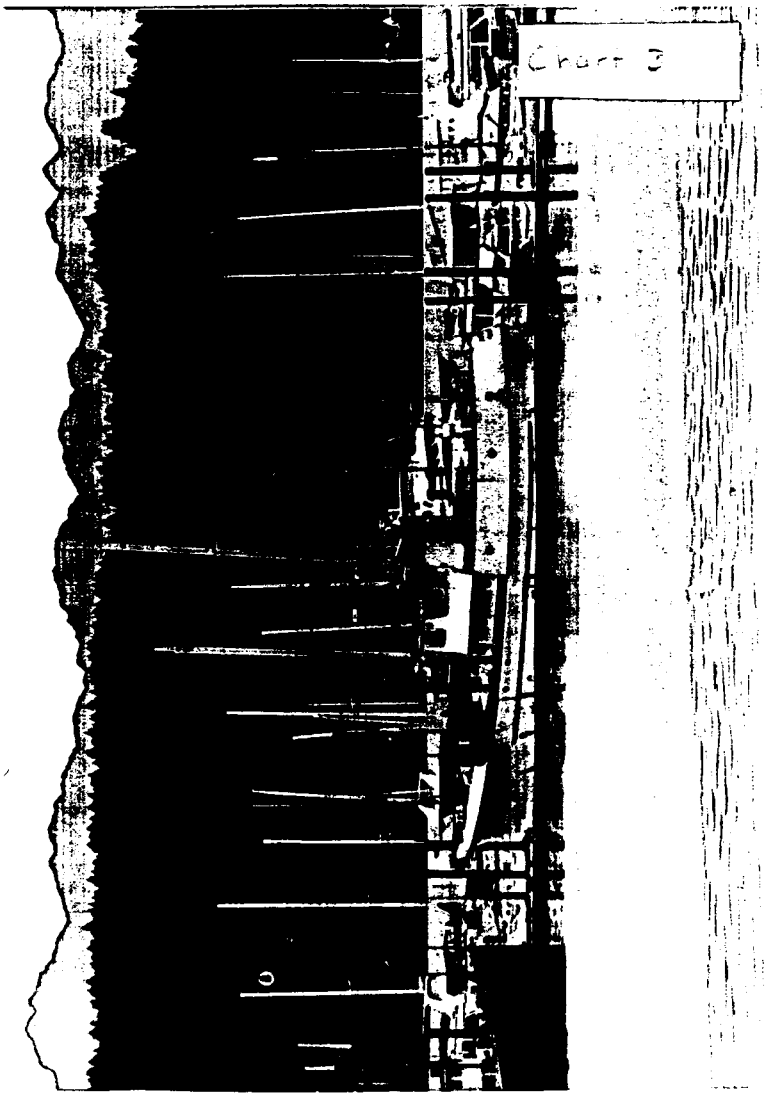


Chart 3


Chart 4
AMERICAN TRIUMPH

Chart 5

Foreign "Rebuild" Before - After

Vessel	Contract Date	Tons			Length (ft)		
Endurance	6/17/87	<500	-	2,117	195	-	239
Ocean Rover	6/17/87	293	-	4,345	180	-	223
Claymore Sea	6/25/87	1,258	-	2,397	228	-	218
Heather Sea	6/26/87	1,258	-	3,200	228	-	290
American Empress	7/07/87	1,258	-	2,493	228	-	280
Saga Sea	7/07/87	<500	-	4,861	173	-	271
American Dynasty	7/08/87	<500	-	3,659	189	-	240
Alaska Ocean	7/08/87	<500	-	4,555	192	-	344
Northern Hawk	7/08/87	<500	-	3,582	—	-	310
Alaska Spirit	7/27/87	—	-	1,148	—	-	203
Alaska Victory	7/27/87	—	-	1,215	185	-	206
Pacific Explorer	7/27/87	399	-	1,389	—	-	213
Pacific Scout	7/27/87	399	-	1,389	—	-	213

1/22/87 S.377 "No Race to Reflag"

6/09/87 Original House Markup Cancelled

7/28/87 House Markup - Effective Control Date in Act

12/22/87 Congress Passes Anti-Reflagging Act

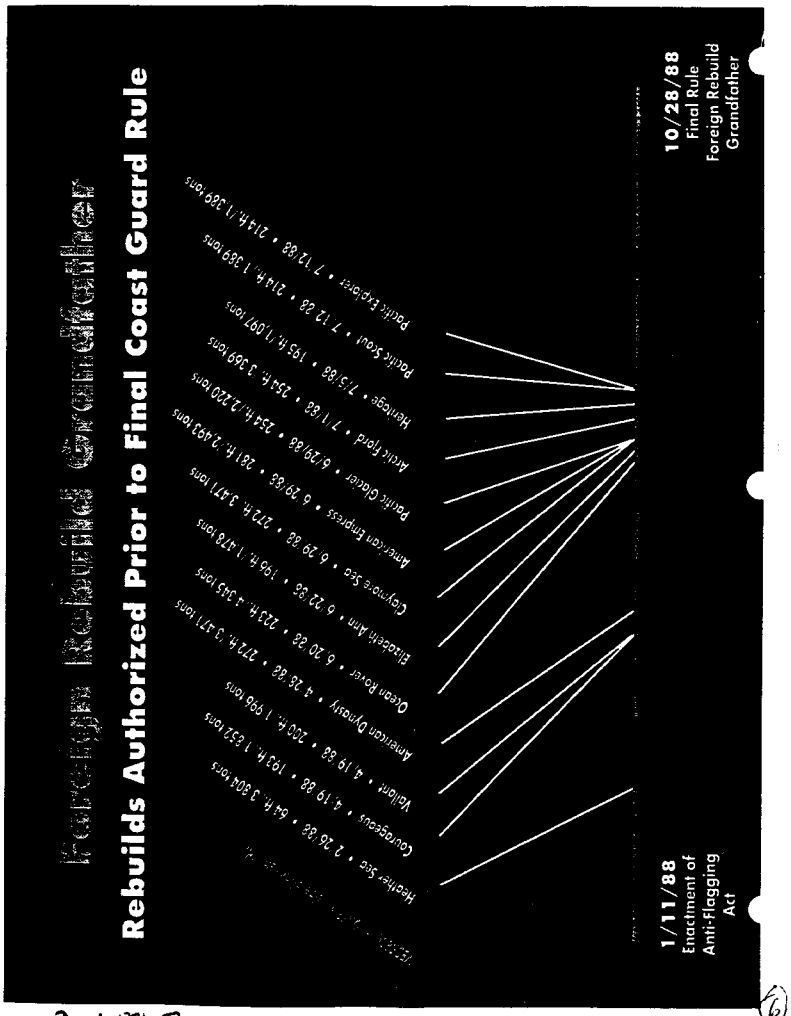
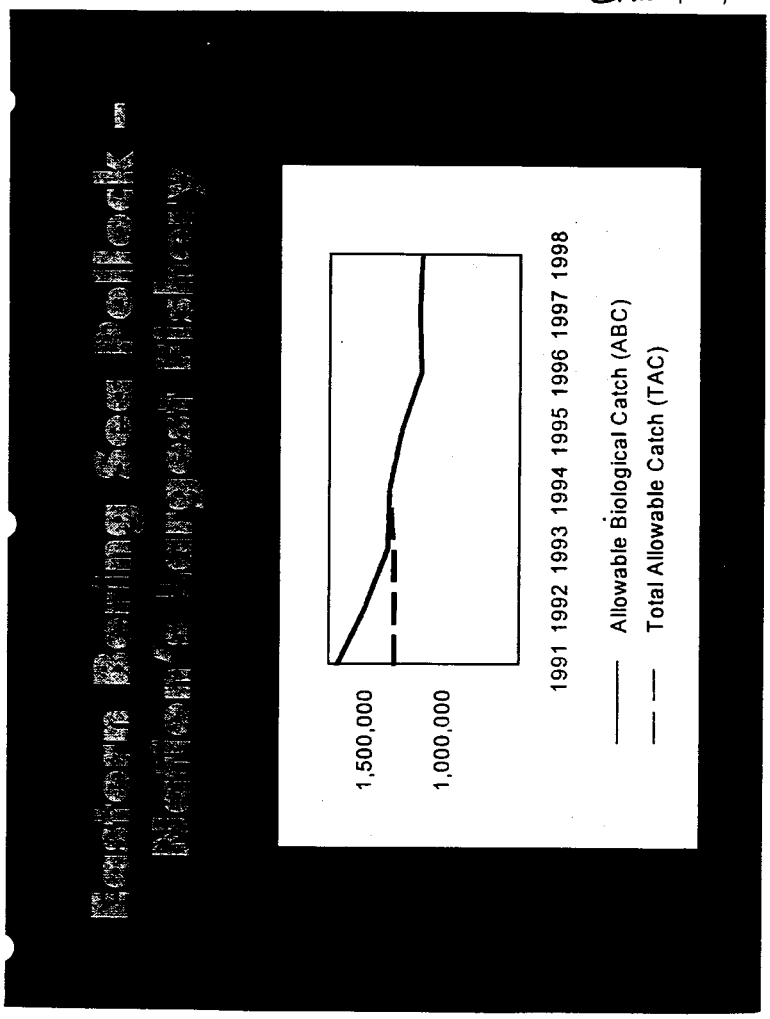

Foreign Rebuilds Grandfather
Rebuilds Authorized Prior to Final Coast Guard Rule
Heather Sea • 2.26.88 • 64 ft. • 3,304 tons
Courageous • 4.19.88 • 193 ft. • 1,652 tons
Valiant • 4.19.88 • 200 ft. • 1,996 tons
American Dynasty • 4.26.88 • 272 ft. • 3,471 tons
Ocean Racer • 6.20.88 • 223 ft. • 3,345 tons
Elizabeth Ann • 6.22.88 • 196 ft. • 1,478 tons
Cayuse Sea • 6.29.88 • 272 ft. • 3,471 tons
American Empress • 6.29.88 • 281 ft. • 2,493 tons
Pacific Glacier • 6.29.88 • 254 ft. • 2,220 tons
Arctic Ford • 7.1.88 • 254 ft. • 3,369 tons
Heritage • 7.5.88 • 195 ft. • 1,097 tons
Pacific Scout • 7.12.88 • 214 ft. • 1,389 tons
Pacific Explorer • 7.12.88 • 214 ft. • 1,389 tons
1/11/88
Enactment of
Anti-Flagging
Act
10/28/88
Final Rule
Foreign Rebuild
Grandfather

Chart 6

(9)

Chart 7


Eastern Bering Sea Pollock
Bering Sea Ecosystem
1,500,000
1,000,000
1991 1992 1993 1994 1995 1996 1997 1998
Allowable Biological Catch (ABC)
Total Allowable Catch (TAC)

Mr. SAXTON. Senator Stevens, thank you very much for the very thorough, and explicit, and articulate testimony.

And first, I ask unanimous consent that Mr. Delahunt and Mrs. Smith be permitted to sit on the panel. Thank you very much.

Second, let me thank you, Senator, for including the provisions of the House bill relative to the northeastern part of the country, and specifically the ship that we referred to, in the language, I believe is the ATLANTIC STAR. We appreciate very much your including those provisions in your bill. We think that's of great importance, particularly to Mr. Delahunt and I, and Mr. Pallone, and other Members of the Congress who represent sections of the northeast.

I'd just like to make one point if I may, and then I'm going to ask Mr. Young for his questions or comments. I'd like to try to help clear up this issue regarding property rights. You spoke very eloquently, and I understand what you said, and I agree with you. I would just like to underline this and perhaps you can respond to this statement. On February 28 of 1995, the American Factory Trawler Associations wrote to the Chairman of the Full Committee, Mr. Young. And I have a three-page letter signed by Joseph Blum, the executive director. And I might add that the American Factory Trawler Association is represented here today by Jim Gilmore. They are now called the At Sea Processor's Association, so they'll have a chance to comment on this as well. In addressing the issue of ITQs, there's an interesting passage—statement here on page 2 of this letter. In speaking to what Congress ought to do relative to a number of issues involving the North Pacific fisheries, and they are addressing the issues of ITQs. And they say, and I'll quote this, "Specifically," they say, "Congress should clarify that a quota share issued to a person under a ITQ program is not a property right. Under the ITQ program, an individual is provided with a privilege of harvesting a percentage of the annual allowable catch." This is the American Factory Trawlers Association which I believe today may be taking a different view.

I would just like you, if you would, sir, Senator, to comment on this statement and how you see it in the context of our discussion today.

Senator STEVENS. Well, Mr. Chairman, I think you're correct that the group that represents the factory trawler have taken all three sides of that same issue. On CDQs, IFQs, and on the fishery's endorsement, they, on one hand, argue that it is a property right. On the other hand, when it's convenient, argue that it's just a privilege. It just depends on what they want in terms of what the constitutional provision means as far as I'm concerned. They have not addressed this issue, I think, fairly on a legal basis. There is no constitutional right; there is no taking of any property right here. I know of no one that previously had claimed that about a fishery's endorsement issued by the Coast Guard. And as such, I just hope the Committee and the Congress will ignore this new argument.

Mr. SAXTON. If fishery quotas or fishing privileges were property rights, we'd have a hard time regulating fisheries at all, wouldn't we?

Senator STEVENS. You're right. As a matter of fact, the Regional Councils under the Magnuson Act can take those down and can

stop them from exercising those rights at any time. If they were property rights, they could not do that without compensation. But the Regional Fishings Councils have been doing that since day one under the Magnuson Act because they set the allowable catch, and they tell you how much that endorsement is worth in each year. And the Act, as well as the Law of the Sea, contemplates that that because they're both provisions to protect the fish—not protect the fishermen or any vessel. Now, their argument would mean that a vessel that acquires such an endorsement has a greater right than an American-built vessel. Think of that, Mr. Chairman. There is no such concept involved, that I know of, in constitutional law.

Mr. SAXTON. Senator, thank you very much.

Mr. Young.

Chairman YOUNG. Thank you, Mr. Chairman.

Before you leave, Senator, I'd like to have both of the two pictures of the so-called rebuilt ship. I want to leave those here and remind each member, that is a classic example of what was not intended. Because other than the Senator and myself, we're the only two that were here. We knew what we were intending to do, and now to have that abused as was done is just absolutely beyond my comprehension. You know, I have hundreds, Senator—and I know you do, too—of people coming in and asking for changes in the Jones Act; we need documentation to get our vessel out of Canada, for instance. The Coast Guard said you can't do it. And this is the example I think of malfeasance, if I've ever seen it.

And, Senator, one question—and I want to thank you for your testimony——

Senator STEVENS. Congressman?

Chairman YOUNG. Yes.

Senator STEVENS. May I interrupt just—sir, attached to each one of the statements we've provided you, are a black and white——

Chairman YOUNG. There's something about—maybe it's the maturity—there's something about a little picture and a big picture.

Senator STEVENS. Oh.

Chairman YOUNG. I would rather look at the big picture, believe me.

Senator STEVENS. Senators have the trouble of seeing the big picture every once in awhile.

[Laughter.]

Chairman YOUNG. OK. The other thing is, to your knowledge, Senator, is there any fishing in any State that it is a right, other than the Indian treaties? That all fisheries, to your knowledge, within the three-mile limit are managed by the State Fish and Game; is that correct?

Senator STEVENS. That's correct.

Chairman YOUNG. Nobody has the right. They can shut it down. Let's go beyond the three-mile limit. What happens if the Council changes the size of the net from an eight-inch net which they used to use, to a two-and-one-half-inch net, or from a two-and-one-half-inch to eight-inch net? Would that be a taking, for instance?

Senator STEVENS. Absolutely not. As a matter of fact, look at the foreign factory trawlers; they argued before the Council and got a ruling of the Council that changed the allocation of fish. It used to be 65 percent onshore, 35 percent offshore. Now, it's 65 percent off-

shore and 35 percent onshore. In other words, the Council, in its ruling, put more than half of the boats that were fishing or bringing the fish back to shore put them on the beach. Now that wasn't deemed to be a taking. They're arguing right now before the Council for a larger allocation of this fish.

Chairman YOUNG. All right. I'm——

Senator STEVENS. All the endorsement gives you is the right to take the amount of fish the Council says you can take.

Chairman YOUNG. All right.——

Senator STEVENS. How can that be a property right?

Chairman YOUNG. Senator, if I'm an onshore processor. And if the Council determines I'd get 50 percent of the fish for example. The Council rules that instead of my getting 50 percent, I get 35 percent; it goes to the offshore trawl fleet. That is not considered a taking from me. But under their premise, it would be a taking. Is that correct?

Senator STEVENS. Well, they consider it to be a taking when we say that they have to give up the rights they acquired through the improper interpretation of the law. Now that is on another phase of this question of constitutionality. That flag that they get, you can see how temporary it is. They have voluntarily given up—if they just go across the line and start fishing in Russia, they give up that right. Now if it's a property right, how can Congress provide it just by going across an imaginary line? They lose that constitutional right. Their property right argument is just full of holes. It has never been a property right. And I do not understand——

Chairman YOUNG. Again, Senator, I know what this is. This is an attempt to what we call "muddy the water," not "tongue in cheek." There is something really fishy about that argument, and I hope we are able to beach it so it never swims again.

Thank you, Mr. Senator.

[Laughter.]

Senator STEVENS. Well, let me tell you, Congressman, these vessels, if we take their flag away from them, they can still fish in U.S. waters at any time that any Council says that the American effort is not sufficient to harvest all the fish. We have not taken away the right to fish; we've just taken away their privilege to fish as a U.S. flag vessel when they really are foreign-built, foreign-operated vessels.

Mr. SAXTON. Thank you.

I believe Mr. Farr has some questions.

Mr. FARR. Well, thank you very much, Mr. Chairman. I appreciate you having this hearing and request that my remarks be submitted in the record.

And I really want to thank the Senator for being here. This is the International Year of the Ocean. Next week is the National Oceans Conference out of my district in Monterey—and a district that you are familiar with because I understood you spent some years at Fort Ord there—and I appreciate the connection. It's also very interesting because Monterey used to be the largest sardine port in the world. And we lost that fishery because we never paid attention to what happens if you don't manage the fisheries.

And I think often people forget that our responsibility as elected Members of Congress—and frankly, it's only our responsibility be-

cause State legislators and local governments can't do it—is to protect the resources of this country which have been declared to be the fisheries out to 200 miles. I mean, in sense, the Law of the Sea Treaty recognizes that all ocean politics are local.

And I appreciate the fact that you're bringing this legislation and this issue to us because if we don't—the bottom line is really fisheries management. And this goes in to how you better manage the fisheries so that there is not an unusual amount of harvesting or harvesting that we can't control, and that that benefit of that doesn't inure to American businesses; that we have been a country that has always looked at the bottom line, and I think that often in resources, we forget that the bottom line is one that really needs to be managed appropriately.

And as far as this idea that anything we would do in this area in regards to taking or—I'd like to remind the Members of Congress that in where you have local fisheries in the States—the State that I come from, California, we've banned gill nets, and there was no takings issue in that. We have required limited entry in numerous fisheries, and there was no takings in that. We have required trawlers to have new gear that is—and we have provided the loan program so that they can transfer from old technology to new technology; there was no takings in that.

I agree with the Senator; this is not a takings issue. To go in and fish in American fisheries is a privilege, not a right. And that privilege is extended by law that is created by this Congress. And I think if we don't pay attention to the fact that we need to be on top of that law, making sure that that law is a wise law, smart law, is law that really does the best we can to regulate a fishery, then we are losing perspective of what we are here elected to do. So I appreciate you bringing this bill to this Committee. And I look forward to working with you on it.

Senator STEVENS. Thank you very much. In years gone by, Senator Magnuson sent me to the Law of the Sea Conference. I had known him for many years before I came to the Senate. He had wanted me to go to the Law of the Sea Conference to represent the Congress committee when he was chairman, and I was a minority member.

I came back and told Warren that I thought that the major issue facing us was the jurisdiction beyond the three-mile limit, and we prepared to draw up—and I drafted the first Magnuson Act and introduced it as a matter fact. Warren made it his bill when he wanted to get it passed, and I think that was the way we got it passed. He was the chairman, and I respected him very greatly, but what I'm telling you is we were not looking at any kind of conflict between States or between anyone, we were looking to try and satisfy the objectives of the Law of the Sea. And when we adopted the concept of the 200-mile limit, the world did.

Mr. FARR. That's right.

Senator STEVENS. But it adopted it with the Law of the Sea concept that the Nation didn't have the capacity to harvest within the 200-mile limit, it had to allow foreign vessels to come in and harvest up to the allowable quota. Now that provision that came out of the Law of the Sea is what inhibited us when we wrote the Magnuson Act. We couldn't go against what we'd argued worldwide, so

we said if we find that there's any place where we cannot harvest it with American fleets, we must allow the foreign fishing vessels in. And for the first 7 or 8 years—we've given you the chart—after the Magnuson Act passed, the foreign vessels continued to harvest within our waters.

These people that came in later, whether they are U.S. flags or foreign flags, they have no property right within that 200-mile limit, as you rightly state. And these people now that are foreign built, foreign dominated, they're arguing that our Constitution protects their right because they came in under our flag. But our own flag people don't have that right. Well I hope that everybody keeps that in mind.

Thank you very much.

Mr. SAXTON. Senator, thank you very much. We very much appreciate your being here and your willingness to spend this amount of time with us. We have two other panels to deal with here this morning, so at this point, unless you have something further, we will move on to our second panel. And thank you, again, very much.

Senator STEVENS. We welcome your interest greatly, Mr. Chairman, and all of your patience with me. Thank you very much.

Mr. SAXTON. Thank you, sir.

I will now introduce our second panel. We have Dr. David Evans, the Deputy Director of the National Marine Fisheries Service, and Rear Admiral Robert C. North of the U.S. Coast Guard.

STATEMENT OF DAVID EVANS, DEPUTY DIRECTOR, NATIONAL MARINE FISHERIES SERVICE, DEPARTMENT OF COMMERCE

Mr. SAXTON. While you are coming forward to take your seats, and before we hear your testimony—Dr. Evans, prior to your testimony I have one question which I'd like you to respond to if you don't mind. The Subcommittee submitted budget questions to your agency on March 27, 1998, and asked for a response by April 17, in order to permit us to include these responses in today's record. Now, June 4, 1998, almost 2 months later, and we still haven't seen responses to the questions. What has been the hold up, and when will we receive these responses?

Dr. EVANS. Mr. Saxton, the answers to those questions are right now at OMB, and I am told that they will be released almost immediately. But I don't know the exact day.

Mr. SAXTON. Well, we would appreciate whatever you can do to break the answers to those questions loose because we believe that they are extremely important. And OMB has apparently had them for quite some time, and has failed to release them. Is that correct?

Dr. EVANS. Yes. There's been some discussion back and forth between the Department and OMB on these questions to get them to you. We're very much aware of the importance of your having that information so that you can continue with this year's process, and we are working very hard to get them to you.

Mr. SAXTON. Do you know roughly how long OMB has had your responses?

Dr. EVANS. No, I don't, sir.

Mr. SAXTON. OK. Thank you very much. You may proceed, Dr. Evans, to give your testimony. We are about an hour and 15 min-

utes into this process, and so we are going to abide by our 5-minute rule for the second and third panel, so if you would proceed to try to stay within the 5 minutes, we would appreciate it. Those little lights there in front of you will help you understand or know when the time limit has expired. So, proceed, sir.

Dr. EVANS. Thank you very much, Mr. Chairman, members of the Committee. I'm pleased to be here today to present the views of the Department of Commerce on the Americanization of the U.S. fishing fleet and U.S. ownership of fishing vessels.

Before I focus on the Americanization issue, I'd like to comment on the overcapacity and overcapitalization issue that was raised in your letter—it was noted in your letter. It's increasingly evident that excessive investments in harvesting capacity can contribute to resource overutilization in fisheries. Both domestically and internationally, there's little doubt that a significant number of our most valuable commercial fisheries are burdened with excessive levels of investment and harvesting capacity. The most obvious domestic examples of these problems are New England groundfish and scallop fisheries, the West Coast groundfish fishery, and the Alaska crab fishery.

The National Marine Fisheries Service is involved in both international and domestic activities that will help us better manage capacity in the fishery sector. Internationally, we're working with the Department of State on an initiative sponsored by the Fish and Agriculture Organization of the United Nations on managing harvesting capacity throughout the world. At home, NMFS has sponsored vessel and permit buyout programs in New England, Texas, and the Pacific Northwest and is currently working with both the Pacific and North Pacific Councils to review the first industry-funded buyout programs developed under the new authority for fishing capacity reduction under the Magnuson-Stevens Fishery Act. We believe that the Councils provide an appropriate mechanism for evaluating the best ways to maximize the benefits to the industry while minimizing potential costs or social impacts from capacity reduction efforts.

Now, let me address the main matter for today. The Committee has requested the Department's evaluation of the Americanization of our coastal fisheries. We use the term "Americanization" to mean actions taken to ensure that the benefits derived from the use of the U.S. Exclusive Economic Zone (EEZ) resources are effectively channeled to U.S. enterprises and citizens. This effort began in earnest with the passage of the original Fishery Conservation and Management Act in 1976. The goals of the FCMA were to phase out foreign fishing off U.S. coasts, expand domestic capacity, optimize domestic benefits, achieve optimum yield, and enhance economic and employment opportunities. In addition to establishing the 200-mile EEZ, the Act directed the Secretary of Commerce to provide the domestic fishing industry priority access to the fishery resources in the EEZ.

In 1979, the Department undertook a major effort to study the social costs and benefits of accelerating utilization of fishery resources in the EEZ. Based on these findings, the White House established a fisheries development policy which stated that significant opportunities for industry expansion existed and that partner-

ships between local, State, and Federal governments in the fishing industry were needed.

This policy led to the enactment of the American Fisheries Promotion Act of 1980 which was directed toward expanding commercial and recreational fishing efforts in underutilized fisheries. The amendments specifically authorized financial assistance to industry, supported the development or expansion of market opportunities for U.S. fishery products, and allowed foreign access to fishery resources in exchange for "chips," including trade concessions, technology transfer, and so on.

In 1982, the Processor Preference Amendment gave U.S. processors preference over joint venture processors for fishing allocations, and accelerated the phaseout of joint venture processing.

Finally in 1987, the Anti-Reflagging Act sought to tighten domestic ownership requirements by increasing the minimum domestic share to 51 percent. These actions had greatly Americanized fishing operations by the end of that decade.

One way to determine whether the goal of Americanizing the U.S. fishing fleet has been achieved is to review the level of foreign fishing in the EEZ under Governing International Fisheries Agreements, GIFAs. The United States currently has GIFAs in force, or is taking steps to extend GIFAs, with Estonia, Latvia, Lithuania, China, Poland, and Russia.

At present, the only foreign fishing activity occurring within U.S. jurisdiction is joint venture processing of U.S. harvested fish off the northeast coast. We permitted joint venture processing for Atlantic mackerel and herring by two processing vessels from Estonia and two others from Lithuania. The total amount of fish available for these activities is 15,000 metric tons of mackerel and 40,000 metric tons of herring.

Finally, we've also issued transshipment permits under section 204(d) of the Magnuson-Stevens Act to one vessel each from Cambodia, Russia, and Panama to receive and transport processed mackerel from those operations. In addition, last year we issued transshipment permits to 14 Canadian herring transport vessels operating in the Gulf of Maine.

While the Department can state that Americanization of the U.S. fleet has been achieved, based on the relatively low GIFA-related fishing activity, it cannot provide the Committee with a clear picture of the ownership structures of the U.S. fishing fleet. The 1987 Anti-Reflagging Act applied only to vessels documented after the date of enactment. However, it's clear that significant foreign participation remains because our maritime and cabotage laws enable foreign firms to retain and even increase ownership shares in some segments of the U.S. fishing fleet. Approximately 25,000 fishing vessels documented prior to the enactment of the Anti-Regflagging Act are exempt from the ownership requirements of that statute. And we have no certain information on their present ownership.

The Department applauds the Committee for its efforts to deal with national policy issues on excess harvesting capacity and Americanization. However, our fisheries are highly diverse and vary substantially in the nature of the fishing vessels deployed in different fisheries. Our limited knowledge suggests that foreign investment differs markedly from region to region. While it would be

appropriate for Congress to continue with the established trend of Americanizing U.S. fisheries, I'd urge you to carefully examine any retroactive application of the ownership requirement. Such measurements could have unintended impacts on those sectors of the industry currently exempt from ownership requirements or on those that rely on foreign investment. The retroactive application of the ownership requirements could also raise concerns about compliance with U.S. obligations to foreign investors under a variety of international treaties.

The National Marine Fisheries Service is prepared to work with the Councils, the fishery constituencies, and Congress to determine the most appropriate course of action for our Nation's fishermen and fisheries. It is the Department's desire to reduce levels of harvesting capacity among all classes of fishing vessels to levels that are matched with sustainable use of our resources and that maximize the economic benefit to our Nation.

Mr. Chairman, this concludes my remarks, but I'm prepared to respond to any questions that you might have. Thank you very much.

[The prepared statement of Dr. Evans may be found at end of hearing.]

Mr. SAXTON. Admiral North, you may proceed.

STATEMENT OF REAR ADMIRAL ROBERT C. NORTH, U.S. COAST GUARD, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY THOMAS WILLIS, UNITED STATES COAST GUARD

Admiral NORTH. Yes, sir. Good morning, Mr. Chairman, members of the Committee, I am Rear Admiral Bob North, the Assistant Commandant for Marine Safety and Environmental Protection. I am pleased to represent the Coast Guard before this Subcommittee today to discuss the Americanization of the U.S. fishing fleet. With me to my left is Mr. Tom Willis, who is the Director of the Coast Guard's National Vessel Documentation Center.

The Anti-Reflagging Act was designed to prohibit the reflagging of foreign-built vessels for participation in U.S. fisheries. It harmonized fisheries and maritime laws, by generally imposing requirements regarding the documentation, ownership, manning, and construction of vessels engaged in the fisheries trade similar to those imposed on vessels engaged in the coastwise trade. The Act also broadened the definition of fisheries to include processors and tenders.

Prior to enactment of Anti-Reflagging Act, it was possible to use foreign-built and 100 percent foreign-owned fish processing vessels to participate in U.S. fisheries. As a result of the Anti-Reflagging Act, fishing vessels today are required to have a certificate of documentation with the fishery's endorsement, must have 51 percent of their stock owned by U.S. citizens, except for vessels that are grandfathered from the American control provisions of the Anti-Reflagging Act.

Two portions of the Anti-Reflagging Act prove problematic. These are the grandfather provisions intended to protect the interests of investors already committed to the U.S. fisheries, and deal with foreign rebuilding and ownership. I will address each separately,

because each has a different impact on the Americanization of the U.S. fishing industry.

Prior to the Anti-Reflagging Act, fishing vessels had to be built in the United States, but could be rebuilt abroad. The Act, among other things, prohibited vessels seeking fishery endorsements from being rebuilt in foreign shipyards. However, the rebuild grandfather provision in the Act exempted vessels that were built in the U.S. before July 28, 1987, and rebuilt in a foreign country under a contract entered into before July 11, 1988, and also purchased or contracted to be purchased before July 28, 1987, with the intent to use the vessel in the fisheries. The rebuilding grandfather provision also required that a vessel rebuilt under the above circumstances had to be redelivered to the owner before July 28, 1990. The window of eligibility for this exemption has long passed, so no additional vessels may be rebuilt outside of the United States and enter or reenter the U.S. fishery. Furthermore, no additional foreign-built vessels may be documented for use as fish processors.

As mentioned earlier, the Act requiring a fishing vessel to be owned by a majority of U.S. citizens. Under the grandfather provision, the required 51 percent of U.S. ownership does not apply if before July 28, 1987, the vessel was documented and operating as a fishing vessel in the Exclusive Economic Zone or as contracted for purchase for use as a fishing vessel in the U.S. fisheries.

The ownership grandfather provision of the Anti-Reflagging Act has been the subject of much controversy. The Coast Guard, following careful examination of the law, concluded that based on the plain language of the statute the grandfather provision ran with the vessel. Although this was seemingly contrary to the purpose of the law, grandfather provisions by their very nature run contrary to the overall purpose of a statute.

Recently, the Senate began consideration of the American Fisheries Act of 1998, S. 1221, a bill which among other things directly addresses the problems that arose as a result of the ownership and rebuild grandfather provisions of the Anti-Reflagging Act.

First, S. 1221 would repeal the ownership grandfather effective 18 months after enactment. In addition, it would increase the American control provision for entities owning fishing vessels from 51 to 75 percent. Entities currently owning documented fishing vessels and which meet the majority American control provisions of the Anti-Reflagging Act would have 18 months to conform to the new standard. A proposed ownership standard would place fisheries on a par with the ownership standard for coastwise trade.

Additionally, S. 1221 would also provide for the orderly phase out of larger vessels, including all of the processing vessels known to have been deemed grandfathered from the rebuild prohibition of the Anti-Reflagging Act. This would remove the remaining 20 vessels which were rebuilt foreign under the grandfather provision of the Anti-Reflagging Act.

The Coast Guard appreciates the opportunity to testify about this important matter and stands ready to work with the Congress on this issue. I'd be pleased to answer any questions that you may have, sir.

[The prepared statement of Admiral North may be found at end of hearing.]

Mr. SAXTON. Admiral, thank you very much.

I understand, Mr. Willis, you're here just to respond to questions. You don't have any testimony? OK, thank you.

As you noted, we are now into the second bells of our vote. We're going to go vote. There are 2 votes, so we'll be 20 minutes or so before we get back. And at that time, we'll begin with our questions. Thank you.

[Recess.]

Mr. SAXTON. I would like, at this time, to turn the floor over to Mr. Young for his questions.

Chairman YOUNG. Thank you, Mr. Chairman.

Dr. Evans, does the administration believe the United States has the right to restrict the harvest of U.S. fisheries resources by foreign vessels?

Dr. EVANS. Does the United States believe that we have the right to restrict the—yes, sir.

Chairman YOUNG. You do?

Dr. EVANS. Yes, under the Magnuson Act. Yes, sir.

Chairman YOUNG. OK. I want to make certain that that is clear for the record.

Does it concern NOAA, the agency responsible for managing and conserving in our fisheries resources that there's approximately 29,000 U.S. fishing vessels for which there is lack of knowledge about ownership?

Dr. EVANS. Well, it can concern us on a couple of grounds. Principally, we're responsible for managing the resource, looking out for biology of the resource, and dealing with the enforcement of the regulations that are promulgated, initiated by the Councils. And from a practical perspective, we apply the same kind of enforcement policies regardless of who is driving the vessels and where they come from. We look to the Coast Guard to provide us with guidance on the ownership and documentation of the ownership of the vessels. We need to enforce the regulations relative to the harvest and provide for the conservation of the stocks regardless of who is on board.

Chairman YOUNG. Doctor Evans, I just have one comment. You know, the Coast Guard's reputation has been thoroughly sullied in this whole operation. Have you requested documentation of who owns what in these vessels?

Dr. EVANS. Any time that a person applies for a permit to go fishing, we rely on the Coast Guard to provide us with documentation——

Chairman YOUNG. Have they done so?

Dr. EVANS. [continuing] for an endorsement.

Chairman YOUNG. Have they done so?

Dr. EVANS. Yes, they do.

Chairman YOUNG. Well, we'll get back to you later and see how recently this has occurred.

What's the total number of factory trawlers in the Bering Sea fisheries, and the total number in the North Pacific fisheries?

Dr. EVANS. I believe it's around 55. Let me check. I have Mr. Kent Lind from our North Pacific——

Chairman YOUNG. He'll write you in a little note there in a minute.

Dr. EVANS. OK.

Chairman YOUNG. How many of these factory trawlers meet or exceed the U.S. ownership requirement of 51 percent?

Dr. EVANS. I don't know the answer to that question, sir. I don't know the ownership characteristics of those trawlers. That's information——

Chairman YOUNG. Admiral, do you know the ownership characteristics?

Admiral NORTH. Of those in the Bering Sea?

Chairman YOUNG. Yes.

Admiral NORTH. Not without knowing which specific vessels they are.

Chairman YOUNG. I would suggest, with all due respect, that you knew this hearing was coming forth. I would suggest that you find out.

Admiral NORTH. Sir?

Chairman YOUNG. Because that is the law.

From the list of 35 vessels identified as Catcher Processors permitted to target North Pacific Pollock for 1997, provided to the Coast Guard by the National Marine Fisheries Service, 20 meet or exceed the U.S. ownership requirement of 51 percent.

Dr. Evans, how does NMPS view fishing permits and fishing licenses? Are they revokable? If so, does NMPS issue compensation? Are permits or licenses given forever? If not, how long are permits or licenses issued? And what's the difference between IFQ and other fishery permits?

Dr. EVANS. I'm sorry, sir. I didn't hear the very last part of your question.

Chairman YOUNG. Well, answer the first one. How do you view fishing permits and licenses?

Dr. EVANS. Fishing permits are basically permission to use the fisheries resource.

Chairman YOUNG. Are they revokable?

Dr. EVANS. Yes, they're revokable.

Chairman YOUNG. Do you issue compensation?

Dr. EVANS. No, we do not.

Chairman YOUNG. They're not forever, are they?

Dr. EVANS. No, they're not.

Chairman YOUNG. How long are they usually issued? And how long are the permits or licenses usually issued?

Dr. EVANS. Well, they vary from fishery to fishery. There're some which are renewed annually; some which are issued for a period of 3 years. It varies.

Chairman YOUNG. What's the longest one?

Dr. EVANS. The longest.

Chairman YOUNG. I mean it's usually 1 to 3 years?

Dr. EVANS. Typically, yes.

Chairman YOUNG. OK. So in reality, if I was a boat owner, a vessel owner, and I caught 16 sea lions in my nets repeatedly, you could revoke by permit. Is that correct?

Dr. EVANS. Probably. I would imagine that——

Chairman YOUNG. If you didn't, I'm sure somebody would——

Dr. EVANS. [continuing] under the Marine Mammal Protection Act, where if the 16 sea lions were, you know, characterized as a problem, that's a possibility. Certainly, yes.

Chairman YOUNG. Very likely. Well, let's say I caught an abundance amount of bycatch beyond in anyone's acceptable amount. You could revoke it, couldn't you?

Dr. EVANS. I'm not sure that there are provisions to do that right now. We tend to use other measures to control bycatch.

Chairman YOUNG. OK. Let's get back—how do you revoke a license, and what for?

Dr. EVANS. Typically, as a consequence of violations of regulations, licenses have been and——

Chairman YOUNG. That's what I just asked.

Dr. EVANS. [continuing] should be revoked. Yes.

Chairman YOUNG. What, I mean——

Dr. EVANS. Exceeding a quota, having——

Chairman YOUNG. I just asked——

Dr. EVANS. [continuing] prohibited species on board, for example. Yes.

Chairman YOUNG. Admiral, how many vessels currently involved in the U.S. fisheries are majority foreign? I asked that question, majority foreign owned?

Admiral NORTH. Sir, there's 29,000 some vessels in the fishery. There's no data base that shows the total number of foreign majority.

Chairman YOUNG. How many in the Bering Sea?

Admiral NORTH. I don't know how many in the Bering Sea are majority-owned. I don't know what vessels are——

Chairman YOUNG. Mr. Chairman, I'm going to suggest we have the Coast Guard before this Committee for a prolonged period of time for more questioning when they are better prepared.

Why did the Coast Guard follow a course of ownership standard which could have led to fully foreign-owned fishing fleet in the United States? And didn't the internal Coast Guard documents raise this issue, and indicate that it was counter to the congressional intent?

Admiral NORTH. The Coast Guard did what it did in interpreting the plain language of the statute.

Chairman YOUNG. Now, Admiral, be careful here. Did not your legal branch warn you of this?

Admiral NORTH. There were a number of legal opinions within Coast Guard that were expressed, and the discussion or the——

Chairman YOUNG. You chose to disregard them?

Admiral NORTH. Those were not disregarded; those were considered by the Chief Counsel. The Chief Counsel's final conclusion was that the grandfather ran with the vessel.

Chairman YOUNG. OK. That's why we're having a GAO investigation, isn't it?

Admiral NORTH. Yes sir. That's right.

Chairman YOUNG. That wasn't on your watch, was it?

Admiral NORTH. It was not.

Chairman YOUNG. That's good. Well, then, thank God for that. [Laughter.]

Because, you know, I have been a big support of your agency, and I am thoroughly, thoroughly disappointed.

Admiral NORTH. Yes sir.

Chairman YOUNG. I think that someone ought to take the time to do a little more research, and I'm not going to particularly beat up any individuals. But this is not the intent. Like I say, I was the only one sitting on this Committee. We knew what our intent was. I'm probably remiss in not finding out what was occurring. But to have the Coast Guard, especially, Mr. Chairman, when I have about a hundred requests a year on documentation for Canadian-made vessel or vessel made in Hong Kong or something. And the Coast Guard says, "Oh, we can't document it." And yet, I look at this vessel over here. Now if you can tell there is some justification for that. I mean that is a disgrace to have that—in fact, I want to find out where that remaining piece of metal is on that ship. Maybe it's in the captain's quarters; it's the only place I can figure out it would be. I wonder how they can identify; maybe it has a DNA.

[Laughter.]

Thank you, Mr. Chairman.

Mr. SAXTON. We have three members with us who are members of the Full Committee but not members of this Committee. And, Mr. Pombo, if you would like to take your 5 minutes at this point.

Mr. POMBO. Thank you, Mr. Chairman.

Admiral, I just have a few questions. Is it standard practice for the rights and privileges relating to vessels to run with the vessel or with the owner?

Mr. WILLIS. Standard practice is that the rights run with the vessel. Certain rights accrue only to owners, such as the right to engage in coastwise trade because of 75 percent ownership. And if a coatwise-eligible vessel was sold to an entity that didn't meet the 75 percent during that time of ownership, the vessel would not be eligible for coastwise trade. If it were sold to an entity that did qualify to engage in coastwise trade, the vessel would again hold that right.

Mr. PALLONE. So typically, if they meet the ownership requirement, it runs with the vessel?

Mr. WILLIS. That is correct.

Mr. POMBO. Was there a general industry understanding in 1987 as to the amount of work necessary for a vessel to be considered to have been rebuilt overseas?

Admiral NORTH. There's a regulatory standard for what constitutes a new vessel, what constitutes a rebuild. So——

Mr. POMBO. And that's a regulatory standard?

Admiral NORTH. Yes.

Mr. POMBO. And it was understood both within the agency as well as in the industry what that standard was at that time?

Admiral NORTH. It was understood within the agency. Whether everyone in the industry understood it or not, I could not tell you.

Chairman YOUNG. Will the gentleman yield?

Mr. POMBO. Yes.

Chairman YOUNG. Is that in the regulations there?

Admiral NORTH. Yes.

Chairman YOUNG. That is under regulations? There's only two pieces of steel; that's considered a rebuild?

Admiral NORTH. Yes, sir.

Chairman YOUNG. Where is that regulation?

Admiral NORTH. 46 CFR 67.

Chairman YOUNG. You have it? That's not the current standard. Hello?

Admiral NORTH. Yes.

Chairman YOUNG. It's the current standard.

Admiral NORTH. Yes sir.

Chairman YOUNG. I beg to differ with you, but I'd like to see where it is. And I don't think that's the standard at all.

Admiral NORTH. It is the standard.

Chairman YOUNG. OK. Well, we'll see.

Mrs. LINDA SMITH. Would the gentleman yield?

Chairman YOUNG. Yes.

Mrs. LINDA SMITH. Those pictures before me, that is a rebuild?

Admiral NORTH. Yes. That is correct.

Mrs. LINDA SMITH. Does that meet that standard?

Admiral NORTH. Yes.

Mrs. LINDA SMITH. So that any piece of metal of any size is the standard?

Admiral NORTH. Not any piece of metal of any size.

Mrs. LINDA SMITH. Obviously, there isn't much there. There's nothing that is structurally going to build that boat and that. So, give me the standard then. I can see no standard. That's like the little one we take out compared to one that is commercial. That's barely commercial. We have one of those like that in our family. But that is not that.

Mr. WILLIS. Typically, rebuilt vessels may include mid-bodies, and so forth. That has been a fact since the second proviso was enacted back in the 1950's. The standard is that if any structural parts from an existing vessel are used in constructing a vessel and those parts are not torn down to a degree where they're committed to use in building a vessel, you do not have a new vessel.

The new vessel standard was written very tightly to protect American interests. In this case, it has been turned in a different direction.

Mrs. LINDA SMITH. Obviously, that's not a standard.

Chairman YOUNG. Madam, I'm getting a little confused because I got something in front of me, Admiral, that says only 7.5 percent of a vessel can be changed on a rebuild in order to keep your U.S. documentation.

Now, the gentleman on the right, is that correct?

Mr. WILLIS. No, sir, that is not correct. If it's 7.5 percent or less it is not deemed rebuilding at all; between 7.5 and 10 percent, it may be a rebuilding; above 10 percent, it is a rebuilding. We're talking about two separate issues here—new vessel versus rebuilding.

Chairman YOUNG. We're talking about rebuilding?

Mr. WILLIS. Yes, sir.

Chairman YOUNG. Now to keep your documentation, there is no standard then? There is no standard. That is not—that cannot be a standard. If it is, we've got to change it. That is not a standard.

Mr. WILLIS. The standard, Mr. Young, is that if you rebuild and use less than 7.5 percent, you do not lose any entitlements which you might have such as coastwise; but if you do exceed the 10 per-

cent, then you will lose entitlement to engage in the coastwise trade and fisheries.

Chairman YOUNG. You think that's more than 10 percent there?

Mr. WILLIS. Yes, sir, I do. And if that project were performed today, it would absolutely lose all privileges.

Chairman YOUNG. When——

Mr. WILLIS. Absolutely.

Chairman YOUNG. [continuing] did they change?

Mr. WILLIS. Pardon?

Chairman YOUNG. When did that change? Since 1987, when was—did the Coast Guard change it?

Mr. WILLIS. No, sir, the Coast Guard did not change it. The Anti-Reflagging Act, as we read it, permitted rebuildings. This is a rebuilding. It is not a new vessel.

Mrs. LINDA SMITH. Would the gentleman yield?

Chairman YOUNG. Yes, I'll continue to yield.

Mrs. LINDA SMITH. Then my understanding is on the reflagging, then at that point we dropped all reasonable standards of a rebuilding and you took that opportunity then. Up to that point, there were reasonable standards. But at that point, anything went, and we no longer had standards because it qualified then, as you said, as a rebuild. So, we changed.

Mr. WILLIS. The Coast Guard did not change the standard. Any vessel could be completely rebuilt overseas without losing privileges prior to effective date in the Anti-Reflagging Act.

Mrs. LINDA SMITH. So there was no standard——

Mr. WILLIS. There was no standard——

Mrs. LINDA SMITH. [continuing] as to what percentage?

Mr. WILLIS. [continuing] for fishing vessels prior to the Anti-Reflagging Act.

Chairman YOUNG. This vessel, ma'am—this vessel was built in that gap, wasn't it?

Mr. WILLIS. Yes, it was, sir.

Chairman YOUNG. In fact, it was put on the waves after the passage of the Act.

Mr. WILLIS. Yes, sir.

Chairman YOUNG. I'm thoroughly confused. You said it couldn't be done after the reflagging.

Mrs. LINDA SMITH. That's right.

Mr. WILLIS. It couldn't be done after the windows enacted in the Anti-Reflagging Act.

Admiral NORTH. Unless it were grandfathered.

Chairman YOUNG. Was this vessel on the waves when we passed the Act?

Mr. WILLIS. No, sir. But the Anti-Reflagging Act required that it be rebuilt under a contract entered into within 6 months after enactment of the Anti-Reflagging Act.

Chairman YOUNG. Do you know when this contract was entered into?

Mr. WILLIS. We can provide that information; yes, sir.

Chairman YOUNG. Thank you.

[The information follows:]

The date of the ACONA's contract was July 10, 1988.

Mr. POMBO. Can I have two additional minutes?

[Laughter.]

Which leads me to my next question.

[Laughter.]

Assuming that all relevant documents provided to the Coast Guard concerning the grandfather vessels to be true and correct, does the Coast Guard consider the foreign rebuilding of grandfather vessels that are purchased, or sailed since 1987, or their entry into U.S. fish areas as fraudulent or illegal?

Admiral NORTH. No.

Mr. POMBO. So the statement that these entered into the fisheries fraudulently or illegally, the Coast Guard would not consider to be correct?

Admiral NORTH. Of those 23 vessels that were rebuilt under the grandfather clause, there was one vessel, this vessel in particular, where an issue has been raised as to whether the documentation that was provided was appropriate or correct. We have no other knowledge or reason to believe that of the other 22 vessels, the documentation provided to prove the rebuild of the vessel, the grandfather rebuild, was not correct.

Mr. POMBO. If you were provided with the documentation showing that these vessels entered in a way that was not true and correct, that they were fraudulent or illegal, would you remove them?

Admiral NORTH. It could be removed, yes.

Mr. POMBO. And what would that take to remove them? Could the Coast Guard do it?

Admiral NORTH. Can we do that? Yes, but we would need whatever documentation one has that would tend to prove the documentation originally submitted was false.

Mr. POMBO. So, if anyone could provide you a documentation showing that these vessels entered into the fishery fraudulently or illegally, you could remove them——

Admiral NORTH. Yes.

Mr. POMBO. [continuing] under current law?

Admiral NORTH. Yes.

Mr. POMBO. If there was evidence of speculation by particular vessel owners subsequent to the passage of the Anti-Reflagging Act, would such speculation have provided the Coast Guard with a legal basis under this or any other act for refusing to issue such a vessel a certificate of documentation with a fishery's endorsement?

Admiral NORTH. I'm not sure how you would define speculation. I know Senator Stevens gave us his definition, but if you look at the documentation again for the various vessels involved, and you look at the time frames provided under the Act, with the exception of the ACONA and the information we've been provided in that case, there is nothing to suggest that the documentation was not correct.

Chairman YOUNG. Will the gentleman yield just for a moment?

Mr. POMBO. Sure.

Chairman YOUNG. Admiral?

Admiral NORTH. Yes.

Chairman YOUNG. Most of these were done within a 2-month's period. You don't call that speculation? Maybe it's seize an opportunity, but it's speculation, too.

Admiral NORTH. Not my definition.

Chairman YOUNG. I know it's not your definition, I know, but I hope you don't take offense because you weren't on this watch. I wished you were on the watch.

Admiral NORTH. Yes, sir.

Chairman YOUNG. You'd have a lot of problems today. But you've got to tell me that you don't think—you don't consider that speculation? Do you deal in the stock market?

Admiral NORTH. No, I don't.

Chairman YOUNG. You don't? Well, you're probably smarter than I am then. Thank you.

[Laughter.]

Mr. POMBO. The difference between a permit to fish and endorsement on a ship, can you explain that to me?

Admiral NORTH. I believe we're talking about a permit issued by NOAA for certain species, versus the endorsement on a certificate of documentation which allows a vessel to engage in a trade called the fisheries.

Mr. POMBO. So the definitions are not interchangeable? One is the permission to fish in a particular fishery, the other one is the ability to use a boat to fish?

Admiral NORTH. One is the ability to engage in a trade; the other is a permit to allow you to take a certain amount of catch or to engage in a certain fishery.

Mr. POMBO. So you would—your answer is that there is a big difference between a——

Admiral NORTH. Yes.

Mr. POMBO. [continuing] permit and an endorsement?

Admiral NORTH. Yes.

Mr. POMBO. Thank you, Mr. Chairman.

Mr. SAXTON. Thank you, Mr. Pombo.

Mrs. Chenoweth.

Mrs. CHENOWETH. Admiral?

Admiral NORTH. Yes, ma'am.

Mrs. CHENOWETH. The Coast Guard issues the endorsement?

Admiral NORTH. The endorsement on the certificate of documentation, yes.

Mrs. CHENOWETH. And the endorsement transfers with ownership? It's pertinent to the vessel?

Mr. WILLIS. The endorsement can be issued if the vessel meets the qualifications for the trade. Transfer of an endorsement is not automatic, however. In order for the endorsement to be transferred, the new owner must qualify for the endorsement, either by conforming to the law or qualifying under a grandfather provision, and must make application for the endorsement. Even if the vessel is qualified for an endorsement, if the new owner does not qualify for the endorsement, it cannot be transferred. If the new owner does not apply for the endorsement because of a desire to use the vessel in a service for which the endorsement is not required, the endorsement will not be issued. However, this does not prevent a future qualified owner from obtaining the endorsement.

Mrs. CHENOWETH. But the endorsement is different than the permit, and——

Mr. WILLIS. The endorsement is different from the permit.

Mrs. CHENOWETH. Can you use the vessel for fishing purposes without the endorsement?

Mr. WILLIS. Not on U.S. navigable waters or in the EEZ.

Mrs. CHENOWETH. So the endorsement, then, is appurtenant to the vessel ability to fish?

Mr. WILLIS. Absolutely.

Mrs. CHENOWETH. Then one could say that the endorsement is a private-property use right?

Mr. WILLIS. I'm not qualified to answer that question.

[Laughter.]

Mrs. CHENOWETH. If you aren't, who is?

[Laughter.]

Now, does NOAA issue the permit to fish?

Dr. EVANS. Yes, we do.

Mrs. CHENOWETH. So the permits and the endorsements are two entirely different—one's a permit, and one——

Dr. EVANS. Right.

Mrs. CHENOWETH. [continuing] is a right.

Dr. EVANS. There is a wide range of permits. There are different kinds of permitting that take place in different fisheries and different places. They last for different times. Some of them are tied to quotas; some of them are permission to fish in open access fisheries. There's a wide variety of permits. It's the way that we have to regulate the fisheries basically, yes.

Mrs. CHENOWETH. Dr. Evans, none of the permits that you have referred to in your answer to me are endorsements?

Dr. EVANS. That's correct.

Mrs. CHENOWETH. There's only one endorsement and that goes with the vessel, right?

Dr. EVANS. That's correct.

Mrs. CHENOWETH. The permit goes with the season and the conditions of the ocean?

Dr. EVANS. Right.

Mrs. CHENOWETH. Thank you.

Mr. SAXTON. Thank you, Mrs. Chenoweth.

Mrs. Smith.

Mrs. LINDA SMITH. Thank you, Mr. Chairman. You've been very lenient so far, and I appreciate that.

I have two issues I'm trying to grapple with and that is private-property rights, and obviously the last question Mrs. Chenoweth addressed that. I'm going to try to clarify a question. It's because I don't totally understand, and certainly you do understand the fishery better than I at this point.

In our household and in our family, we both fish. And we have some that commercially fish, and we have some that are private. But we have known for a long time that when we buy equipment whether it be for private or commercial, that we are relying then on the resource being allocated to us. When I buy fishing licenses or hunting licenses, or even picking berries, I have to go get that permit. And sometimes I get it, depending on the resource, and sometimes they'll restrict it to me. I bought equipment, but the

equipment can't be used unless I get the permit. Tell me how it is different with these ships who have the same characteristics, or is it similar? I'm trying to establish a private-property right discussion because I am trying to sort that out. I don't have a right—from what I can see—to hunt or fish anytime I want because I happen to have the equipment. Is there a difference here that would designate some type of a right beyond the fact that I have the equipment. And my equipment is authorized, as are certain of my guns and certain of my—I can't fish with hooks in certain fishing runs if certain equipment is allowed. How is it any different than having equipment and a permit when you come to this fishery?

Dr. EVANS. You're directing that—I'll take a crack at that and see if I understand it.

Mrs. LINDA SMITH. Yes, thank you.

Dr. EVANS. Obviously, you need appropriate equipment, and we can place regulations upon the characteristics of the equipment that is used to pursue the fishery. But you also need to have a permit; you need to fish in season; you need to comply with a whole variety of regulations with——

Mrs. LINDA SMITH. Which is what I get when I get a license——

Dr. EVANS. Exactly.

Mrs. LINDA SMITH. [continuing] or a permit.

Dr. EVANS. Exactly.

Mrs. LINDA SMITH. So it has the same two characteristics.

Dr. EVANS. Yes.

Mrs. LINDA SMITH. I'm trying to establish whether I have a private-property right because I have both.

Dr. EVANS. I can't answer that. I can tell you that the permit is quite analogous to your hunting or fishing permit in general, or your berry-picking permit, for that matter, yes.

Mrs. LINDA SMITH. The other question I have comes around the amount of investment in these ships. I'm trying to sort each one of them out—where they come from, when they were retrofitted or rebuilt, where they were rebuilt, and where they were capitalized. Because some of them, I'm finding, have 51 percent in America; but where the money is, is really where the control is. So they'll have 51 percent in our State or in our country, but they were totally capitalized somewhere else. They are built—all the money came from somewhere else. So they might show controlling stock interests, but we all know that he that he who has the money is really the one in control. So, what I'm asking is a question of value of these ships. My understanding is we're talking about several million, hundreds of millions of dollars to build these. Is that right?

Dr. EVANS. I'm sure in the case of some vessels, yes.

Mrs. LINDA SMITH. OK. So, if an asset only had—say the value of the original ship was an American vessel, which is what we need, right? We needed something, one little piece of something to be the original. If, let's say, that was the only American investment in dollars, and it was $100,000 dollars in assets. But on paper, it shows that the American interest, which is that, is 51 percent; is that 51 controlling percent just because it shows on paper to be controlling stock?

Mr. WILLIS. We require that 51 percent of all classes of stock be owned by U.S. citizens, and in our regulations we state that equity

is the issue. So we are concerned about U.S. equity in the regulation.

Mrs. LINDA SMITH. OK. So, that does answer what you're concerned with. I don't know that that answers the actual application right now. But you do consider equity?

Mr. WILLIS. Yes.

Mrs. LINDA SMITH. OK, you've answered my questions. Thank you.

Mr. POMBO. Will the gentle lady yield? I had an additional question.

Mrs. LINDA SMITH. Yes, I'll yield.

Mr. POMBO. If we were to remove—is it 23 vessels? Would there be less fish—and I guess this is for Dr. Evans—less fish caught then are currently caught if we took this class of boats out of the fishery? Would you then have less fish taken out of the fishery next year?

Dr. EVANS. No, I don't think so. There's plenty of capacity there to harvest the full quota of pollock, for example.

Mr. POMBO. So it's not a matter of there being there or less fish caught? That would not impact——

Dr. EVANS. I don't think so.

Mr. POMBO. [continuing] the decision that you make?

Dr. EVANS. I don't think so.

Mr. SAXTON. Will the gentleman yield?

Mr. POMBO. Yes.

Mr. SAXTON. Just let me try to make a point which you're speaking to. When Senator Stevens was here, he made the point, and I think he repeated the point, that this is an overcapitalized fishery. And Dr. Evans is right; it is so overcapitalized that taking these ships out of the fishery probably would not reduce the catch, but it moves toward a lesser capitalized fishery which is where we want, eventually, to go.

Mrs. CHENOWETH. Would the lady yield?

Mr. SAXTON. The gentle lady's time has expired. We'll be lenient and permit you to ask one more question, and then we're going to move on.

Mrs. CHENOWETH. Mr. Chairman, in focusing on the overcapitalization rather than either a scarce resource or the overriding public health, safety, and welfare goal which usually has been the standards in the courts for a governmental taking. I, out of great respect for the chairman, I honestly do feel that we're moving into new and unchartered waters. And I appreciate the fact that you are holding this hearing and allowing these issues to come out. And I just want to thank you very much for doing that. But I do think that if this Congress establishes overcapitalization as a new standard for perhaps taking, we may be moving into dangerous waters.

Thank you very much.

Mr. SAXTON. Admiral, let me just ask my questions, if I may. Other types of fishing vessels are endorsed by the Coast Guard as well; is that right? Smaller vessels?

Admiral NORTH. Yes, sir. All vessels that are in the fishery, whatever fishery it may be.

Mr. SAXTON. Scallop fishery, the long-line fishery——

Admiral NORTH. For U.S. flag vessels.

Mr. SAXTON. [continuing] whatever the fishery is?

Admiral NORTH. Yes, sir.

Mr. SAXTON. In New England, we recently saw—or there is recently pending from Dr. Evans' shop, a proposal to dramatically reduce fishing days permitted for scallopers. If that new regulation is adopted, does there come into play a takings issue?

Admiral NORTH. Again, I don't believe that I can really answer a question on taking versus——

Mr. SAXTON. Well has there historical, when we reduce permitted catches? Has there ever been a takings issue?

Admiral NORTH. Not that I'm aware of. I'm not versed in what a taking issue is. I'm not a lawyer; all I can tell you is the vessel documentation laws don't get into that issue.

Mr. SAXTON. Dr. Evans, would you like to comment?

Dr. EVANS. Let me just check with my counsel. I don't believe that there's a case.

No, to the best of our knowledge, there's not—the issue has not been raised. We regulate fisheries, increase quotas, decrease days at sea, increase them, have closed areas. There are many kinds of regulations which greatly impact the fisher's ability to prosecute the fishery.

Mr. SAXTON. In the Gulf of Mexico, back in the 1980's, we required a gear change for shrimpers with the provisions relative to turtle-excluder devises. Was there any takings issue considered there?

Dr. EVANS. Not that I'm aware of.

Mr. SAXTON. When we closed the red fish fishery in the Gulf of Mexico, was there a takings issue?

Dr. EVANS. No, sir.

Mr. SAXTON. Striped bass in the northeast?

Dr. EVANS. No.

Mr. SAXTON. Fifty percent reduction in shark in the Atlantic?

Dr. EVANS. I don't think so; no. It hasn't been raised as an issue.

Mr. SAXTON. Sea urchins on the West Coast?

Dr. EVANS. No, sir.

Mr. SAXTON. So without going further, which I could do, basically we have set a—we're not upon setting out on new waters here or creating a new precedent with our discussion here. If we fail to issue permits or if—let me ask this question. Can the Congress change the eligibility standings for qualifying for fishing permits?

Dr. EVANS. I believe so; yes.

Mr. SAXTON. And as far as you——

Dr. EVANS. I mean you've established the laws under which we issue the permits. We try to prosecute those laws as best we can.

Mr. SAXTON. And if we choose to say, in establishing qualifications for fishing permits that of a ship over 165-feet long with more than 3,000 horsepower does not qualify for a fishing permit, then you could administer that law without fear of reprisal under some kind of a takings?

Dr. EVANS. Well, I'm not sure—we would certainly administer that law. If you passed it, we would certainly administer that law. But in my experience in the Fishery Service it seems possible for us to be, you know, sued and challenged on almost all the decisions that we prosecute——

[Laughter.]

[continuing] so, I wouldn't go so far as to say that we wouldn't be, but we would certainly comply.

Mr. SAXTON. Does changing qualifications lead to any compensation generally to those who don't meet new qualifications?

Dr. EVANS. Not that I'm aware of; no.

Mr. SAXTON. Thank you very much. I have no further questions.

Mrs. CHENOWETH. Would the gentleman yield?

Mr. SAXTON. Briefly.

Mrs. CHENOWETH. Thank you, Mr. Chairman. I very much appreciate your indulgence, but I think there's a fine line that you so astutely were able to bring out.

Dr. Evans, do you have any authority or any jurisdiction over the issuance of an endorsement?

Dr. EVANS. No, ma'am, we do not. The endorsements are issued by the Coast Guard.

Mrs. CHENOWETH. And so, for the retrofitting of a boat such as we see here, you have absolutely no authority over that?

Dr. EVANS. That's correct.

Mrs. CHENOWETH. And your authority lies with the issuance of the permit and the carrying out of the terms and conditions of the permit?

Dr. EVANS. That's correct.

Mrs. CHENOWETH. Such as closing fishing to certain species in certain areas, you have that authority?

Dr. EVANS. That's right.

Mrs. CHENOWETH. And the permit is seasonal?

Dr. EVANS. Can be, yes. Or——

Mrs. CHENOWETH. And the permit is not appurtenant to the property or the vessel, itself; right? The permit is issued on the basis of ocean conditions and the season?

Dr. EVANS. Right, and can only be issued to people who are qualified, for example, who would have an endorsement.

Mrs. CHENOWETH. The endorsement has to come first?

Dr. EVANS. Right.

Mrs. CHENOWETH. Thank you, Doctor.

Mr. SAXTON. Thank you very much, Panelists, for your testimony and for answering our questions.

At this time, we're going to move on to panel No. 3. We have Mr. Joe Plesha, the general counsel of Trident Foods Corporation; Mr. Jim Gilmore, director of Public Affairs at the At-Sea Processors Association; Mr. Eugene Asicksik, president of Norton Sound Economic Development Corporation; Mr. Michael Kirk of Cooper, Carvin and Rosenthal; Mr. Frank Bohannon, the vice-president of United Catcher Boats; and Mr. Gerald Leape of Greenpeace.

Welcome aboard, if you can all fit.

STATEMENT OF JOE PLESHA, GENERAL COUNSEL, TRIDENT SEAFOODS CORPORATION

Mr. PLESHA. Thank you, Mr. Chairman, members of the Committee. I appreciate the opportunity to testify today. My name is Joe Plesha, and I work for Trident Seafoods.

Mr. Chairman, during consideration of the Anti-Reflagging Act, you, Congressman Young, and other Members of Congress were led

to believe that there were substantial, identifiable, and irrevocable commitments by U.S.-owned fishing companies to rebuild their vessels in foreign shipyards. In reliance on those representations, Congress allowed foreign rebuilding for particular owners of vessels which were purchased before July 27, purchased with the intent that the vessels be used in the fishery, and which had entered into a contract to rebuild that vessel in foreign shipyards by July 12, 1988.

I'd love it if I could describe each and every project that entered in under this grandfather provision, but because of time, I just want to describe two that came in under this grandfather.

Congress was told that the vessel STATE EXPRESS would be converted into a 500-gross ton, Coast Guard-inspected refrigeration cargo vessel. The facts are that on July 8, 1987, Sunmar Holdings acquired an option to purchase the STATE EXPRESS. The agreement required that Sunmar convey in writing to the seller its intent to purchase or reject the vessel by September 6th. That option was extended twice.

Finally, on February 29, 1988, 7 months after the purchase cutoff date, Sunmar gave written notice of its intent to purchase the vessel. Then on July 10, 1988, 2 days before the rebuild cutoff date, Sunmar signed a document which contemplated rebuilding this vessel in a Norwegian shipyard. But the document contained conditions which allowed either party to walk away from the project without penalty. Under U.S. law, there was no legally binding consideration. Lawyers representing the project said that U.S. law didn't matter because the agreement was a valid contract under Norwegian law.

The STATE EXPRESS, a vessel of less than 500 gross tons was ultimately rebuilt into a 376-foot factory trawler of almost 5,000 gross tons, now called the ALASKA OCEAN.

A second example is the vessel ACONA. Although the rebuilt grandfather specifically requires that evidence of the intent that the vessel was purchased for use in the fishery be in the contract of purchase itself, this small research vessel was grandfathered based solely on a very short letter of intent. According to the seller of the ACONA, he was asked to sign that undated letter of intent well after the actual sale. The letter was then allegedly backdated and submitted to the Coast Guard as evidence of the intent that the vessel was purchased for use in the fishery. The paperwork for this project was then sold to a foreign-owned fishing company, and the vessel was rebuilt into what now is the AMERICAN TRIUMPH, the single largest fish producer in the Bering Sea pollock fishery.

Now lawyers representing these projects claimed that they were just following the plain meaning of the statute's grandfather provisions. But the plain meaning of the language requires that these foreign rebuilt vessels be under a contract of purchase, not an option to purchase. The plain meaning of the statute requires evidence of intent to use the vessel in the fishery, quote, "be in the contract itself," close quote, not in a backdated letter of intent. The plain meaning requires a rebuilding contract entered into by July 12, 1988. And I can only assume that Congress meant a rebuilding contract valid under U.S., not Norwegian, law.

These boats do not belong in the U.S. fishery under the law, Mr. Chairman. The Coast Guard blew the call. I think the Coast Guard made a disastrous decision when it issued ruling letters allowing foreign-owned corporations to purchase any vessel that was in the fishery as of 1987.

In the case of the foreign ownership grandfather, though, at least the Coast Guard's Division of Maritime and International Law got the call right when it held the correct interpretation is that the savings provision terminates once the vessel is sold or transferred. Unfortunately, the Coast Guard's written, legal opinion was not followed by its Special Documentation Office.

Because of abuses in the Act's grandfather provisions, a flood of foreign-built, foreign-owned, foreign-subsidized vessels has entered the North Pacific fisheries. Foreign control of our fisheries is increasing each year. It is likely that over a billion pounds of groundfish is now harvested in the North Pacific by foreign-owned fishing vessels. The pollock season has been reduced from a year-round fishery in 1989 to one that lasts just over 2 months each year now. The remainder of the year, our investments lie idle.

My company, Trident Seafoods, is 100 percent American-owned. It's a seafood processing company, and during its 25-year history, we have never once declared a dividend for our company shareholders. Instead, all of our earnings have been reinvested back into the business. After the Anti-Reflagging Act was passed in late 1987, we invested well over $100 million dollars to expand our plants in Alaska to process pollock into various product forms including surimi. Every penny of the money of those investments came from earnings or borrowings from U.S. banks. Trident's plants were built with U.S. materials, U.S. labor; our employees are U.S. residents.

We made these investments because the cornerstone of the Magnuson-Stevens Act was to Americanize the utilization of our Nation's fishery resources. Yet, unless Congress removes the fishing privileges—and I do mean privileges—from the vessels that blatantly abuse the Act's rebuild provision and requires true U.S. ownership and control of American flag fishing vessels, the goals of the Magnuson-Stevens Act will have been defeated. And those of us who invested everything that we had in this industry to truly Americanize the fishery will be displaced.

Thank you.

[The prepared statement of Mr. Plesha may be found at end of hearing.]

Mr. SAXTON. Thank you very much.

Mr. Gilmore, please.

STATEMENT OF JIM GILMORE, DIRECTOR OF PUBLIC AFFAIRS, AT-SEA PROCESSORS ASSOCIATION

Mr. GILMORE. Thank you, Mr. Chairman, and members of the Committee. I am Jim Gilmore; I represent the At-Sea Processors Association, a trade association comprised of companies that own and operate 23 U.S. flag catcher/processor vessels. Our member vessels participate primarily in the Bering Sea pollock and West Coast Pacific whiting fisheries. APA companies have made signifi-

cant contributions to Americanizing U.S. fishery resources and in creating benefits in the local, regional, and national economy.

Recently, competing fishing interests have attempted to mischaracterize U.S. flag catcher/processors as foreign vessels because of foreign investment in the fleet, such as that found in many other sectors of the U.S. seafood industry.

All vessels in the U.S. catcher/processor fleet are U.S.-built vessels and are operated by U.S. corporations formed under the laws of the U.S. or a State. The corporations and documented U.S. vessels are subject to all laws of the U.S., including tax, environmental, labor, and all other applicable laws and regulations. We are subject to maritime manning requirements, that 75 percent of the crew members on-board vessels be U.S. residents. We estimate that APA member vessels easily exceed that minimum requirement.

Our principal competitors, onshore processors, are not subject to similar manning requirements. And independent reports indicate that, indeed, Bering Sea shore plants hire a high percentage of foreign guest workers. Government surveys report that at-sea processing workers earn two to three times higher wages than workers in onshore plants. Also, the catcher/processor fleet produces a higher percentage of pollock products for the domestic consumer. Major U.S. seafood buyers such as Long John Silver's restaurants point out that onshore plants, particularly the Japanese-owned onshore processors in the Bering Sea, largely produce surimi for export to Japan regardless of what market prices are between surimi and fillet products, the two principal product forms.

It has also been pointed out by the National Marine Fisheries Service, and more importantly in the seafood marketplace, that at-sea processed products are consistently higher grade than pollock products made onshore. That benefits the American consumer and helps boost U.S. export earnings for those products that we do produce for overseas markets.

While our record of Americanizing the North Pacific fisheries is good, some suggest going further. Some suggest revoking the ownership grandfather contained in the Anti-Reflagging Act that extends to most U.S. fishing and fish processing vessels. The grandfather exempts these vessels from having to meet the 51 percent U.S. citizen ownership requirement.

APA member companies support eliminating the grandfather rights that cover all of our catcher/processor vessels. Revoking the grandfather will result in changes of ownership for certain companies. APA urges that companies be provided a reasonable period of time to comply with the new set of rules. In addition, we do compete in an international marketplace, and ask Congress not to limit our ability to sign long-term marketing agreements with foreign buyers or to seek financing from abroad.

Unfortunately, some advocate going even further, that is revoking fishery endorsements for a substantial portion of the U.S. catcher/processor fleet when they come into compliance with new ownership standards. That's right. Some advocate eliminating vessels from the fishery that have lawfully and responsibly participated in U.S. fisheries since 1990 and earlier. This proposal places at risk at least 1,500 jobs held by licensed officers, fishermen, and

processing workers. It will also force the forfeiture of investments held by individuals who relied on the law as well as executive and judicial branch rulings that confirm that their projects were consistent with all relevant laws and regulations.

We have up here a third chart—perhaps a little less dramatic than Senator Stevens: You see the cover of this month's Alaska Fishermen's Journal, "In and Out?"—question mark. You'll see the two vessels in the top right-hand corner. They are foreign-built vessels that would be allowed to stay in under the Senate bill. The other vessels are U.S.-built, but foreign-rebuilt, vessels that would be out under the legislation.

Some advance the rationale that revoking fishery endorsements for certain U.S. catcher/processors is intended to punish speculators. These speculators are individuals deemed to have rushed through business deals back in 1987 that resulted in the rebuilding of vessels overseas. But the proposal to bar certain vessels from the fishery doesn't penalize the speculators, they are long gone. It punishes the American workers, fishermen who have stayed the course, or more recent purchasers of vessels who made investments based upon the law.

Another rationale is that the fisheries are overcapitalized. Mr. Plesha and Mr. Bohannon suggest that someone has to go, and that someone would be us. And that is the nub of the issue, allocation. Should Congress be in the business of allocating fish among participants in the fishery?

NMFS has stated in its Senate testimony that proposals to bar certain vessels from the Bering Sea pollock fishery offer no conservation benefits and are not an effective method of addressing overcapitalization. The same amount of fish will be caught. There will continue to be a race for the fish. And NMFS has even suggested that within 1 or 2 years, capacity would return to the fishery that was taken out under the Senate legislation. There is not likely to be a reduction in bycatch, nor will there be increased utilization of fishery resources as the race continues.

There will be winners and losers, but legislating winners and losers in the marketplace is not Americanization.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gilmore may be found at end of hearing.]

Mr. SAXTON. Thank you very much.

Mr. Asicksik.

STATEMENT OF EUGENE ASICKSIK, PRESIDENT, NORTON SOUND ECONOMIC DEVELOPMENT CORPORATION

Mr. ASICKSIK. Yes, thank you, Mr. Chairman, members of the Committee. My name is Eugene Asicksik. I am president of Norton Sound Economic Development Corporation, which is a managing organization for 15 western Alaska villages participating in the Western Alaska Community Development Quota Program.

Let me start by saying that NSEDC is totally in support of the Americanization of the Bering Sea fisheries. In fact, from our standpoint we are not only in support of Americanization, but also Alaskanization.

This has happened in our case where 15 western Alaska villages of NSEDC have 50 percent ownership of Glacier Fish Company, a company which owns two catcher/processors and one long-line vessel. Our ownership carries through to the harvesting, the processing, and the marketing of the fishery. Through our direct participation and in ownership in the Bering Sea fisheries, we have learned a lot about the Bering Sea, both what is working and what is not working.

In addition to NSEDC, another CDQ group has an ownership position in catcher/processor, and several CDQ groups have ownership positions in long-line vessels and crabbers.

In the pollock fishery, which is the single largest fishery in the Bering Sea, there is extensive foreign ownership in the onshore sector. Nearly 70 percent of the onshore factories which process Bering Sea pollock are foreign-owned. This foreign-owned processing carries directly through to foreign-owned marketing. Almost all of the production of the shore-based plant is surimi, which is largely the Japanese market. In addition, foreign ownership is increasing in the catcher boat fleet which delivers to the foreign-owned processors.

In summary, the Bering Sea pollock and onshore trend is actually going backward to more foreign.

I should clarify a point here which occasionally causes confusion. In the Bering Sea pollock fishery, the term onshore and offshore refer to the physical location of the processing facilities. They do not mean domestic and foreign as the onshore and offshore label might imply if we were referring to, for example, banks.

So back to the pollock fishery; in the offshore sector, there are vessels called motherships which are vessels which only process the pollock after being harvested and delivered by catcher boats. And there are catcher/processors in which both activities take place on the single hull. The three motherships in the fishery are all owned, financed, or operated by foreign entities.

In the catcher/processor portion of the fishery, the companies operating the fishery are mostly U.S.-owned. But one large firm is foreign-controlled. This firm has most vessels so that where the catcher/processors overall, foreign ownership is approximately 60 percent. We estimate that our little only owned, U.S.-owned and half Alaskan-owned company, Glacier Fish Company, has about 9 percent market share among the catcher/processors. To our knowledge, there are no Alaskan ownership with a shore-based processing plants. The Alaskan ownership which has started to show up in the Bering Sea pollock fisheries in the offshore sector. In the Bering Sea there is still significant foreign presence. In the biggest picture of harvesting and processing and marketing pollock, Americanization has occurred the most among the catcher/processors including a trend of Alaskanization of which we are very proud of.

In our support of Americanization, we have an additional point we wish to make. Some of the measures and proposals which might be proposed and those of Senate bill 1221 have measures regarding both Americanization and capacity reduction. We believe that this is critically important for Congress if it is to affect measure regarding capacity reduction, to take precautionary measures against reallocation of fish to less Americanization sectors. If, for example,

there were capacity reductions in catcher/processor fleet such as might occur in the passage of S. 1221, we are very fearful that there will be assertions in North Pacific Fishery Management Council that Congress intended for there to be a companion at reallocation for the onshore sector. Any such reallocation would defeat Americanization; Congress would have succeeded in Americanizing the offshore fleet. Then the fishery would slip away to the foreign-dominated onshore fleet.

In conclusion, Mr. Chairman, we believe strongly in Americanization because of the great benefit which the Bering Sea fisheries have brought to western Alaska villages through the CDQ program. We also are very proud of the Alaskanization of this fishery. And most American presence in this fishery to date is with the catcher/processors. We would support further Americanization. We have a fear, however, that a measure to Americanize the fishery are at risk of being defeated if they do not apply equally to the onshore sector. If they are not to be applied equally to the shore-side sector, then we strongly urge to be viewed to place a moratorium on other protective measures to prevent our Bering Sea resources from being reallocated from an Americanized sector to foreign-dominated sector.

Thank you.

[The prepared statement of Mr. Asicksik may be found at end of hearing.]

Mr. SAXTON. Thank you very much, Mr. Asicksik.

Mr. Kirk, please.

STATEMENT OF MICHAEL KIRK, COOPER, CARVIN AND ROSENTHAL

Mr. KIRK. Thank you, Mr. Chairman. Mr. Chairman, members of the Committee, I appreciate the opportunity to be here today. My purpose was to lay to rest the tenuous argument that has been made by some that legislation along the lines of S. 1221 would work a taking of private property in violation of the takings clause of the Fifth Amendment. In large part, however, Mr. Chairman, you and Chairman Young and Senator Stevens have beaten me to the punch and have made the point that is dispositive of any claim that a taking would take place.

Fishing is not—and throughout our history has never been—a property right. Rather, it is a privilege that has been granted by the State and Federal Governments and is, and continues to be, fully subject to the regulatory authority of Congress and the States.

My partner, Chuck Cooper, who during the Reagan Administration served as head of the Office of Legal Counsel in the Department of Justice, has carefully analyzed the claim that has been made that a bill like S. 1221 would work a taking. And I can report with some confidence that the Supreme Court's Fifth Amendment jurisprudence, along with numerous cases from the lower Federal courts, fully confirm your understanding of the law in this area.

As an initial matter, no reasonable claim can be made—and I don't understand one to be made—that the Senate bill or like legislation would result in a physical taking of the vessels, for the bill neither directly appropriates vessels nor ousts the owner of possession of the vessels, nor does it require owners to acquiesce in any

physical invasion or occupation of their vessels. Any takings challenge, therefore, must allege that the bill effects what the Supreme Court has called a regulatory taking of some right that's been secured by regulation. Analysis under either of the two broad conceptual approaches that the Supreme Court has taken to regulatory takings yields the inescapable conclusion that S. 1221 or any legislation like it would not effect a regulatory taking.

Now some have argued that under the Supreme Court's decision in the Lucas versus South Carolina Coastal Commission case, a taking of vessels could be effected because a bill like S. 1221 somehow denies owners of all economically beneficial use of the vessels. For several reasons, that analysis is inapt. As an initial matter, it is not at all clear that Lucas even applies to personal property like vessels. The Supreme Court did note in Lucas, that the principles applied to the real property at issue in that case did not necessarily give rise to similar conclusions in cases involving personal property.

But beyond whether or not it applies to personal property, the plain fact is that the value of affected fishing vessels simply will not be significantly diminished by any legislation such that it could be said that the bill would deprive vessel owners of all economically beneficial use of their vessels.

The courts that have applied that test have determined without setting a specific threshold that it generally means upwards of 90 percent of the fair market value of the property must be taken to work a regulatory taking in this area.

There can be no question that legislation such as that introduced by Senator Stevens would at most require owners of vessels subject to the bill to sell their vessel or to use their vessel in fisheries outside the EZZ—EZE, excuse me, EEZ, I'll get it right the third time. In that regard, it is noteworthy that well over 90 percent of the fish that have been harvested worldwide have been harvested outside the EEZ. Accordingly, there can be no question that any sale that would take place in response to legislation enacted by Congress would take place at a price at or approaching fair market value. In other words, at a value far in excess of any claim that all economically beneficial use has been deprived. Even vessels that are forced to surrender their fishery endorsements would continue to be able to fish outside the EEZ. And finally, any vessels that lose or have their ability to fish within the EEZ limited by such legislation could be converted to other economically beneficial uses.

In summary, whatever policy considerations may guide the members of this Committee as you deliberate over the merits of proposals to alter Magnuson-Stevens or the Anti-Reflagging Act, the potential that the Federal Government will be compelled to pay compensation to owners of affected fishing vessels can safely be dismissed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kirk may be found at end of hearing.]

Mr. SAXTON. Thank you very much, Mr. Kirk.

Mr. Bohannon.

STATEMENT OF FRANK BOHANNON, VICE-PRESIDENT, UNITED CATCHER BOATS

Mr. BOHANNON. Thank you, Mr. Chairman. Mr. Chairman, and Committee Members, my name is Frank Bohannon and I am vice-president of United Catcher Boats.

UCB consists of 58 harvesting vessels, and we fish principally in the North Pacific for pollock and whiting. I have been a fisherman for 35 years, and I own a vessel called NEAHKAHNIE that participated in the first joint ventures in 1979 and 1980 where we began the Americanization of the pollock and whiting fisheries. I now have two sons fishing in those fisheries, and one of them runs the vessel. We are an American fishing family.

Over 20 years ago, we fought hard to pass the 200-mile limit law to Americanize our fisheries and end foreign fishing in our waters. Ten years ago, Congress passed the Anti-Reflagging Act in support of full Americanization of U.S. fisheries. At that time, U.S. fishermen had fully Americanized the harvesting but not the processing of North Pacific fishery resources. Today, we have more foreign fishing in our waters than we did 10 years ago. So, UCB asks this Subcommittee to approve legislation that will put an end to foreign fishing in our waters and fully Americanize our fisheries.

The 1987 Act did more to harm American fishermen in the North Pacific than it did to help them. Boats like mine went from harvesting 92 percent of the catch in 1987 to only 26 percent in 1990. Our catches were reduced by 66 percent over a 4-year period because Congress was told that in order to Americanize the processing industry, our foreign partners had to go.

The 1987 testimony before Congress was all about U.S. processing replacing foreign processing. There was almost no testimony about the new harvesting capacity coming into the fishery. The issue was processing, and we were given every assurance that the Congress did not intend to harm U.S. fishermen. Unfortunately, the 1987 Act had a severe negative impact on the catcher boat fleet because it allowed 17 or so foreign-owned, foreign-built, and heavily subsidized factory trawlers to enter our fishery and harvest in direct competition with an Americanized catcher boat fleet. This was certainly not the intent of the 1987 Act or the Magnuson-Stevens Act. Congress did not intend to allow foreign companies to buy and sell ownership in foreign-built factory trawlers. Yet, in spite of this, the Coast Guard Documentation Office, against the advice of their own lawyers, issued letter rulings which exempted foreign owners from complying with the new U.S. ownership and rebuild requirements. This was wrong, and I hope this Committee will investigate why the Coast Guard so subverted the intent of Congress.

Ten years ago, my vessel fished throughout the entire year and harvested enough annually to create a viable business. Over the last 5 years, I have seen many factory trawler companies go broke and the vessels assimilated into the empire of a foreign factory trawler company. I have also watched a number of my fellow catcher boat captains who pioneered the North Pacific in the 1980's reluctantly sell their vessels to large processing companies. Fishing less than 3 months out of the year for little or no profit has taken the future out of the fishery.

S. 1221 corrects a wrong that was done some years ago by restoring the intent of the Magnuson Act that American fishermen get first priority. We had achieved that in the late 1980's. The misinterpretation of the Anti-Reflagging Act by the Coast Guard undid all our gains and has given foreign fishing companies a large share of our fisheries resources. It is time to fix that. For the sake of preserving American fishing communities, we ask that you approve legislation similar to S. 1221 as quickly as possible.

United Catcher Boat believes the key element to the legislation are as follows:

Removal of the foreign-owned fleet. UCB believes that those foreign-owned factory ships that sneak through the loopholes in the 1987 Act and have not provided any meaningful markets for U.S. harvesters must be removed from the fishery. This non-citizen, heavily subsidized, new entrant fleet contributed greatly to the overcapitalization of the industry, should not have been allowed to enter our fisheries in the first place, and have had 10 years of fishing opportunities at the expense of the existing fishermen.

The ownership. A new 75 percent U.S. ownership requirement to be established for all fishing industry vessels. In order for a vessel to be eligible for a fishery endorsement, it would have to be owned by an entity which has at least 75 percent of the controlling interest vested in citizens of the United States. Virtually all of our vessels already meet this requirement, and we strongly support a tougher U.S. ownership standard.

No reentry into the U.S. fishery. The legislation should contain a provision that will prevent the issuance of any new fishery endorsements for fishing vessel that have reflagged foreign and left our fisheries. The owners of these vessels have made a conscious business decision to fish in Russia or other foreign waters. And in light of the overcapitalization of our fisheries, we do not think these vessels should be allowed back into our fisheries.

National vessel size limitation. UCB recommends that if Congress wants to establish vessel size limits within our fisheries that it direct the Management Councils to do so. While most of the harvesting vessels are under the 165-foot threshold proposed in the Stevens bill, several are not. Many of our fisheries are already under limited entry, meaning that the threat of new, large vessels entering the fisheries is not great. UCB would support a requirement that directs the Councils to review this issue on a fishery-by-fishery basis and prescribe appropriate vessel size limitations in those fisheries where it is needed.

Excessive control. As catcher boat owners, UCB wants more competition in the marketplace so that we receive the fairest price for our fish. We hope that the Subcommittee will consider a provision that will ensure that no company would obtain excessive control within the fisheries as a result of the enactment of the legislation. In removing the foreign-owned fishing fleet, we would like to see additional markets open up, as opposed to closing markets for our catch and further consolidating control of the fisheries.

Again, thank you for the opportunity to testify, and I would be pleased to answer any questions. Thank you for letting me go overtime.

[The prepared statement of Mr. Bohannon may be found at end of hearing.]

Mr. SAXTON. Thank you very much, sir. We appreciate it, and we'll get to the questions here in a minute.

Mr. Leape.

STATEMENT OF GERALD LEAPE, GREENPEACE

Mr. LEAPE. Thank you, Mr. Chairman. On behalf of Greenpeace, I want to thank you for the opportunity to testify at this oversight hearing on the failure of the Magnuson-Stevens Act and the Anti-Reflagging Act to Americanize the ownership of fish harvesting vessels in U.S. fisheries.

These failures have allowed 13 of the largest factory trawlers to enter the world's largest fishery, the pollock fishery between 1988 and 1990. These vessels have not only had a devastating environmental impact on the Bering Sea ecosystem and the fishery it supports, but if gone unchecked could eventually impact fisheries both on the Pacific Coast and in New England. These boats which increased fishing capacity in the pollock fishery exponentially have had detrimental impacts on the pollock stocks, on other marine mammals and birds that rely on fish, and as you've heard, small-scale fishermen who have been the life line of many of our Nation's coastal communities for decades.

In addition, as the seasons have gotten shorter, it's become increasingly difficult for many of the factory trawler crews to earn livable wages. I direct you to a recent article in the Tacoma News Tribune. In 1989, the last year before these boats began to enter the fishery, boats were able to fish for pollock year round. And as you've heard, in 1997 the fishery lasted just 55 days. In 1991, the first full year that all of these boats were active in the fishery, factory trawlers caught over 1 million metric tons of pollock, or almost 70 percent of the total prompting the enactment of a mandated allocation split, split seasons, and an end to the practice by the Council of mandating a buffer between the scientifically suggested limit of catch and the actual allowable catch.

The increased effort in the split season have forced the fishery into greater concentrations of fishing in smaller areas of the eastern Bering Sea, much of which is critical habitat to many marine mammals where they forage for food. In addition, there has been a tenfold increase in fishing on pollock as they're spawning.

The impact of this increase is beginning to be seen. The half a million metric ton quota for the spawning season represents almost 25 percent of the estimated total spawning biomass of 2.2 million metric tons. Even if there is no mandated reduction in catch, as we frankly hope there will be, allowing the fishery to spread out over space and time will inevitably have a conservation benefit.

The fishery is now dependant on a strong recruitment of a 1996-year class to stave off more draconian action by the year 2000. And I direct you to a plan team graph at the end of my testimony that you have before you.

Finally, there is the bycatch issue. The operators of the boats being investigated today say that they are among the cleanest fishers in the world. They are careful not to compare themselves to their shoreside competitors. Using National Marine Fisheries Serv-

ice numbers, that have been cleansed to show that they correspond to the specific fishery, these boats have a bycatch rate that is two to three times that of their shoreside counterparts. As recently as 1997, these boats were wasting more fish than the catch of many of the rest of the fisheries in the U.S. combined.

What is done, or not done, with these boats will have an impact on the rest of the country as well. For the West Coast, if the pollock fishery continues to decline, these large factory trawlers will have to look elsewhere to fish, making it difficult for many of the Pacific fisheries to maintain their limitations on entry. On the East Coast, a campaign supported by environmentalists such as the National Resources Defense Council, the American Oceans Campaign, and others, fishermen from coast to coast, and this Committee overwhelmingly endorsed action last summer, H.R. 1855, which resulted in an appropriations rider preventing the factory trawler, ATLANTIC STAR, rebuilt in a Norwegian shipyard, from entering the Atlantic herring and mackerel fisheries.

As many of you know, the Fisheries Service has fought the implementation of that rider every step of the way. That moratorium on factory trawlers needs to be extended to allow completion of the plan without a factory trawler waiting in the wings.

Toward that end, we would urge you in legislation to mirror the language in S. 1221 on this issue. Many of the groups that were active on the East Coast campaign last year have lined up in support of S. 1221 and would be poised to support you, Mr. Chairman, if you choose to introduce a companion bill in the House.

All around the world over-fishing and destructive fishing practices on the part of factory trawlers are destroying fish stocks damaging ecosystems and threatening the livelihoods of millions of people. On the East Coast to the U.S. and Canada, over-fishing by foreign factory trawlers has cost almost 40,000 jobs.

Mr. Chairman, we strongly urge you to introduce legislation that will not only phaseout these boats which are being the subject of this hearing, but to include provisions from S. 1221 which would limit the allowable size, weight, and power of the new vessels, eliminate the remaining subsidies that could be used to build these large boats or expand existing boats, and prohibit the replacement of remaining vessels that currently exceed these limits at the end of their useful life.

Failure to act this session could spell the beginning of the end of the Bering Sea pollock fishery in the North Pacific.

Thank you, and I'd be happy to answer any questions.

[The prepared statement of Mr. Leape may be found at end of hearing.]

Mr. SAXTON. Thank you, Mr. Leape. Thank all of you for your very fine testimony.

Mr. Young, do you have a question?

Chairman YOUNG. Thank you, Mr. Chairman.

Eugene, the CDQs have environmental restrictions placed on them in the form of bycatch. Could you comment on those restrictions and the environmental restrictions as far as the open access of the fishery?

Mr. ASICKSIK. Yes; the CDQ program, as you well know, is an allocation program, and they are six groups that apply to the State

of Alaska who has an oversight. And each CDQ group has to submit a Community Development Plan to the State. And we have to identify the targeted fisheries, and we have to identify that we would have a vessel, a certain—the type of vessel, what kind of processing, what kind of marketing, and you know, the cost.

And once all of that is submitted, the State allocates. And they also, when they allocate the targeted fishery, they also allocate a prohibited or a bycatch allocation. And the bycatch allocation can vary from specie to specie. But also in that bycatch allocation is that if we go over our bycatch in a targeted fishery, we cannot target the other fishery. So if we have two fisheries that have the same type of bycatch, and one is 15 percent and the other one is 20 percent. Say, we went over in one fishery, we can't go and harvest the other fishery.

Chairman YOUNG. OK. Now what I'm suggesting here is that you have a quota or amount of tonnage that you're allowed to catch; right?

Mr. ASICKSIK. Yes.

Chairman YOUNG. You can catch that over a longer period of time, can't you? You don't have free-for-all fishery, do you?

Mr. ASICKSIK. No, we're not. We can fish outside of the open access fishery, or CDQ fishery can take place outside——

Chairman YOUNG. OK——

Mr. ASICKSIK. [continuing] or prior or after.

Chairman YOUNG. Now, what I've heard from everybody on that table that I don't—even you, Jim, think there's an overcapitalization of the fishery?

Mr. GILMORE. Yes. There is certainly an overcapitalization of the fishery. Where the CDQ program works well is that they don't race to catch the fish and, therefore, they're able to control the bycatch similar to the Pacific whiting cooperative.

Chairman YOUNG. I would like to refer again to my opening statement—I want to stress this again, Mr. Chairman—is again, for those that are being paid lots of money to represent everybody in this room, you better listen to me very carefully because the issue here is the retention—with all due respects to Greenpeace—the retention of a viable trawl industry which does play a major role, other than an environmental role. A role that I don't think is on the positive side. That this overcapitalization, this free-for-all fishery, and I think the excessive amount of bycatch has to stop. And I think it appears to me, if you're right, Gene, that the CDQs have done that. Is that correct?

Mr. ASICKSIK. Yes, we have. And as the regulations are being written, we will, you know, go into the other fisheries. We've done the pollock; we are able to do the halibut and sable fish. And I understand, by August, we will start the mackerel and——

Chairman YOUNG. OK.

Mr. ASICKSIK. [continuing] shortly we should fish the other fisheries.

Chairman YOUNG. Joe, would you clarify something in your testimony? The District Court and the Appeals Court rulings, with regard to Southeast Shipyards Association of the United States versus United States case, specifically did the original case deal with

both the American ownership and foreign rebuilding saving clauses? And did the Appeals Court ruling deal with both issues?

Mr. PLESHA. Thank you, Mr. Chairman. Just to refresh your recollection, that case was about two vessels, the GULF FLEET 10 and the GULF FLEET 14. Those vessels were purchased on the very last day, July 27, right before the Committee's markup. They were then contracted to be rebuilt in a Norwegian shipyard. After that, they were subsequently sold to a foreign company—I believe a Japanese company. They were then taken to Japan and rebuilt in a Japanese shipyard to completely different specifications than the original rebuild contract. Southeast Shipyards brought a lawsuit against the Coast Guard. That lawsuit made two allegations. One is that the Coast Guard misinterpreted the ownership requirement because they allowed the boat to be transferred to foreign ownership. And second, they requested in their complaint that these specific vessels be investigated, the Coast Guard make findings, and revoke the fishery endorsements because they had violated the rebuild provision of the Anti-Reflagging Act.

The District Court granted the plaintiff's motion for summary judgment because their memorandum in support of that then discussed the idea that the concept of the Anti-Reflagging Act was Americanization, the Coast Guard asked for a clarification. The clarification was denied. The ownership issue was appealed, and eventually reversed. But the Order, with regard to the rebuilding provision specific to those two boats, has never been reversed.

Chairman YOUNG. And so the Coast Guard hasn't fulfilled their obligation, according to that?

Mr. PLESHA. I believe so.

Chairman YOUNG. Again, I think the Coast Guard came here very ill-prepared for this testimony, as they did in the Senate. And I think it's a slap to the Congress. And now we have this court case that actually verifies that.

I'm about out of time, Mr. Chairman, so go ahead and I'll ask more questions later on.

Mr. SAXTON. Thank you very much.

Mr. Pombo.

Mr. POMBO. Thank you, Mr. Chairman.

Mr. Kirk, I had the opportunity to review your analysis. Since your original analysis in March, and there has been a Federal Court decision on a similar issue, the Martirans versus United States, concern Federal legislation requiring oil tankers in the U.S. waters to have double-hulls by a set date causing significant property devaluation for the owners of the single-hull vessels. The Court held that the plaintiffs in that case had a takings claim. The Court's opinion stated, "that the right to use vessels has been described as one of the classical property rights inherent in the ownership of vessels is the right to use them."

How does that affect your analysis?

Mr. KIRK. Thank you, Mr. Pombo. You're correct. The Maritrans decision was issued after we put in the paper that we submitted in the context of Senator Steven's hearing in March. I would correct one—quibble with one statement you made in describing the opinion. Judge Hodges did not hold in Maritrans that the plaintiff had a takings claim. That is still the subject of that litigation.

Rather, the judge rejected certain arguments that the United States had made in seeking to dismiss the claim, and the case will continue. There's been no final determination that the plaintiffs have a takings claim.

But beyond that, to address the substance of the point you were making, I think the most significant portion of Judge Hodges' decision—Judge Hodges, as you know, Congressman, is on the Court of Federal Claims here in Washington—is the care with which he distinguished the long line of decisions holding that revocation of permits—permits going to such activities as building, grazing, prospecting, mining, traversing, and fishing on public lands or in government-regulated waters—all of which hold that such revocations do not constitute takings under the Fifth Amendment. In particular, he talked about a decision from the Court of Appeals for the Federal Circuit called Mitchell Arms which explained this principle.

So at bottom, the Maritrans decision in no way changes our view. In fact, most of the portion of his opinion dealing with the line of permits cases confirms our view.

Mr. POMBO. Can you differentiate between the permit processes and the endorsement process on these boats? Do you know the difference, and that there is a difference? And I'm sure you've had the opportunity to read this case from your answer to my question. There's a distinct difference in the judge's decision between the permit and the endorsement.

Mr. KIRK. Well, I don't think the judge's decision addressed the endorsements that are before this——

Mr. POMBO. The argument that you laid forth in answering my question, you dealt with the permit issue—whether it's grazing permit or a fishing license, or whatever it is. That's one side of the argument, and we could have an interesting debate as to whether or not that is truly a taking. But I do believe that there is a difference between a permit and an endorsement. And in the answer to the question you gave, you seemed to try to run all of that together in order to make your point. And I think that you're mistaken in——

Mr. KIRK. With respect, Congressman, I have to disagree with you on that. When one is looking at this from a constitutional perspective and analyzing a potential takings claim, the endorsements that the Coast Guard issues under current law are really no different than the fishing permits. Yes, it is true and in answer to some of the questions that were put to the prior panel, some distinctions between the endorsements——

Mr. POMBO. So your argument is there's no difference?

Mr. KIRK. As a matter of constitutional law, no. At the end of the day, what the endorsement does is it allows fishing to take place.

Mr. POMBO. So you disagree with the judge's opinion that inherent in the ownership of vessels is the right to use them?

Mr. KIRK. I do not disagree with that point, but with holding the——

Mr. POMBO. Which part of it do you agree with?

Mr. KIRK. I——

Mr. POMBO. If the permit and the endorsement are the same thing in your mind, I don't see how you can say that you agree with the judge's statement.

Mr. KIRK. The judge didn't address the distinctions that the Coast Guard has between permits and endorsements. He had before him a completely different case. The statement that you read concerning——

Mr. POMBO. It was a very similar case.

Mr. KIRK. Well——

Mr. POMBO. In terms of a regulatory taking, it was a very similar case. Unfortunately, I'm just about out of time. I'm sure the chairman will be very lenient——

[Laughter.]

If you——

[Laughter.]

If you accept that the revocation of a fishing endorsement completely destroys the market value of these ships, would you concede that the Lucas decision applies, if that were the case?

Mr. KIRK. If you start with the assumption—which I don't share—that a revocation of the fishing endorsement completely destroyed all economic value in the vessel, there would still be a significant question as to whether or not Lucas led to the conclusion that a taking had taken place because Lucas was quite—the Supreme Court in Lucas was quite clear in limiting its decision to real property. And of course, vessels are personal property. So, I would not say that it necessarily follows that there is a taking, even under that hypothetical that you offer.

Mr. POMBO. In your understanding of the Constitution, does the Fifth Amendment say that only real property applies? Or does it say private property?

Mr. KIRK. It just uses the word "property," but in the Supreme Court's cases addressing issues of takings, they've noted that expectations are different with regard to real property as opposed to personal property. Throughout our history, both the States and Congress have regulated personal property with considerably more detail, so property owners have a greater expectation with regard to real property.

Mr. POMBO. Because that's where the cases have been, but the cases have not——

Mr. SAXTON. Mr. Pombo, why don't you ask one final question so we can move on to Mrs. Chenoweth?

Mr. POMBO. Mr. Chairman, I'm going to ask for a second round of questioning. Thank you.

Mr. SAXTON. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman.

Mr. Kirk?

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. I'm aware of a March 12th document produced by your firm, Cooper, Carvin and Rosenthal entitled "Constitutional Analysis of S. 1221, the American Fisheries Act." On whose behalf did you prepare this analysis? And who paid your fees to prepare this document?

Mr. KIRK. We are appearing in this proceeding, and I believe in Senator Steven's hearing in connection with which the document

you are referring to was submitted on behalf of the American Fisheries Act Coalition.

Mrs. CHENOWETH. But that's not the question I asked you.

Mr. KIRK. I apologize.

Mrs. CHENOWETH. All right. Let me repeat it.

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. Mr. Kirk, I'm aware of a document that was produced by your firm dated March 12, 1998, entitled "Constitutional Analysis of S. 1221, the American Fisheries Act,"——

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. [continuing] prepared by the firm that you work for, Cooper, Carvin and Rosenthal. I assume you work for that firm?

Mr. KIRK. I'm a partner in that firm. Yes, ma'am.

Mrs. CHENOWETH. All right; you're a partner. On whose behalf did the firm prepare that document?

Mr. KIRK. We prepared that document, I believe, in my name—I didn't write it, my partners did. But it was my understanding that we prepared it on behalf of the American Fisheries Act Coalition. I hope that's responsive.

Mrs. CHENOWETH. And you don't want to add——

Mr. KIRK. And I believe that second——

Mrs. CHENOWETH. [continuing] anything to your answer, right?

Mr. KIRK. I wanted to respond to the second part of your question. You'd, I believe, also inquired as to who paid our fees, and it's my understanding that it was Tysons Seafood.

Mrs. CHENOWETH. All right. Thank you.

In the Maritrans case, the court did distinguish from cases involving guns and nuclear power, as you referred to in your testimony, from cases such as this one. And as you know the facts of the Maritrans case goes to the requirement of regulation that oil tankers in U.S. waters have to have double-hulls by a certain date.

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. And the Court held that the inquiry is not so simple as examining whether the government prevents the exercise of a property right by regulating it, transforming the property right into one totally dependent on the government's regulatory regime. "That is tautology," the Court said, "mere participation in a regulated industry does not preclude a finding that a taking has occurred." So the Court did rule that a taking had occurred in that case.

I wanted to ask Mr. Plesha——

Mr. PLESHA. Yes.

Mrs. CHENOWETH. You mentioned the fact that vessels were, of course, taken over to Japan and retrofitted and so forth. Are you aware that on July 28, 1987, the Committee adopted a provision allowing vessels purchased for use as fish processors up until the date of the markup to be rebuilt overseas? Were you aware of that bit of history?

Mr. PLESHA. Actually they had to be purchased before the date of the markup. They had to actually be purchased, and then they had to have a contract to rebuild by July 12, 1988. So, yes; I was certainly aware of that provision.

Mrs. CHENOWETH. So, if any of the vessels that you were referring to in your testimony violated those provisions, then it would be a legal question, wouldn't it?

Mr. PLESHA. Is it a legal question? Had the statute of limitations passed——

Mrs. CHENOWETH. A question of violation of the contract?

Mr. PLESHA. We have not even learned of how these contracts are put together until the last 6 months. We have just now discovered, for example, that the STATE EXPRESS was never had a contract to purchase by the right date. They had an option to purchase. I didn't know that 6 months ago, and I assume that the statute of limitations has passed for anything that can be done in court.

Mrs. CHENOWETH. You know——

Mr. PLESHA. But the honest answer is that the Coast Guard made a mistake in how they interpreted the Anti-Reflagging Act's grandfather provisions. They didn't follow the literal meaning of the statute. They basically just allowed these vessels in on representations of their owners.

Mrs. CHENOWETH. Don't you think in most cases, though, that people who invested in the vessels invested on the basis that they were assured that they could make those investments under the 1987 Amendment?

Mr. PLESHA. There were people who had these projects that absolutely had no investments. They had no financial investments whatsoever prior to the boats being rebuilt and delivered into the United States. That's part of the problem. For example, on one of the boats, it was a conditional sales contract without any money being put down in the contract whatsoever. They had no obligation to pay a cent; that's not a financial investment.

Mrs. CHENOWETH. Then, wouldn't that be a question for the courts? I mean if somebody—like the chairman, our Chairman Young said, there's malfeasants. Gosh, if there is somebody should be hung for that. And our concern here, as members of the Committee, is to protect those who legally and honestly have relied on the current laws and——

Mr. PLESHA. Excuse me, but what about us who tried to follow the intent of Congress and have spent everything that we have following that intent by trying to Americanize this fishery? We are the people who are impacted by that boat. Now if that boat's legal, there's a backdated document allegedly involved in that qualifying. We have for 10 years suffered from that boat being in the fishery. And I mean what we've tried to do from day one is follow the intent of Congress to Americanize this fishery with American dollars from American banks.

Mrs. CHENOWETH. You know, Mr. Plesha, I have great concern over our fisheries being over-fished, being from Idaho. I don't want to see our salmon over-fished. I identify with that issue; but capitalization as a means for a taking is a concern that we have here. And so if someone has failed to follow the law, if they have not been honest in upgrading their fishing vessels, then they should be taken to court.

Mr. PLESHA. You know, I reflect back to Oscar Dyson who had the PEGGY JO. That was the very first steel-hulled crap catcher

vessel in Alaska. It fished there for 15 years, and he was the pioneer of the crab fishery. There is a moratorium put in place that eliminated that boat from ever fishing crab again. And PEGGY JO—its value was impacted by that. It found alternative uses, but that is a boat that—I don't know the distinction that you're trying to reach between a permit and an endorsement, but it will never, ever fish crab again, because of a regulation.

Mr. SAXTON. The gentlelady's time has expired. Let me——

Mrs. CHENOWETH. Chairman, I would like to have another round of questioning.

Mr. SAXTON. OK, we'll get to it. We sure will; that will be fine. [Laughter.]

Let me just explore two points, if I may. First, with Mr. Plesha. Mrs. Chenoweth just made a point—I believe, perhaps incorrectly—that people, investors who invested in the fishing vessels which in effect would have their endorsement nullified by Stevens' bill would suffer a loss on their investment which we, in essence, according to the premise of the question, provided assurance that they would have some kind of security. I would make a different point; those decisions apparently were made—and you correct me if I'm wrong; I want to make sure I understand this. Those decisions were made to enter into contracts during a window of opportunity that was provided because of a delay in the Merchant Marine and Fisheries Committee. And that those contracts were signed—A, not knowing whether the law would ever be passed; B, not knowing what the provisions of the law would be, if it passed; and C, not knowing what—given those two facts—not knowing what the competition or the fishery would be like subsequent to the passing of that law. Is that a fair statement?

Mr. PLESHA. That's correct. The markup was July 28, 1987, and the bill was signed into law December 11, 1988. So it was a long period of time between the markup and eventual signing.

Mr. SAXTON. So one could conclude that during that period of time when those decisions were made, that the individuals who made those decisions didn't really have any assurance as to what the future would be like, anymore than when those of us who buy mutual funds or put our money into real estate investments or any other type of investment decision that we make, they certainly didn't have any greater assurance than any other investor. Is that a fair statement?

Mr. PLESHA. That's correct.

Mr. SAXTON. And so if one were to lose on an investment of this type, it would be no more out of character than any other investor in a free economy?

Mr. PLESHA. That's exactly correct.

Mr. SAXTON. Thank you.

Mr. Kirk?

Mr. KIRK. Yes, Mr. Chairman.

Mr. SAXTON. With regard to my friend, the gentleman from California, Mr. Pombo's questions regarding the endorsement issue and whether or not there would be a taking if the Stevens bill were to pass, I believe, and I may—anyone can correct me, including Mr. Pombo, but I think the assumption was—part of the question was an assumption that there would be a significant devaluation in the

property known as a fishing vessel; right? Is that—can you explain from a legal point of view how that devaluation would generally be considered by the Court?

Mr. KIRK. Yes, Mr. Chairman. In analyzing a takings claim, the economic impact is one factor that a court will look at assuming that the predicate has been established that there is a property right there in the first place. In my view, that predicate cannot be established here for the reasons that I discussed in my testimony.

But even assuming that there is—that a takings challenge could overcome that hurdle and get to the question that the analysis that the Supreme Court developed in the Penn Central case, and economic impact was something that the court looked at, in my opinion, notwithstanding—the impact in this case would not be sufficient to support a taking. There are cases on the books where upwards of 70 percent of the value of the plaintiff's property has been diminished by regulations enacted by Congress. And the courts have held that that's not enough.

In view of all the remaining uses that these vessels would have upon passage of legislation like Senator Steven's bill, I just don't believe that the economic impact is severe enough to support a takings finding.

Mr. SAXTON. Thank you. Now, let me just make a statement, and then perhaps you would like to respond to it. With regard to devaluation in this circumstance, should the Stevens bill pass?

I would make the point that there is at least some evidence to indicate that there would be no significant devaluation based on information I have here in front of me involving other opportunities, or potential opportunities, for these ships. This is verified, I believe, quite well by the situation involving the huge Dutch factory trawler known as the ATLANTIC STAR which recently announced its arrival in the Mauritanian waters off the coast of Africa to begin a new fishing venture on pelagic species. Also, in May 1998, China announced its rapidly expanding distant water fishing industry will need an unspecified number of 240 to 250 to 300-foot factory trawlers soon after the turn of the century. In 1998, a German fish company announced taking delivery of a refitted 171-foot factory trawler to replace two others that were sold abroad. In May, also of this year, an Icelandic fishing company announced its intent to purchase a 195-foot factory trawler from Lithuania for fishing in the North Atlantic, and—I won't read all these, but there an additional 8 or 10 opportunities for sales.

So it seems to me that if you were dead wrong, with regard to your interpretation of whether or not there was a taking, that there is ample evidence here for us, at least, to assume that there is a market or an opportunity for these ships to be put to other uses which certainly would have an economic value speaking strongly against the position that would be taken when someone suggests that there is a taking here.

Mr. KIRK. The only comment I have, Mr. Chairman, is I agree wholeheartedly with the point you just made.

Mr. SAXTON. Thank you very much.

Mr. Pombo, would you like to——

[Laughter.]

Mr. KIRK. That's a risky position.

Mr. SAXTON. [continuing] take another shot here?

Mr. POMBO. Yes, I would, Mr. Chairman.

Mr. Kirk, have you been heavily involved with the fishing industry in the past?

Mr. KIRK. No, I've not, Mr. Pombo.

Mr. POMBO. And are you familiar with the sale of boats and fishing vessels, and have you done a lot of work in that area?

Mr. KIRK. No, sir, I've not.

Mr. POMBO. What about in the property rights area? Have you done an extensive amount of work on that area?

Mr. KIRK. In that area, I do have a fair amount of experience; yes, sir. We've represented—and I've personally represented clients in a wide-range of industries, primarily bringing takings claims against either the United States or various States. And I've testified a number of times before State legislatures, I believe up until today, always arguing that the legislation on the table would effect the taking of private property. This is the first time that I've testified that, in my view, the proposed legislation would not effect a taking.

Mr. POMBO. Mr. Gilmore, the question that the chairman just asked about the sale of these boats on the open market; would you like to comment on that?

Mr. GILMORE. I'm not an expert on the brokerage of vessels either, however, what the Senate legislation would do would be to put 18 factory trawlers from the United States out of business within an 18-month period. That would be a capital value of $400 to $500 million that would be on the market at one time. They would lose their fishery endorsement in the U.S. Comments were made earlier that there are opportunities for foreign flag vessels in the U.S. 200-mile zone, but these boats were built for the largest fishery in the United States, the Bering Sea pollock fishery. I don't know of any other joint venture type operations that would be available to them. The fate of the ATLANTIC STAR would indicate that there are relatively few opportunities, and so I think it would be highly unlikely that these vessels would—in fact, if you go to Seattle, when you go down to pier 91, you'll find a boat called the AMERICAN MONARCH, a $60 million catcher/processor vessel that was permitted to fish in Chile that had its permit in Chile revoked. I don't know the takings law in Chile, maybe we've got something here, but had its permit revoked before it ever caught a fish in Chile, and has been sitting idle for over a year now at the dock there. So, if there are opportunities, I think they're few and far between. And for the forced-sale of assets in such a short timeframe, it would be very difficult to get a fair market price.

Mr. POMBO. Mr. Leape, is that correct? The organization that you represent, and in your testimony, you stated that you would like to see a reduction in the number of fish that are taken in this fishery. Is that accurate?

Mr. LEAPE. Yes. If legislation is introduced, we have urged that a mandated reduction be included.

Mr. POMBO. And the boats that they're talking about here—the 18 boats or whatever it is—if they were taken out of production, would that be enough to satisfy the reduction that you're talking about?

Mr. LEAPE. Yes, our request urge the Congress to direct the Councils to achieve an approximate reduction as the boats leave. So, yes; the answer to your question would be yes.

Mr. POMBO. So, just so I understand your position, what you're saying is that if you took these boats out of production and the remaining boats just caught the number of fish they are now, that would meet your goal?

Mr. LEAPE. Well, as I said in my statement, a lot of things would happen if those boats left. Currently, the fishery lasts 55 days. And as recently as 1989, it was year-round. If it was allowed to lengthen, fishing would slow. It could be spread out, and it would have less of an impact. You wouldn't see the problem of localized depletions and heavy focus of effort on the pollock when they're spawning. And it could be run in a much more environmentally friendly manner.

Mr. POMBO. But the total number of fish that are caught would remain the same? That instead of doing it in 3 months, they might be able to do it year-round, but the total number of fish would remain the same?

Mr. LEAPE. Well, what's hard about this hearing, Mr. Pombo, is it's an oversight hearing and not on specific legislation. And so if we comment about specific legislation, it's about what's out there, and that's S. 1221 currently. And what I said is, we would be urging that a change be included in the legislation to provide for a mandated reduction in the fishery. Currently, as the legislation stands, no, it doesn't contain that.

Mr. POMBO. Well, I wasn't referring to legislation necessarily, I was trying to figure out where your position was on total number of fish being caught, or at least your organization's position, because you said that you wanted to see a reduction——

Mr. LEAPE. Right.

Mr. POMBO. [continuing] in the number of fish that were caught. And I was trying to figure what that reduction was——

Mr. LEAPE. Well, we felt——

Mr. POMBO. [continuing] that you would prefer——

Mr. LEAPE. [continuing] if you take out the factory trawlers in question, from estimates, it seems to be that they account for about 30 percent of the harvest. That would approximate what we feel would be the appropriate level of reduction.

There are others who disagree with us. I can only speak for Greenpeace and what we feel would be appropriate.

Mr. POMBO. So, you believe that a 30 percent reduction would be appropriate?

Mr. LEAPE. Yes; and we have said that before the North Pacific Council 2 years running.

Mr. POMBO. Is that just in this particular fishery, or is that in all fisheries?

Mr. LEAPE. Well, let's keep with the matter at hand, with all due respect. These factory trawlers fish primarily in the pollock fishery, and some of them fish in the whiting fishery. We have been focusing on the pollock fishery because that's where they all fish. You know, fisheries are different as you go around the coast, and the conditions they're in are different. For now, that request is just for the pollock fishery in the Bering Sea.

Mr. SAXTON. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman.

Mr. Kirk, are you here on behalf of Mr. Cooper? Was the testimony that was prepared which stated testimony of Mr. Cooper was that all along supposed to be your testimony?

Mr. KIRK. Let me explain the circumstances, Mrs. Chenoweth. My partner, Mr. Cooper, is today in the midst of a 7-week trial in the Court of Federal Claims. At the time we prepared the testimony, we had hoped that he would be able to personally break away from the trial and appear and give the testimony. As matters developed, the government's expert witness that he was responsible for dealing with was up this morning, and so I was prepared to and appeared in his stead.

Mrs. CHENOWETH. Well, in Mr. Cooper's written analysis of S. 1221, and I noticed that in your oral testimony you skipped over this part. But he stated that the Supreme Court's decision in Lucas versus South Carolina Coastal Council set forth a per se rule applicable to the taking of all beneficial and productive use of private property; that it is limited only to land. I noticed you very carefully said private—or property, private property. Do you agree with him that it's only limited to land? And is it your position that Lucas, then, does not apply to other property rights as defined by the Supreme Court such as contracts entered into by Savings and Loan and——

[Laughter.]

[continuing] I mean it's——

Mr. KIRK. That's a——

Mrs. CHENOWETH. Where do you go with this?

Mr. KIRK. The specific holding in Lucas, Congresswoman, was limited to real property. And the Supreme Court carefully noted that. I think it's an open question as to whether the per se taking analysis where all economically beneficial use of the property has been taken would apply to rights other than real property.

That being said, it is certainly not our view, and I don't believe we've said anywhere that a taking claim, in general, can not be brought involving contract rights, personal property, or other forms of property aside from land. In the Savings and Loan case that you referenced, coincidentally enough, that's the case Mr. Cooper is trying, the damages phase of that case. The takings claims there were not based upon the standard in Lucas. It was based on other Supreme Court takings jurisprudence.

Mrs. CHENOWETH. I assume you have read Lucas?

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. You know that Lucas was involved—the taking and the case centered around a special permit procedure. The court did rule that, with regards to the State's power over the bundle of rights which includes land and the permits and the right to build on the land, including a house, that they acquire, when they take title to property, in other words when they take the title, they have actually taken the bundle of rights. "Because it is not consistent with the historical compact embodied in the takings clause that title to real estate is held subject to the State's subsequent decision, to eliminate all economically beneficial use of regulation hav-

ing that effect cannot be newly decreed and sustained without compensations being paid the owner."

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. And I'm quoting directly from Lucas.

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. Now, Mr. Kirk, you've heard my line of questioning before. Section 201(b), I think it is, in the new Bennett 1221 would prescribe new requirements for the size of the ship and where it was built, and so forth. That would effectively render, unless someone could meet those new requirements, render the endorsement useless, wouldn't it? Unless they could meet the new requirements of section 201(b) without paying for it?

Mr. KIRK. It would deprive them of the endorsement, but I don't believe that it would render the underlying vessel economically useless for the reasons that the chairman gave. It appears likely to me that the underlying vessel would continue to have almost all, if not all, of its current market value.

Mrs. CHENOWETH. Isn't it true that without the endorsement, they cannot use the vessel to fish?

Mr. KIRK. No, ma'am. It's true that they cannot use the vessel to fish within the——

Mrs. CHENOWETH. Legally?

Mr. KIRK. Legally within the——

Mrs. CHENOWETH. Right.

Mr. KIRK. I can never——

Mr. SAXTON. The EEZ.

Mr. KIRK. [continuing] get the acronym right. The EEZ, thank you. They could still use the—and actually even that's not true. As I understood Senator Stevens's testimony, when the full quota has not been fished out of the particular area, the foreign vessels who don't possess the endorsements are allowed to come in and fish.

Mrs. CHENOWETH. That is under the permit, and I'm talking about the endorsements that are appurtenant to the vessel. So, when the endorsement is taken away from vessel, it cannot be used for fishing, correct?

Mr. KIRK. Within the EEZ. It could still be used for fishing anywhere else in the world.

Mrs. CHENOWETH. So my question is, who would buy a vessel that would have no place to fish immediately after sale? I mean, you know, those are just dynamics of the marketplace.

Mr. KIRK. Yes, ma'am.

Mrs. CHENOWETH. So——

Mr. KIRK. I would assume somebody who wanted to use it to fish elsewhere in the world would be interested in buying it. I assume somebody who could, himself, obtain the endorsement would be interested in buying it. Or I assume somebody who would be interested in converting it to other uses——

Mrs. CHENOWETH. Why would we——

Mr. KIRK. [continuing] would be interested in buying it.

Mrs. CHENOWETH. [continuing] as lawmakers assume that under these sets of circumstances a forced sale under these sets of circumstances would bring a full market-value price? And therein lies the question with the taking.

Thank you, Mr. Chairman.

Mr. KIRK. Thank you, ma'am.

Mr. SAXTON. Thank the gentlelady very much for her very thoughtful questions. And I thank the panelists very much also for their patience in sticking with us here today. Thank you very much everyone for your participation, and the hearing is adjourned.

[The prepared statement of Mr. Giles may be found at end of hearing.]

[Whereupon, at 2:16 p.m., the Subcommittee adjourned subject to the call of the Chair.]

[Additional material submitted for the record follows.]

STATEMENT OF DR. DAVID EVANS, DEPUTY ASSISTANT ADMINISTRATOR, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Thank you, Mr. Chairman, for the opportunity to present the views of the Department of Commerce on the Americanization of the U.S. fishing fleet and U.S. ownership of fishing vessels.

Before I focus on the main topic of this hearing, the Americanization of U.S. fisheries, I would like to take this opportunity to discuss briefly the issue of overcapacity and overcapitalization. As noted in the letter of invitation, it has become increasingly recognized both in the United States, as well as many other countries, that excessive harvesting capacity and investments in the harvesting sector are contributing to the difficulty in developing management policies to address widespread resource overutilization in capture fisheries. In a global context, the Food and Agriculture Organization (FAO) of the United Nations has estimated excess capacity in world fisheries for the most important commercial species at about 30 percent. From a domestic standpoint, similar concerns have intensified in recent years, and it now appears beyond doubt that a significant number of our most valuable commercial fisheries are burdened with excessive levels of harvesting capacity and investment in that sector. The most obvious example of these problems are the New England groundfish and scallop fisheries, the West Coast groundfish fishery, and the Alaska crab fishery.

NMFS is heavily involved in both international and domestic initiatives that we believe will help us better manage capacity in the fishery sector. Internationally, NMFS is working with the Department of State on an FAO-sponsored initiative on managing harvesting capacity throughout the world. Recently, FAO held a technical experts consultation in La Jolla, California, which will result in a report on defining and measuring harvesting capacity and analyzing the effectiveness of possible remedies to the capacity problem. This report is intended to provide the basis for the development of a FAO global plan of action. In the domestic sphere, NMFS has sponsored vessel and permit buyout programs in New England, Texas, and the Pacific Northwest. The agency has been working with both the Pacific (West coast groundfish) and North Pacific Fishery Management (Alaska Crab fishery) Councils to review the first industry funded buyout proposals developed under new authority for fishing capacity reduction under the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). These proposals have been initiated by the industry and are under review by the appropriate Councils. In addition to buyouts, the Councils continue to have the authority to design fishery management programs and amendments on a case-by-case basis. This allows Councils to recommend appropriate harvesting regimes that meet the individual needs of specific fisheries. Obviously, actions that remove and/or reduce excess harvest capacity at the least economic and social costs are the most desirable. We believe that the Councils provide an appropriate mechanism for evaluating the best ways to maximize the benefits to the industry while minimizing any potential costs and/or social impacts from capacity reduction efforts.

Now, let me address the issue before the Committee today. The Committee has expressed its interest in the Department's evaluating of the Americanization of the fisheries off the coasts of the United States. The term "Americanization" can be characterized as actions taken over the last two decades to ensure that the benefits derived from the use of Exclusive Economic Zone (EEZ) resources are effectively channeled to U.S. enterprises and, generally, to U.S. citizens. This effort began in earnest with the passage of the original Fishery Conservation and Management Act (FCMA) in 1976. The goals of the FCMA were to phase out foreign fishing off U.S. coasts and expand domestic capacity, optimize domestic benefits, achieve and maintain optimum yield from each fishery on a continuing basis, and enhance economic and employment opportunities. In addition to establishing the 200-mile Exclusive Economic Zone, the FCMA directed the Secretary of Commerce, through the development of fishery management plans, to provide the domestic fishing industry priority access to the fishery resources in the EEZ.

In 1979, the Department undertook a major effort to study the production potential and development patterns for underutilized species, the social costs and benefits of developing policy to accelerate utilization of fishery resources in the EEZ, and the export market opportunities for underutilized species. Based on these findings, the White House established a fisheries development policy that found that significant opportunities for industry expansion existed, that a partnership between the Federal Government, state and local governments, and the fishing industry was needed; that each region had different problems to be addressed; and that development for all sectors of the U.S. industry should be considered.

This policy led to the enactment of American Fisheries Promotion Act of 1980 (AFPA) which was directed towards expanding commercial and recreational fishing efforts in underutilized fisheries. The amendments specifically authorized financial assistance to industry through a competitive grant program (the Saltonstall/Kennedy grants program); supported the development or expansion of market opportunities for U.S. fishery products; and allowed foreign access to fishery resources in exchange for "chips," including trade concessions; harvesting technology transfers, foreign investment in U.S. processing facilities, and over-the-side-sales of U.S.-harvested fish (joint ventures). The "Processor Preference Amendment" to the MSFCMA was enacted in 1982 to give U.S. processors preference over joint venture processors for fishing allocations. This had the effect of accelerating the phase-out of joint venture processing and boosting investment in U.S. harvesting and processing capacity. Finally, the 1987 Anti-Reflagging Act (ARA) sought to tighten domestic ownership requirements by increasing the minimum domestic share to 51 percent. During the period covered above, foreign fishing operations in the U.S. EEZ were progressively reduced and finally eliminated, and the harvesting sector was—at least apparently—fully Americanized by the end of the last decade.

The most straightforward way of determining whether the goal of Americanizing the U.S. fishing fleet has been achieved is to review the level of foreign fishing in the EEZ under General International Fisheries Agreements (GIFAs). GIFAs provide a mechanism by which a foreign nation can petition the U.S. for access to stocks for which U.S. harvesting effort is expected to take less than the total allowable harvest for that year. Participation in a GIFA is the only way foreign fishing vessels can participate in U.S. fisheries.

With the largest EEZ of any country in the world, the United States historically shared significant quantities of its fisheries resources with GIFA partners. The United States has negotiated GIFAs with many countries under authority of Section 201 (c) of the MSFCMA. GIFAs' set forth the terms and conditions under which foreign fishing activity may be permitted within the U.S. EEZ. I say "foreign fishing activity" because the MSFCMA broadly defines the word "fishing" so as to include, for example, at-sea processing. The United States currently has GIFAs in force, or is taking steps to extend GIFAs, with Estonia, Latvia, Lithuania, China, Poland, and Russia. In addition, the United States has had GIFAs with Bulgaria, Cuba, Denmark, European Union, German Democratic Republic, Iceland, Japan, Korea, Mexico, Norway, Portugal, Romania, Spain, and Taiwan.

GIFA partners were also permitted to send processing vessels into U.S. waters to receive U.S.-harvested fish under joint venture arrangements, but these activities dwindled in the early l990s. At present, the only foreign fishing activity occurring within U.S. jurisdiction is joint venture processing of U.S.-harvested fish off the northeast coast. We have permitted joint venture processing for Atlantic mackerel and herring by two processing vessels from Estonia and two others from Lithuania. Russia is preparing an application for one additional vessel. The total amount of fish available for these activities is 15,000 metric tons of mackerel and 40,000 metric tons of herring.

Activities in the Northeast under these permits provide a small but important outlet for U.S. fishermen who are coping with our rebuilding programs for the groundfish stocks. They have enabled four U.S. vessels from the States of Massachusetts and New Jersey to harvest almost 2,000 metric tons of mackerel and almost 500 metric tons of herring worth $375,000 and $30,000, respectively. Our rebuilding programs are headed in the right direction, and, in the meantime, delivering product to foreign processing vessels has allowed U.S. fishermen to continue to earn income during the rebuilding period for the major U.S. stocks.

We have also issued transshipment permits under Section 204(d) of the Magnuson-Stevens Act to one vessel each from Cambodia, Russia, and Panama to receive and transport processed mackerel from these operations. In addition, last year we issued transshipment permits to 14 Canadian herring transport vessels operating in the Gulf of Maine, as provided for under Section 105(e) of the Sustainable Fisheries Act.

While the Department can state that the Americanization of the U.S. fleet has been achieved, based on the relatively low level of GIFA-related fishing activity, it cannot provide the Committee with a clear picture of the ownership structures of the U.S. fishing fleet. The 1987 Anti-Reflagging Act sought to tighten domestic ownership requirements by increasing the minimum domestic ownership share to 51 percent but only for vessels documented after the date of enactment. However, it is clear that significant foreign participation remains because our maritime and cabotage laws enable foreign firms to retain and even increase ownership shares in some segments of the U.S. fishing fleet. While Commerce is not responsible for administering the ARA, welfare committed to working closely with the U.S.C.G. to en-

sure that all U.S. fishing vessels are properly documented before being allowed to participate in federally managed fisheries. However, fishing vessels documented prior to enactment of the ARA are exempt from the ownership requirements of that statute, resulting in approximately 25,000 U.S. fishing vessels for which there is a lack of knowledge about ownership. This lack of information constrains our ability to provide an analysis of the financial characteristics of the U.S. fishing fleet.

The Department applauds the Committee for its efforts to deal with national policy on the issues of excess harvesting capacity and Americanization. However, our fisheries are highly diverse and vary substantially in the nature of the fishing vessels deployed in different regions and in fisheries taking different species. In addition, our limited knowledge suggests that levels of foreign investment and ownership differ markedly from region to region. We need to be sensitive to the differing needs in various fisheries. While it would be appropriate for Congress to continue with the established trend of prospectively Americanizing U.S. fisheries, including increasing the U.S. ownership requirement, I would urge Congress to carefully examine any retroactive application of the ownership requirement. Such a measure could have possible unintended impacts on the financial foundation of those sectors of the fishing industry currently exempt from ownership requirements and who currently rely on foreign investment. The retroactive application of ownership requirements could also give rise to questions concerning compliance with U.S. obligations to foreign investors under certain international agreements.

The National Marine Fisheries Service is prepared to work with the Councils, the various fishery constituencies, and the Congress to determine the most appropriate course of action for our Nation's fishermen and fisheries. It is the Department's desire to reduce levels of harvesting capacity among all classes of fishing vessels to levels that are sustainable and provide the greatest economic benefit to the fishing industry and our Nation.

Mr. Chairman, this concludes my remarks and I am prepared to respond to questions from Members of the Committee.

STATEMENT OF REAR ADMIRAL ROBERT C. NORTH, U.S. COAST GUARD, DEPARTMENT OF TRANSPORTATION

Good morning, Mr. Chairman. I am pleased to represent the Coast Guard before this Committee's oversight hearing on Americanization of the U.S. fishing fleet. The Coast Guard is the agency responsible for implementing the provisions of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 (Public Law 100-239), commonly known as the Anti-Reflagging Act.

The primary purpose of the Anti-Reflagging Act was to prohibit the reflagging of foreign built processing vessels under the Magnuson Fisheries Conservation and Management Act. The Anti-Reflagging Act harmonized fisheries and maritime laws. It did this by imposing similar requirements regarding the documentation, ownership, manning, and construction of vessels engaged in the fisheries trade as are imposed on vessels engaged in coastwise trade. The Act also broadened the definition of fisheries to include activities previously excluded. This harmonization was accomplished by modifying the U.S. documentation laws so that only U.S. built vessels are admitted into fishery related activities, and vessels lose fisheries privileges if rebuilt in a foreign country.

Prior to enactment of the Anti-Reflagging Act, vessels engaged in fish processing activities were not required to be documented with a fisheries endorsement. As a result, it was possible to use foreign-built vessels for fish processing activities. Following enactment of the Anti-Reflagging Act, documentation with a fisheries endorsement is required for fish processing.

The Anti-Reflagging Act amended the ownership requirements for vessels in the fisheries trades. Prior to enactment of the Anti-Reflagging Act, it was possible for corporations organized under U.S. laws and meeting citizenship criteria for the corporate president, chairman of the board, and control of the board of directors, to document vessels for use in U.S. fisheries; even if 100 percent of the stock was owned by foreign citizens. Today, U.S. citizens must own 51 percent of the stock, except for a vessel that is grandfathered from the American control provisions of the Anti-Reflagging Act.

The Anti-Reflagging Act also addressed the past practice of using foreign crew and officers on commercial fishing industry vessels. Today, the citizenship requirements for fishing industry vessels are identical to the requirements for other commercial vessels in the Exclusive Economic Zone; except when fishing exclusively for highly migratory species.

To carry out its responsibilities under the Anti-Reflagging Act, the Coast Guard has amended its regulations in Title 46 Code of Federal Regulations. These regulations are enforced in the Coast Guard's daily regulatory activities and in our compliance and enforcement boarding activities.

Two portions of the Anti-Reflagging Act proved problematic. These were the provisions intended to protect the interests of investors already committed to the U.S. fisheries. These provisions dealt with foreign rebuilding and ownership. I will address each separately, because each has had a different impact on the Americanization of the U.S. fishing industry.

Prior to the Anti-Reflagging Act, fish harvesting vessels had to be built in the U.S., but could be rebuilt abroad. Section 3 of the Anti-Reflagging Act, among other things, amended 46 U.S.C. 12108 by prohibiting vessels seeking fishery endorsements from being rebuilt in foreign shipyards. Section 4 of the Anti-Reflagging Act made new 46 U.S.C. 12108(a)(3) inapplicable to a vessel which (1) was built in the United States before July 28, 1987 and (2) was rebuilt in a foreign country under a contract entered into before July 11, 1988, and (3) was purchased or contracted to be purchased before July 28, 1987 with the intent to use the vessel in the fisheries. This rebuilding savings clause, or grandfather provision, also required that a vessel rebuilt under the above circumstances had to be redelivered to the owner before July 28, 1990. Because the window of eligibility for this exemption has long passed, no additional vessels may be rebuilt outside of the U.S. and enter or reenter the U.S. fisheries. Furthermore, no additional foreign built vessels may be documented for use as fish processors.

Section 7 of the Anti-Reflagging Act, among other things, amended 46 U.S.C. 12102 by requiring a majority of voting shares in a corporation owning a fishing vessel to be owned by U.S. citizens. Section 7 of the Act also provided a savings clause, or grandfather provision. Under this grandfather provision, the "American control" provision requiring 51 percent U.S. ownership does not apply if before July 28, 1987 the vessel was (1) documented and operating as a fishing vessel in the EEZ; or (2) was contracted for purchase for use as a fishing vessel in the U.S. fisheries. The Coast Guard, following careful examination of the provision of the Anti-Reflagging Act grandfathering vessels from the American control provision, concluded that the grandfathered provision ran with the vessel. Although this was seemingly contrary to the purpose of the law, grandfather provisions by their very nature run contrary to the overall purpose of a statute. The Coast Guard was aware there were many persons who believed the ownership grandfather provision should terminate on sale or transfer of the vessel. However, after deliberating this issue, the Coast Guard concluded the plain language of the statute did not allow the Coast Guard to adopt a rule that the ownership grandfather provision's protection terminates when there is a change of ownership or control. As a result, almost 28,000 vessels currently documented for the fisheries are eligible for the ownership grandfather. This means that they can be sold and still retain full fisheries privileges, without having to meet the 51 percent U.S. citizen ownership provisions. Furthermore, those vessels can be rebuilt in the U.S. into much larger vessels, and still be employed in the fisheries by foreign controlled corporations.

Recently, the Senate began consideration of the American Fisheries Act of 1998 (S. 1221), a bill which, among other things, directly addresses the problems that arose from the ownership and rebuild grandfather provisions of the Anti-Reflagging Act.

First, S. 1221 would repeal the ownership grandfather effective 18 months after enactment. In addition, it would increase the American control provisions for entities owning fishing vessels from 51 to 75 percent. Entities currently owning documented fishing vessels and which meet the majority American control provisions of the Anti-Reflagging Act would have 18 months to conform to the new standard. The proposed ownership standard would place fisheries on a par with the ownership standard for coastwise trade.

Additionally, S. 1221 would also provide for the orderly phase out of larger vessels, including all of the processing vessels known to have been deemed grandfathered from the rebuild prohibition of the Anti-Reflagging Act. This would remove the remaining 20 vessels which were rebuilt foreign under the grandfather provision of the Anti-Reflagging Act.

The Coast Guard appreciates the opportunity to testify about this important matter and stands ready to work with the Congress on this issue. I would be happy to answer any questions you may have.

STATEMENT OF JIM GILMORE, AT-SEA PROCESSORS ASSOCIATION

Thank you, Mr. Chairman and Members of the Committee for the opportunity to testify before the Subcommittee on issues relating to the conduct of the North Pacific fisheries, including the relative contributions of various sectors of the fishing and fish processing industry to the domestic economy. I am Jim Gilmore, Director of Public Affairs, for the At-sea Processors Association (APA).

APA represents companies that operate twenty-four U.S.-flag at-sea fish processing vessels. APA's catcher/processors are principally engaged in the Bering Sea pollock fishery and the West Coast whiting fishery. By volume, these two fisheries account for almost 30 percent of all fish landed in the U.S. Over 90 percent of the fleet's revenues are derived from its participation in these two fisheries. Pollock and whiting are harvested using trawl nets, cone-shaped fishing nets towed behind the vessel in the middle of the water column. These two fisheries are widely recognized as two of the cleanest fisheries in the world, that is, the target species comprise about 98 percent of the catch.

In the context of this hearing on the status Americanization, it is important to emphasize that the fleet is entirely composed of American-flag vessels operated by U.S. corporations. The fleet substantially exceeds Federal requirements that at least 75 percent of the crewmembers on board U.S. fishing and fish processing vessels be American citizens or qualified U.S. residents. APA estimates that over 90 percent of the workforce in the pollock catcher/processor fleet consists of American citizens or permanent U.S. residents. The at-sea pollock processing fleet alone directly employs about 4,000 American workers. A majority of the workers live in Washington state, but Alaska, Oregon, California and Idaho residents are also strongly represented.

American catcher/processor vessels supply substantially more of their products to the domestic consumer market than their competitors. Our principal competitors in the pollock fishery are onshore processors located at, or near, Unalaska on the Aleutian Islands chain. Two Japanese multinational seafood companies, Nippon Suisan and Maruha, own or control roughly 70 percent of the Bering Sea onshore pollock processing capacity. Under current allocations, the North Pacific Fishery Management Council reserves more than one-third of the Bering Sea pollock harvest for an onshore processing sector that is dominated by Nippon Suisan and Maruha.

Unlike the at-sea processing sector, there is no U.S. hire requirement applied to onshore processors. A study commissioned by the National Bank of Alaska reports that onshore processors employ a high percentage of Third World foreign guest workers who live in company bunkhouses and send home most of their wages. Virtually all of the onshore pollock production is made into *surimi,* most of which is exported to Japan for valued-added secondary processing and distribution.

The balance of APA's testimony focuses on the following four issues:

1. The U.S.-flag pollock catcher/processor fleet provides greater national benefits than competing industry sectors. The U.S.-flag fleet provides family wage jobs for approximately 4,000 workers. A recent State of Alaska study reported wages in the at-sea sector are two and one-half times higher than wages paid to workers in onshore processing plants. At-sea processors also provide a significantly higher percentage of pollock products to the domestic market than onshore competitors, thus creating jobs and wealth in the U.S. through value-added activities. Because fish are processed within hours of being caught in the at-sea sector, higher quality is also achieved; therefore, export earnings are maximized on pollock products that are shipped to overseas markets.

2. Twenty-three U.S. vessels were rebuilt abroad in the 1980's in accordance with requirements of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 (the Anti-Reflagging Act) and documented as vessels of the United States with fisheries endorsements. The vessels received U.S. Coast Guard letter rulings approving their conversion to catcher/processors. Seventeen of these vessels currently participate in the Bering Sea pollock fishery, comprise more than half the pollock catcher/processor fleet, and enhance U.S. competitiveness in the seafood industry. The right of these vessels to continue to participate in the fishery should not be in question.

3. All sectors of the Bering Sea pollock fishing industry are responsible for the overcapitalization that has occurred in the harvesting and processing sectors. Congress ought not to legislate certain participants out of business for the benefit of companies seeking preferential access to fishery resources, including Tyson Foods which is a recent and appar-

ently unsuccessful entrant into the fishery. Competing interests should work together to resolve the problem of overcapitalization in a manner fair and equitable to all participants.

4. APA supports eliminating the ownership grandfather contained in the Anti-Reflagging Act, thus requiring at least 51 percent or more of the stock in U.S. corporations owning fishing and fish processing vessels be held by U.S. citizens.

1. The At-sea Processing Sector Provides the Greatest Benefits to the Nation.

The Magnuson-Stevens Fishery Conservation and Management Act (the Magnuson-Stevens Act) was amended in 1978 to emphasize the need "for a national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska. . ." At that time, the enormous and healthy North Pacific groundfish fishery was dominated by foreign-flag fishing and fish processing vessels because the U.S. industry lacked sufficient harvesting and processing capacity.

APA represents the U.S.-flag catcher/processor fleet that contributed substantially to achieving Americanization of the fisheries. The association's member vessels cover the spectrum from vessels with little or no foreign investment to vessels in which foreign investment is substantial. We also represent vessels that were built or rebuilt exclusively in the U.S. and those U.S.-built vessels that were converted overseas in the 1980's in conformance with the Anti-Reflagging Act. One thing that all of the vessels have in common is that they participate in the sector of the Bering Sea pollock industry that produces the greatest benefits to the U.S.

a. U.S.-flag Catcher/Processors Provide Family Wage Jobs for Americans.

As stated above, Federal law mandates that U.S. residents comprise 75 percent of the crew on board U.S.-flag at-sea fish processing and fishing vessels. There is no similar requirement for the three large companies operating onshore Bering Sea pollock processing plants. As noted above, a report prepared for the National Bank of Alaska found that foreign guest workers account for a significant percentage of the work force in shoreside plants. A recent survey conducted by the Alaska Department of Community and Regional Affairs discusses the wage disparity between the onshore and at-sea processing sectors. Wages for crew members on catcher/processors are about two and one-half times higher than for employees holding comparable jobs onshore.

b. Catcher/Processors Maximize the Value of U.S. Fishery Resources.

Surimi and fillets are the primary products made from pollock. In the pollock "A" season, valuable roe products are produced, the flesh of the pollock is then processed into fillet and *surimi* products. With respect to the principal processed products, *surimi* accounts for about 60 percent of the catcher/processor fleet production; fillet-type products account for 40 percent. The product mix for the Japanese-dominated onshore processing sector is about 90 percent *surimi* and 10 percent fillets.

Most *surimi* is exported to Asian markets, principally Japan, where Nippon Suisan's and Maruha's secondary processing plants and distribution networks capture the added value. In short, Nippon Suisan's and Maruha's U.S. subsidiaries are geared towards capturing America's pollock resource primarily to support parent company operations in Japan.

In testimony provided to the Senate Commerce Committee in March, major domestic seafood buyers, Long John Silver's, Gorton's Seafoods, and LD Foods stated that the Japanese owned plants produce *surimi* regardless of how low *surimi* prices might drop or fillet prices might rise. Domestic seafood buyers are placed at a significant disadvantage in attempting to purchase pollock products from onshore processors because production by the Japanese-owned plants is dedicated almost entirely to feeding the home market of these vertically integrated multinationals.

The U.S.-flag catcher/processor fleet's sales of pollock fillets to the domestic market provide additional evidence of how the at-sea sector provides greater national benefits than its onshore competitors. By relying on the domestic market for 40 percent of our sales, jobs and value are created not only at the secondary processing stage but throughout the distribution chain to retail and food service outlets. The benefits are not inconsequential since last year the catcher/processor fleet produced 100 million pounds of pollock fillet-type products.

In addition to the issue of product mix, quality issues affect value. The National Marine Fisheries Service's (NMFS') testimony to the Senate Commerce Committee on S. 1221 confirmed that at-sea processed pollock products are generally of higher quality and consequently command a higher price in the marketplace. Thus, in the *surimi* market, U.S. export earnings are maximized by at-sea processing of pollock. Because we earn higher prices for our products, catcher/processors that supplement

their own harvests by purchasing fish from catcher vessels provide the ancillary benefit of paying higher prices to fishermen than our shoreside competitors.

Catcher/processor production of fillet products reduces U.S. dependence on the Japanese market for seafood sales. Currently, the troubled Japanese economy, and the accompanying decline in the value of the yen, means U.S. producers are facing near record low prices for *surimi* products. Meanwhile, the domestic pollock fillet market is quite strong. Maintaining a viable and diverse catcher/processor fleet that adjusts its product mix in response to market conditions will enable the U.S. to realize greater national benefits from fishery resources.

c. Catcher/Processors Offers Greater Opportunities for Fishing Communities.

Recent changes to the Magnuson-Stevens Act require consideration of the needs of fishing communities. The at-sea fish processing sector, particularly the catcher/processor fleet, makes vital contributions to Northwest fishing communities by providing direct and indirect employment for thousands of fishermen, processors and support industry personnel. The importance of the fleet to the maritime economy should not be overlooked. The U.S.-flag catcher/processor fleet spends $15-20 million annually in Northwest and Alaska shipyards. This economic activity combined with the other substantial contributions of the fleet to local communities prompted the Washington State Labor Council and the AFL–CIO's Maritime Trades Department to oppose proposals to revoke fisheries endorsements for vessels in the fleet.

The catcher/processor fleet also makes important economic contributions to the Alaskan economy. In 1991, the catcher/processor fleet initiated training and hiring programs for residents of Western Alaska native communities, a precursor to the Community Development Quota (CDQ) program. The CDQ program implemented a year later formalized efforts to create jobs and economic opportunities for more than 50 Western Alaska native communities. Catcher/processor companies became partners in the six CDQ groups that formed. Two of the CDQ groups have invested in at-sea processing vessels or in companies that operate such vessels. Further consolidation or shrinking of the fleet, particularly by legislative fiat, threatens those investments. It could also reduce the value of the 200 million pound annual CDQ pollock apportionments since fewer companies would be left to bid on contracts.

It is also important to note that in addition to providing an important market for pollock fishermen, catcher/processors provide alternative marketing opportunities in Alaska's salmon fishery. Some catcher/processors also operate solely as motherships in the Pacific whiting fishery taking deliveries from smaller Northwest trawl fishing vessels.

This situation contrasts with the onshore pollock processing plants that are located in only two Alaska communities, Unalaska and Akutan. No doubt, the onshore Bering Sea pollock plants make important economic contributions in the area, but perhaps less so than one might think. For example, the local tribal council in Akutan wrote that "few local residents have elected to work at the (Trident Seafoods) plant because of the conditions related to processing line jobs: very long hours at minimum wages." With a high percentage of foreign guest workers employed onshore, operating in areas remote from other Western Alaska communities, and producing primary processed products for overseas parent companies, Congress should carefully consider the effects of proposals that harm U.S.-flag catcher/processors.

2. The Growth of the Catcher/Processor Fleet, While Rapid, Was Anticipated. The Fleet, Including Vessels Re-built Overseas in the 1980's, Enhances U.S. Competitiveness.

In 1987, most of the Bering Sea pollock harvest was being harvested by U.S.-flag fishing vessels, but was being processed on board foreign-flag processing vessels operating in the U.S. 200-mile zone. The U.S. fishing industry was slowly making progress to develop domestic processing capability, principally by building catcher/processor vessels. The priority accorded U.S. processors under the Magnuson Stevens Act over foreign processors was helpful, but there were many hurdles to overcome, including acquiring state-of-the-art technology, gaining market access in Japan, and perhaps most challenging, obtaining financing and willing investors.

Congress recognized that one circumstance could preclude development of domestic processing capability—the right of foreign-built, foreign-flag processing ships to simply re-flag U.S. To prevent the reflagging of these vessels, which were fully amortized and would make development of a U.S.-flag catcher/processor fleet problematic, Congress acted to bar the reflagging of foreign built processing vessels to U.S.-flag.

Testimony provided in mid-1987 at Congressional hearings on legislation to bar reflagging affirmed U.S. fishing companies intent on harvesting and processing pol-

lock were purchasing U.S. vessel hulls for the purpose of rebuilding them overseas into catcher/processors. It was already common knowledge that U.S. hull vessels were being sought for these planned conversions. In January 1987, the Maritime Administration even placed advertisements in fishery trade publications offering for sale offshore oil industry vessels that had been repossessed by the agency, vessels which were "suitable for conversion to a number of fishing applications."

Foreign rebuilding of U.S.-built vessels for the purpose of operating in U.S. fisheries was permitted prior to enactment of the Anti-Reflagging Act. The decision to take these projects abroad was not surprising; after all, foreign shipyards had been building catcher/processors since the 1950's. U.S. shipyards had no experience in constructing fishing vessels that included state-of-the-art processing facilities on board the vessel. It was clear that conversions would entail significant rebuilding since accommodating an onboard *surimi* processing plant, quarters for a crew of 100 or more, adequate galley facilities, and other non-fishing functions is virtually impossible to fit into a vessel smaller than 275 feet in length. Bob Morgan of Oceantrawl, a company that rebuilt overseas three of the largest vessels in the Bering Sea pollock fishery, described the scope of the vessel projects in testimony before the Senate Commerce Committee.

Lists of vessel projects were circulated in Congress and dozens of overseas rebuild projects were identified. Identifying potential business. some U.S. shipyards lobbied Congress to expand the scope of the legislation beyond simply barring the reflagging of foreign built processing vessels. The yards sought to limit foreign rebuilding of U.S. vessels as well. Congress acted to address shipyard interests while protecting investments made by those already engaged in overseas conversion projects. On July 28, 1987 the House Merchant Marine and Fisheries Committee "marked-up" anti-reflagging legislation that provided a rebuild "grandfather" to U.S. vessels being converted overseas to catcher/processors *as long as the vessel was contracted for purchase by the bill's date of enactment.*

In other words, the Committee created a window for new projects beyond those projects already in the pipeline on the date of the Committee "mark-up." By July 28th, twenty-four vessels had already received Coast Guard rulings approving the planned overseas conversions as consistent with existing law. A total of 36 vessel projects had been identified by the date of the "mark-up." A list circulated by Marco Shipyard on August 3, 1987, just one week after the "mark-up" claimed that more than 100 foreign rebuild projects were planned. With this information in hand, the rebuild provision was tightened significantly during House floor consideration of the anti-reflagging legislation in November, 1987. A retroactive provision was added providing that *only vessels contracted for purchase by July 28, 1987—the date of the House "mark-up," not the date of enactment—were eligible for the rebuild grandfather.* The bill even included language to make eligible for rebuilding abroad one vessel project that did not meet the revised, stricter standards included in the final version of the Act.

Since 1987, Congress has not held a single hearing, nor has legislation been introduced, that evidenced concern about the number of rebuilt catcher/processors qualified to participate in U.S. fisheries under the rebuild "grandfather" provisions of the Anti-Reflagging Act. There was an unsuccessful court challenge to the Coast Guard's interpretation of the ownership grandfather. In a unanimous opinion the Court of Appeals for the District of Columbia ruled that the plain language of the statute required the Coast Guard to interpret the statute as it had.

A 1990 General Accounting Office report found that passage of the Anti-Reflagging Act effectively limited the rebuilding of U.S. vessels abroad. No foreign rebuilt vessels, or any other pollock catcher/processors for that matter have entered the fishery since 1990. The Anti-Reflagging Act has been amended once since 1987. The 1989 Coast Guard authorization bill contained a provision providing an exemption from the Anti-Reflagging statute to allow a foreign built vessel to be reflagged and to enter the Bering Sea pollock fishery as a mothership vessel. In short, two years after enacting legislation to bar the reflagging of foreign vessels as U.S. processors and to limit foreign conversions of U.S.-built vessels, *Congress made a special exception to allow a foreign built vessel to enter the fishery.* Ironically, this late entrant into the fishery, which is controlled by Maruha, will not lose its fisheries endorsement under Senate legislation that eliminates certain U.S.-built, foreign rebuilt catcher/processors.

3. All Sectors of the Bering Sea Pollock Fishery Are Responsible for Overcapitalization and Should Work Cooperatively on a Solution.

Overcapitalization in the Bering Sea pollock fishery is a serious concern. The fishery management regime, which rewards those who catch fish the fastest, creates an incentive for continued capitalization by participants. Fishermen and processors

alike have obliged. Neither the current moratorium on new vessel entry into the fishery, nor the approved license limitation program developed by the North Pacific Fishery Management Council, address the issue of overcapitalization because neither management measure stops the "race for fish." As a result, virtually all participants in the pollock industry—onshore plants, catcher vessels, and at-sea processors—contribute equally and substantially to overcapitalization.

The economic pressures sparked by overcapacity that face the fishing industry have led many industry members to seek a rational management regime that focuses on ending the race for fish. Others, such as Tyson Foods, which bought into the fishing industry in 1992, and Trident Seafoods, are seeking to legislate competitors out of business. Their preferred vehicle is S. 1221, the Senate bill which revokes fishery endorsements for certain U.S. vessels rebuilt overseas in the 1980's. Their proposal to remove fishing rights from 18 U.S.-flag catcher/processors valued at approximately $400 million raises numerous issues of policy and law, including assertions that the revocation of fisheries endorsements constitutes a "takings." Of course, it will be left to the courts to determine the constitutionality of any such action, but it is clear that serious equity issues are raised by proposals to revoke fishing rights for vessels that have participated lawfully and responsibly in the Bering Sea pollock fishery since 1990 and earlier. Regardless of the legal avenue available to vessel owners, revocation of fishing rights for vessels will lead to substantial economic and social hardship for affected workers, disruptions to the market place, and other significant adverse impacts.

Even if the group of vessels targeted by S. 1221, or any other group, is excluded by law from the North Pacific groundfish fishery, overcapitalization would remain a problem. NMFS concluded in its Senate Commerce Committee testimony on S. 1221 that arbitrarily revoking fishing privileges for certain vessels is not an effective method of addressing overcapitalization. The agency stated that capacity removed from the pollock fishery without ending the race for fish would be replaced within one to two years.

It is important to remember that despite concerns about overcapitalization, North Pacific fish stocks in general, and the pollock resource in particular, are healthy and well managed. Despite the relatively long-standing presence of excess harvesting and processing capacity in the pollock fishery, fishery managers continue to set the allowable biological catch (ABC) level at or below the safe harvest level as determined by Federal, state and university scientists. Catches are closely monitored and recorded by Federal fishery observers onboard all vessels longer than 125 feet. Electronic reporting of catch data ensures that harvest amounts are calculated on a real time basis so the quotas are not exceeded.

a. Overcapitalization in the Onshore Pollock Processing Sector.

In 1992, the Federal Shoreside Processor Preference rule was imposed requiring that 35 percent of the annual Bering Sea pollock harvest be delivered onshore for processing. Three large seafood companies, Nippon Suisan, Maruha and Trident Seafoods are the principal beneficiaries of this fishery management regulation. Onshore production, which increased significantly from 1987 to 1991, has remained relatively stable during the 1990's. While production levels remain relatively constant, the length of the onshore fishing season has declined from about 150 days a year when the 1992 Shoreside Preference rule was implemented to 75 days in 1997. According to the Department of Commerce's 1990 report on the Anti-Reflagging Act, onshore pollock processing capacity was 290,000 metric tons during the year round fishery in 1988; onshore capacity in 1998 is at least 1 million metric tons, or three times the annual onshore production levels.

In sum, onshore processors do not compete against catcher/processors in a race for the fish. They compete only against one another. After years of expanding their plants, upgrading processing equipment, and financing and purchasing catcher vessels with increased fishing power and capacity, onshore processors are suffering the consequences of overcapitalization. The onshore processors are currently seeking a change in the Shoreside Preference rule that would give them an increased percentage of the annual pollock harvest. Because overcapitalization onshore is a self-inflicted problem, their case for gaining an increased share of the pollock harvest is weak. To increase their chances of acquiring a greater onshore pollock allocation, the onshore processors' benefit from legislating catcher/processors out of business and demanding their share of the harvest.

b. Both Catcher Vessels and Catcher/Processors Have Contributed to Overcapitalization in the Harvesting Sector.

Some claim that the development of the U.S. catcher/processor fleet preempted opportunities for catcher vessel operators. Those making that claim point to catch to-

tals from the mid-1980's when only a half dozen U.S.-flag catcher/processors were operating. At that time, virtually all of the harvest was taken by catcher vessels operating in joint venture operations, that is, they were delivering their catch to foreign-flag processing vessels operating within the U.S. 200-mile zone. A number of catcher vessel operators, taking advantage of U.S. processor preference provisions in the Magnuson-Stevens Act, embarked on projects to build U.S. catcher/processors. Thus, much of the harvest taken by the catcher vessel sector in the mid-1980's and then by the catcher/processor sector by 1990 went to the same individuals or companies; they had simply made the transition to a more Americanized fishing industry.

Interestingly, since 1991 the catcher vessel sector has increased its share of the annual pollock harvest from 35 percent to just over 50 percent. The catcher/processor sector share of the catch has declined from 65 percent to just under 50 percent. The number of catcher boats and the fleet horsepower have increased by more than 40 percent, the tank capacity is up by one-third, and the catch per day has grown by nearly 70 percent. These figures demonstrate dramatically that overcapitalization in the catcher vessel sector continued unabated.

To be sure, the catcher/processor sector continued to add capacity as well to try to stay competitive in the race for fish. The solution to overcapitalization lies in adopting a rational fishery management system that ends the race for fish and that is a position advocated by the catcher/processor fleet (and the catcher vessel fleet) throughout the decade. The solution is not to have Congress select allocation winners and losers by summarily revoking fishing rights for some long-term participants for the short-term benefit of a few.

4. APA Supports Eliminating the Anti-Reflagging Act Ownership Grandfather.

The principal purpose of the Anti-Reflagging Act, as indicated by its title, was to prevent the reflagging of foreign-built processing vessels from foreign to U.S.-flag status. After considerable debate and negotiation in Congress, an ownership provision was included. Prior to passage of the Anti-Reflagging Act, there was no limit on how much, or how little, interest foreign nationals could own in a U.S. corporation operating fishing or fish processing vessels. The Anti-Reflagging Act imposed a requirement that a minimum 51 percent interest in a corporation owning a fishing or fish processing vessel must be held by U.S. citizens.

A "grandfather"provision was included and that right attached to an existing qualified fishing vessel. There is no reference in the statute to the "grandfather" right applying to the vessel owner and, therefore, almost 30,000 fishing vessels enjoy "grandfather" rights under the Act. Some assert that this result was not Congress intent, but the legislative history of the Anti-Reflagging Act indicates otherwise. It is replete with statements opposing limits on foreign investment in U.S. corporations operating fishing and fish processing vessels. It is not at all surprising that in the "give and take" of the legislative process that compromise language would impose a prospective ownership standard, but that existing vessels and vessel projects would be "grandfathered." The significance, of course, of "grandfather" rights running with the vessel, and not the owner of the vessel, is that the "grandfather" does not expire when a transfer of ownership in the vessel takes place.

The Coast Guard, relying on a plain reading of the statute, issued a rule confirming that the ownership "grandfather" attached to the vessel. The agency's interpretation was challenged in court. The U.S. District Court of Appeals unanimously upheld the Coast Guard's interpretation. Thus the situation today that most fishing vessels remain "grandfathered" under the Act and are not subject to the 51 percent U.S. ownership standard adopted in 1987.

APA supports eliminating the ownership "grandfather" while providing for a scheduled phase-in of U.S. ownership in corporations operating fishing and fish processing vessels, at or perhaps above, the 51 percent level. If Congress acts to eliminate the ownership "grandfather," APA suggests that the following points be considered. First, companies should be granted sufficient time to come into compliance with new ownership requirements. We suggest that Congress establish a three-year time period. Second, preserve the competitiveness of U.S. seafood companies in the world marketplace. If Congress acts to increase the level of U.S. citizen ownership and control in American corporations operating fish and fish processing vessels, care should be given not to preclude, or impede, domestic seafood companies from signing long-term marketing agreements with foreign buyers or arranging for financing from abroad. Third, protect the interests of U.S. shareholders in corporations required to restructure their ownership because of a change in the law. The Senate bill, S. 1221, imposes a 75 percent U.S. ownership and control standard. Failure to meet that new standard would result in revocation of a vessel's fisheries endorsement, rendering the vessel valueless for use in U.S. fisheries. This provision raises a possibility that foreign investors holding more than 25 percent ownership

interest in vessels might refuse to sell their share to their American partners. Faced with a loss of fishing rights in the U.S., American partners could be leveraged into selling their vessel (or buying out their foreign partner) on unfavorable terms.

Domestic ownership raises another important issue. Serious consideration should be given to the effects of foreign control of the Bering Sea onshore pollock processing sector given the dominance of Nippon Suisan and Maruha in the Japanese *surimi* market. If Congress believes that limiting foreign investment in the fisheries is necessary to increase national benefits, then perhaps similar ownership limitations should be applied to the onshore processing sector. A recent annual report issued by Maruha boasts that the conglomerate controls 100,000 metric tons of *surimi* annually, or one-quarter of the annual Japanese consumption. Nippon Suisan is a similar sized company. Without extending limits on ownership to the foreign-dominated plants, fishermen will continue to receive less than 9 cents per pound for pollock while Nippon Suisan and Maruha realize all of the economic benefits of value-added activities from primary processing through sale to the Japanese consumer. These rules are at least as important to a truly Americanized fishery as proposals requiring foreign divestment of ownership in the catcher/processor fleet.

Once again, thank you for the opportunity to appear here today. I am pleased to answer any questions that you might have.

STATEMENT OF MICHAEL W. KIRK, PARTNER, COOPER, CARVIN & ROSENTHAL, PLLC, COUNSEL FOR THE AMERICAN FISHERIES ACT COALITION

Mr. Chairman, members of the Committee, I appreciate the opportunity to be here today. I represent the American Fisheries Act Coalition, an association of domestic fishing vessel owners and operators. My purpose today is to lay to rest an extremely tenuous argument made by some opponents of the Senate bill that the legislation would work a taking of private property without providing just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

Briefly, the American Fisheries Act is designed both to further the long-standing congressional policy to "Americanize" United States fisheries and to address the problem of over-capacity in those fisheries. The bill would accomplish these objectives by (1) establishing a new "corporate control" standard for the owners of fishing vessels seeking fishery endorsements; (2) closing certain loopholes in the citizen control and foreign rebuild provisions of the Commercial Fishing Industry Vessel Anti-reflagging Act of 1987 that have allowed foreign-controlled and foreign-rebuilt fishing vessels to obtain fishery endorsements; and (3) prohibiting the issuance of new fishery endorsements for large fishing vessels and requiring that the fishery endorsements for certain such vessels be permanently surrendered.

Enactment of the bill will result in the loss of fishery endorsements for certain United States flag fishing vessels currently operating within the Exclusive Economic Zone ("E.E.Z."), including vessels that were purchased, built, or rebuilt in reliance upon the loopholes in existing law making such vessels eligible for fishery endorsements.

My partners Charles Cooper, Vincent Colatriano, and I have analyzed the claim that the bill could effect a taking of private property in some detail, and I summarize our conclusions today. At the most fundamental level, the Senate bill regulates access to the fish in the sea, and no one asserts a property right to the fish.

As an initial matter, we have concluded that no reasonable claim can be made that the Senate bill would result in a *physical* taking of the vessels, for the bill neither directly appropriates the vessels, nor ousts the owner of possession of the vessels, nor requires the owner to acquiesce in a physical invasion or occupation of the vessels. Indeed, the bill's opponents do not claim that a physical taking would occur. Any takings challenge, therefore, must allege that the bill effects a "regulatory taking" of the vessels. Analysis under either of the two broad conceptual approaches to regulatory takings yields the inescapable conclusion that the bill does not effect a regulatory taking of fishing vessels.

Opponents argue that, under the Supreme Court's decision in *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003 (1992), the bill effects a taking of vessels because it somehow denies the owners "all economically beneficial use" of those vessels which no longer qualify for fishery endorsements. For several reasons, the *Lucas* analysis is inapplicable to the bill.

The *Lucas* decision contains language suggesting that the "deprivation of all economically beneficial use" analysis is limited to real property. It is unlikely, therefore, that the *Lucas* test would even apply to governmental regulation of property other than land. But even if the *Lucas* test applies to regulation of personal prop-

erty, it is unlikely that the value of affected fishing vessels will be so significantly diminished by the bill that the bill can be said to deprive vessel owners of all economically beneficial use of their vessels. The "all economically beneficial use" test, according to court decisions applying it, means upwards of 90 percent of the fair market value of the property in question. If the bill does in fact result in some loss in value, the loss could not possibly amount to such a high proportion of total value. For example, as to vessels failing the bill's new corporate control test, the bill merely requires domestic control which presumably could be effected by a sale either of the vessel itself or of an interest in the vessel-owning entity. Since any such sale would presumably take place at a price at or approaching fair market value, any loss in value would certainly constitute far less than all economically beneficial use. Even vessels that are forced to surrender their fishery endorsements would continue to be able to fish in waters outside the E.E.Z. Finally, any vessels that lose their ability to fish in the E.E.Z. could be converted to economically beneficial uses other than fishing. Many of the vessels in question, after all, were converted from nonfishing uses in the first place. In fact, I understand that at least one has actually been converted into a seismic research vessel, and a number of vessels have been put to use in foreign waters. The analyses put forward by the bill's opponents ignore these alternatives.

Those who argue that the bill would effect a taking similarly ignore an even more fundamental point. Since at least 1976, the Federal Government has maintained plenary authority to regulate access to the E.E.Z. A fishery endorsement merely allows fishing in the E.E.Z. subject to the government's authority to regulate. A fishery endorsement does not give the holder the assurance of use. To the contrary, fishing quotas in the E.E.Z. can be reduced to zero. Moreover, an endorsement holder has no right to exclude others from a given fishery—all who meet statutory requirements are entitled to receive an endorsement. Endorsement holders pay essentially nothing for the endorsement itself. These features of the endorsements confirm that a fishery endorsement is not private property; its revocation is not a taking. Rather, the endorsement is merely a permit to fish in waters over which the government retains complete authority.

A long line of cases considering the revocation of permits to perform activities—building, grazing, prospecting, mining, traversing, and fishing—on public land and government regulated waters holds that such revocations cannot rise to the level of a Fifth Amendment taking. In one such case, the United States Court of Appeals for the Eleventh Circuit noted that "both Federal and other state cases stand for the proposition that permits to perform activities on public land—whether the activity be building, grazing, prospecting, mining or traversing—are mere *licenses* whose revocation cannot rise to the level of a Fifth Amendment taking." *Marine One, Inc. v. Manatee County,* 898 F.2d 1490, 1492-93 (11th Cir. 1990) (emphasis in original); *see United States v. Locke,* 471 U.S. 84, 104-05 (1985) ("The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. . . . Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests."); *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 312 U.S. 592, 596 (1941); *Acton v. United States,* 401 F.2d 896, 899-900 (9th Cir. 1968), *cert. denied,* 395 U.S. 945 (1969); *Osborne v. United States,* 145 F.2d 892, 896 n.5 (9th Cir. 1944); *Burns Harbor Fish Co. v. Ralston,* 800 F. Supp. 722, 727 (S.D. Ind. 1992); *Organized Fishermen of Florida v. Watt,* 590 F. Supp. 805, 815-816 (S.D.Fl. 1984), *aff'd sub nom. Organized Fishermen of Florida v. Hodel,* 775 F.2d 1544 (11th Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986). In *Acton,* the Ninth Circuit held that a government license to mine uranium on public land was not property which, when canceled, entitled the licensee to compensation. Noting that the plaintiff had made large expenditures in reliance on the expectation that mining would be permitted to take place, the court made clear that the *value* of government permits and licenses does not transform a government privilege into property protected by the Takings Clause. Relying on an early Supreme Court decision involving grazing permits, the court reasoned:

> Unquestionably, the grazing permits were of value to the ranchers. They were an integral part of the ranching unit—indeed, the fee lands are practically worthless without them. But, 'the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be.' *Reichelderfer v. Quinn,* 287 U.S. 315, 319, 53 S. Ct. 177, 178, 77 L.Ed. 331.

Acton, 401 F.2d at 900.

Particularly instructive is *Organized Fishermen of Florida,* which considered whether the National Park Service's cancellation of permits to engage in commercial

fishing, as a preference to sport fishermen, in waters enclosed by Everglades National Park constituted a taking of private property. 590 F. Supp. at 815-816. The court held that despite the long-standing practice of allowing commercial fishing in the area in question, "the annual permits are merely a license to conduct commercial fishing activity, ... [are] a privilege granted by the Park Service, and [are] ... by [their] very nature, revocable." *Id.* at 815. Comparing the commercial fishing permit to the grazing licenses considered in *Acton,* that held:

> [A] permit for grazing has been considered "a privilege which is withdrawable at any time for any use by the sovereign without payment of compensation." Similarly, plaintiffs in the instant case have no Fifth Amendment taking claim.

Id. at 816 (citations omitted).

In sum, given that the Federal Government has plenary authority over fishing in the E.E.Z. and that a fishery endorsement merely grants to the holder the nonexclusive privilege to engage in commercial fishing in the E.E.Z., the revocation of a fishery endorsement—like the revocation of a grazing permit—does not trigger a claim for compensation. Accordingly, any resulting loss of value in a fishing vessel is also not compensable.

The same result is yielded under the *ad hoc* regulatory taking test announced by the Supreme Court in *Penn Central Transportation Co. v. New York,* 438 U.S. 104 (1978). This test calls for inquiry into (1) the character of the governmental action, (2) the economic impact of the action on a claimant, and (3) the action's interference with the claimant's reasonable "investment-backed" expectations." *See id.* at 124; *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984).

For many of the same reasons that the bill would not, under *Lucas,* deprive vessel owners of all economically beneficial use of their fishing vessels, it is doubtful that the "economic impact" of the bill, under the *Penn Central* test, would be considered particularly severe. These fishing vessels could be sold for fair market value, or if not sold, would still be able to fish in waters outside the E.E.Z., and, under certain conditions, in waters within the E.E.Z. Moreover, they can be converted to non-fishing uses.

The inquiry into the "character of the governmental action" also weighs heavily against a finding that the bill effects a regulatory taking. The bill merely seeks to refine standards for vessel documentation and endorsement, and to redefine the conditions under which foreign interests will be allowed to fish in United States sovereign waters. Both of these areas are well within the Federal Government's plenary and long-standing authority. The bill thus hardly represents an initial Federal foray into a new area; nor is it a dramatic departure from past regulatory practice.

These same considerations also defeat a claim that the bill unduly interferes with the reasonable investment-backed expectations of vessel owners. No provision of current law regarding the standards for issuing fishery endorsements can be read to provide some sort of governmental guarantee, contractual or otherwise, that those standards were permanent. Any such claim would amount to the assertion that whenever Congress tightens the standards for eligibility for Federal licenses or permits, it must compensate the adversely affected licensees. Such a rule would have the practical effect of handcuffing Congress from ever increasing the standards or requirements for Federal licenses or other privileges, and there is no principle of takings law that supports such a far-reaching proposition. Moreover, as under the *Lucas* analysis, the fundamental proposition that fishery endorsements, like other governmental licenses, do not create property interests in the licensees defeats any claim that the endorsements could form the basis for some type of reasonable investment-backed expectation that an endorsement, once obtained, would never be lost.

Our analysis, moreover, is unchanged by the United States Court of Federal Claims' recent decision in *Maritrans Inc. v. United States,* 1998 WL 214268, No. 96-483C (Fed. Cl. Apr. 24, 1998), cited by some in support of their arguments against the bill. In *Maritrans,* owners of single hulled oil barges are claiming that Federal regulation which phases out the use of single hulled oil vessels, in preference for double hulled vessels for environmental reasons, constitutes a taking of the single hulled barges. I should first note that the decision of the court does *not* decide whether the phasing out of single hulled tankers effects a taking. The opinion merely rejects two of the arguments presented by the government that would have barred a claim. But even if the court ultimately does order that compensation must be paid, the case is easily distinguished from the line of cases I described earlier concerning permits to use government land or waters. That the bill's opponents have even cited *Maritrans* suggests the difficulty they face fashioning a case that the bill takes private property.

In summary, whatever policy considerations may guide the members of this Committee as you deliberate over the merits of this legislation, the potential that the

Federal Government will be compelled to pay compensation to the owners of affected fishing vessels can safely be dismissed. Thank you.

STATEMENT OF DON GILES, PRESIDENT, ICICLE SEAFOODS, INC.

Thank you, Mr. Chairman, for the opportunity to provide a statement for the record concerning Icicle Seafood's views on legislation to Americanize the United States flag fishing fleet.

By way of introduction, Icicle Seafoods started in 1965 when a group of local fishermen and businessmen purchased a salmon cannery in Petersburg, Alaska. Today our seafood processing company continues to be 100 percent American owned, with a majority of our ownership held by Alaskan fishermen and employees. Icicle employs, at peak, over 2500 workers at our processing facilities in Alaska and Washington. As one of the largest American seafood processing companies, we have concentrated our business on all species of crab, fresh/frozen/canned salmon, fresh and frozen halibut, herring, sablefish, and surimi analog products. This year we are the crab processing partner for four of the six CDQ groups in western Alaska.

Icicle supports the goals of S. 1221, introduced by Senators Stevens, Breaux, Murkowski, Hollings, and Wyden. We believe that legislation should be enacted to Americanize our fisheries by "establishing a meaningful and enforceable standard of U.S. citizen ownership and control for U.S. flag vessels employed in the fisheries." Icicle also strongly supports the revocation of the fishery endorsements of foreign owned and foreign controlled factory trawlers that entered our fisheries contrary to the intent of Congress. However, we do have some concerns about the bill, which are explained below.

Americanization

As one of the few truly American seafood companies and one of the only major independent Alaskan processors left, we strongly support the full Americanization of our fishing industry. Because we are one of the very few independents within the seafood industry, we have no multi-national partners pressuring us to pursue specific agendas, actions or policies. We are concerned that S. 1221 may not be tough enough in terms of preventing foreign owned companies from controlling fishing and processing vessels. Today we have reason to believe there are highly integrated foreign-owned corporations that control fishing and processing vessels, as well as halibut and sablefish ITQ's, contrary to the intent of the law. In this regard Icicle would like to encourage the Subcommittee to consider strict and enforceable standards, such as those found in section 2 of the Shipping Act, 1916, to ensure that U.S. fishing and fish processing vessels are truly controlled by U.S. citizens.

Removal of Foreign Owned/Controlled Factory Trawlers

As a matter of fairness, we support the removal of the seventeen or so foreign owned or controlled factory trawlers that sneaked into our fisheries through a misinterpretation of the law by the U.S. Coast Guard. During the debate on the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, Icicle and two other American companies seriously looked into the design, construction, and proforma of a new U.S. built factory trawler. We collectively spent over $150,000 in securing bids from four major American shipyards. However, we ultimately came to the conclusion that it was not a prudent investment, considering the amount of over-capitalization that was pouring into the pollock fishery from foreign owned and foreign built factory trawlers that jumped through the loopholes of the 1987 Act. We believe our project was precisely the type of investment that Congress intended to encourage through the establishment of the American preference policy that provides priority access to our fishery resources to American fishermen and American processors. Icicle's plans to participate in the Alaska groundfish fisheries were preempted by foreign-owned and foreign built factory trawlers and we see no reason that these vessels should be allowed to continue to thwart the policies of the Congress.

Market Consolidation/Unintended Consequences

Icicle is concerned that if S. 1221 or similar legislation is enacted into law, it could have the unintended consequence of creating greater market concentration or excessive control of the fisheries within the hands of a few huge domestic and foreign controlled seafood companies. If pollock that had been previously harvested and processed by the vessels eliminated from the fishery through enactment of a new law now becomes available to only the remaining pollock participants, the effects will be detrimental. Under such a situation, their power will increase as a result of a windfall profit and increased impacts on the market. Some of these companies

are vertically integrated and/or are already dominant players, therefore they would now become even more powerful. Such an outcome could stifle competition within the industry and would not be beneficial to United States fishermen or independent shoreside processors like Icicle. Even though Icicle is not in the business of harvesting or processing pollock, we could be harmed by these unintended spillover effects of S. 1221 or similar legislation.

One way to address this issue is to add a provision to the legislation that would cap at current levels the amount of quota any large seafood company/entity could control. The term large seafood entity could be defined as any vessel owner or corporation that controlled X percent or more of the pollock landings over the previous three year period. We believe NMFS and the Council have this vessel landing history readily available. In determining who controls the quota NMFS should apply criteria similar to those used to determine control under section 2 of the Shipping Act, 1916, rather than the less rigorous review used today in the halibut/sablefish fishery. Such a provision would ensure that small vessels and processing companies benefit from removing foreign owned or controlled factory trawlers. Under this scenario, we would envision increased competition to purchase, process, and sell pollock end-products.

Another way to address corporate consolidation or excessive control within the fishery is to take a portion of the unallocated quota (quota made available as a result of removing foreign owned or controlled factory trawlers) and make it available to traditional American companies that were preempted from entering the fishery by the foreign owned and built factory trawlers. We think this approach would be good for the industry and are confident that specific fair criteria could be developed to guide this reallocation of quota to bona fide American companies. These criteria could include a company's history and investment in all fisheries, local employment, history of processing in the Bering Sea area, ownership structure, participation in community development programs and evidence of specific plans or projects that did not go forward because they were preempted by the foreign owned and built factory trawlers.

Conclusion

Icicle hopes that our comments will be useful to you as the Subcommittee considers legislation to continue the Americanization of the fishery that began with the Magnuson-Stevens Act. We support S. 1221 or similar legislation, and encourage the Subcommittee to include measures to address the concerns we have raised. If this were done, it would make the bill much stronger, and we urge your prompt action on such a bill. The long term health of the fishing industry makes it critical that Congress act soon to fully Americanize our fisheries and ensure that they are not dominated by huge corporations.

STATEMENT OF TCW SPECIAL CREDITS, LOS ANGELES, CALIFORNIA

Introduction

TCW Special Credits submits this statement to provide comments with respect to the general subject of United States ownership of fishing vessels and S. 1221, the American Fisheries Act, and requests that this statement be made a part of the June 4, 1998, hearing record.

TCW Special Credits is an affiliate of The TCW Group, Inc., a Los Angeles based investment management group that includes Trust Company of the West, a California trust company and bank. The TCW Group entities manage over $50 billion of assets on behalf of public and private pension and retirement plans, educational and college endowments, charitable foundations, and, to a lesser extent, certain mutual funds. TCW Special Credits is a California general partnership which serves as investment manager of specific funds, trusts and separate accounts under the TCW umbrella. As such, TCW Special Credits is a registered investment adviser regulated by the U.S. Securities and Exchange Commission pursuant to the Investment Advisers Act of 1940, and is a Qualified Pension Asset Manager regulated by the U.S. Department of Labor pursuant to the Employees Retirement Income Security Act of 1994.

Total assets under management by TCW Special Credits are approximately $1.5 billion today. Investors in these funds and accounts, like the clients of Trust Company of the West generally, consist mostly of large public and corporate pension plans, charitable and educational trusts, as well as some individual investors. Among the investors in the funds managed by TCW Special Credits are pension funds of nine states and municipalities, the endowments of 18 colleges and univer-

sities as well as 14 charitable foundations, and the retirement plans of 12 of Fortune's top 200 companies.

TCW Special Credits, as agent and nominee of the above-described funds and accounts, is the holder of record of a first preferred ship mortgage on the factory fishing vessel ARCTIC FJORD (Official No. 940866). The ship mortgage secures a term loan made to Arctic Fjord, Inc., the owner of the vessel, in the amount of $17 million.

As currently drafted, S. 1221 could substantially impair the security interest of TCW Special Credits in the ARCTIC FJORD. For the reasons set forth in this statement, TCW Special Credits requests that the Subcommittee make changes in this bill to avoid penalizing TCW Special Credits, which is a U.S. investor in a company that is now wholly owned by U.S. citizens, including the Bristol Bay Economic Development Corporation.

Background of the Bill

S. 1221 would amend the vessel documentation laws of the United States to establish a new rule of citizenship control for vessels engaged in the fisheries of the United States. To operate as a U.S. flag vessel in the navigable waters and 200-mile exclusive economic zone, a fishing vessel must be properly documented under Title 46 of the United States Code and owned by certain qualifying entities. In 1976, when fisheries jurisdiction was extended to 200 nautical miles in the Magnuson Fishery Conservation and Management Act (now called the "Magnuson-Stevens Act"), Congress rejected an amendment that would have established a vessel citizenship/ownership requirement similar to that required for vessels operating in the coastwise trade. Instead, the less restrictive rule of allowing foreign nationals to be equity investors (of up to 100 percent) in vessel-owning companies was continued. *Douglas v. Seacoast Products,* 431 U.S. 265 (1977). It is clear that this investment rule assisted the fairly rapid development of a large fleet of U.S. factory trawlers sufficient in capacity to exclude entirely the foreign fishing fleets that had dominated fish harvests off the U.S. coast prior to 1974.

By the end of the 1980s, Congress became concerned about the growth of the U.S. fishing fleet and the practice of reflagging foreign-built and foreign-converted fishing/fish processing vessels and enacted the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 ("Anti-Reflagging Act"). Although justified in part by the purported need to conserve the affected fish resources, support for this legislation primarily emanated from competitive and allocation pressures between and among various sectors of the fishing industry, primarily in the Pacific Northwest. Moreover, for many years, domestic fishing industry interests have been concerned about foreign investment generally, due to the fact that overseas investors play such a large role because of strong foreign demand for U.S. seafood products, in particular salmon, herring, crab, and groundfish from Alaska. Congress clearly believed that policies should be established that reduced foreign involvement in U.S. fisheries and, concomitantly, that benefited U.S. citizens.

The Anti-Reflagging Act was intended to limit foreign ownership of U.S. flag fishing vessels and cut off the ability to "rebuild" fishing vessels in foreign shipyards. *Southeast Shipyard Ass'n v. U.S.,* 979 F.2d 1541 (D.C.Cir.1992). Under that law, specifically 46 U.S.C. § 12102(c)(1), a vessel-owning corporation or partnership had to be owned at least 51 percent by U.S. citizens to document new vessels for the fisheries. However, if a vessel, prior to July 28, 1987, had been documented under U.S. flag or had been contracted for purchase to be used in the U.S. fisheries, foreign citizens could still own a controlling interest in the owning entity, so long as the corporation's president, chairman of the board of directors, and a majority of the board were U.S. citizens. This ownership "grandfather" clause was confirmed by the D.C. Court of Appeals in the *Southeast Shipyard* case.

In addition, prior to the Anti-Reflagging Act, fishing vessels could undergo substantial reconstruction in foreign shipyards and not lose their eligibility to operate in the U.S. fisheries. The Anti-Reflagging Act ended that practice. Again, however, Congress provided a saving "grandfather" clause to allow vessels that met certain pre-existing conditions to be rebuilt overseas notwithstanding the change in law.

History of the ARCTIC FJORD

The factory fishing vessel ARCTIC FJORD began as the BRAE SEA, an offshore supply vessel built in Seattle, Washington at Todd Shipyard Corp. and delivered in 1975. The vessel was later purchased by Orion Trawlers, Inc. ("Orion"), a U.S. documentation citizen under 46 U.S.C. § 12102(a)(4), for conversion to a factory trawler. However, during the relevant time period, the stock of Orion was owned by non-citizens. This purchase was agreed to in a contract entered into before July 28, 1987. The vessel was rebuilt in a Norwegian shipyard pursuant to a contract also

entered into before July 28, 1987. Upon its conversion to a factory fishing vessel, it was renamed the MICHELLE IRENE.

Upon delivery following reconstruction, ownership in the vessel was transferred to three Washington State corporations as tenants in common: WestcodII, Inc. (50 percent), Simonson Enterprises V, Inc. (25 percent), and BTI, Inc. (25 percent). Westcod II, Inc. was a documentation citizen but the controlling interest in the company was not held by U.S. citizens consistent with the new test in 46 U.S.C. § 12102(c)(1). The other two companies were controlled by U.S. citizens. Thus, the same entity that purchased or contracted for, and entered into the rebuilding contract, was not the same entity that owned or controlled the vessel upon documentation at redelivery.

All these transactions complied with the requirements of the Anti-Reflagging Act. The U.S. Coast Guard, the agency responsible for overseeing compliance with the documentation laws, confirmed in writing that this particular vessel qualified for both the citizenship and rebuild grandfather clauses under the Anti-Reflagging Act and that the transactions did not result in loss of fishing privileges.

In 1993, the owners came into difficulty with their lender, Christiana Bank og Kreditkasse, and foreclosure action was taken against the MICHELLE IRENE, then named the PACIFIC ORION. In 1994, the vessel was sold to Arctic Fjord, Inc. and renamed ARCTIC FJORD. Shortly thereafter, TCW Special Credits purchased the loan on the vessel from Christiana Bank.

The vessel was owned entirely by Arctic Fjord, Inc. until 1995, when an ownership agreement was entered into with the Bristol Bay Economic Development Corporation ("Bristol Bay") to carry out the purposes of the Community Development Quota program. As a result of that agreement, Bristol Bay purchased 20 percent of the stock in Arctic Fjord, Inc. The ARCTIC FJORD is currently owned and managed in accordance with that agreement. The ownership structure involves only U.S. citizens.

Effect of S. 1221 on ARCTIC FJORD

In his introductory statement, Senator Ted Stevens (A-Alaska) said that the rebuilding provisions of the Anti-Reflagging Act were misinterpreted by the Coast Guard and abused by speculators, resulting in 14 factory trawlers entering the fisheries off Alaska that should have been prohibited by the Anti-Reflagging Act. Based on the fact that the vessel was subject to the ownership and rebuild grandfather clauses of the Anti-Reflagging Act, the ARCTIC FJORD is one of those vessels. In addition, because the same entity did not own the vessel upon redelivery after its foreign conversion, Sec. 201 (b)(3)(D) of the bill applies to the vessel. Under that provision of S. 1221, if the controlling interest in a vessel such as the ARCTIC FJORD materially changes, regardless of who now owns the vessel or security interests in it, the vessel must permanently lose its fishery endorsement unless another active vessel of comparable size and capacity surrenders its endorsement. S. 1221; Sec. 201(b). This intent is confirmed in Senator Stevens' introductory comments.

Although the bill is unclear as to every material change in ownership that brings about this draconian result, we presume that a foreclosure of TCW Special Credits' ship mortgage and resulting sale of the vessel is in fact such a material change. Moreover, other sales of interests in the vessel could be material, such as the sale of the vessel to another company, a reorganization of Arctic Fjord, Inc., a change in the current ownership arrangement with Bristol Bay, or even the death of a partner in part of the ownership structure. Consequently, it is quite possible, if the bill is enacted in its current form, that the value of the ARCTIC FJORD could be far less than the $17 million face value of the mortgage it secures because it will not be allowed thereafter to engage in the fisheries of the U.S. TCW Special Credits has also been advised that it would be immensely difficult, if not impossible, to operate the vessel in any other world fishery. Such a result would be a severe blow to TCW Special Credits' investment in this loan and its primary security for the loan, which is the vessel itself.

Furthermore, as a lender, TCW Special Credits is concerned about the size and capacity restrictions set forth in Sec. 301(a) of the bill that extinguish a vessel's fishery endorsement if the length, tonnage, and horsepower of that vessel is increased after September 25, 1997. We understand that changes in tonnage could occur inadvertently because of the way tonnage is calculated. In addition, every minor alteration of the vessel, routinely done during drydock repairs, would create uncertainty into the future.

Overall, S. 1221, as presently drafted, is very ominous for TCW Special Credits' investment in the Pacific Northwest fishing industry. It is difficult to fully understand why a U.S. lender, representing U.S. investors and contracting with U.S. citi-

zen borrowers, should face the substantial impairment of its investment in this arbitrary manner. No warning about this significant change in policy was ever given.

Summary and Conclusion

If enacted in its present form, S. 1221 could result in the loss of fishing privileges for the ARCTIC FJORD, a vessel owned by U.S. citizens including an Alaska native corporation and significantly impair the security in the vessel held by TCW Special Credits, also a U.S. citizen. Whatever the policy goals of the bill, this result is clearly unfair with respect to this vessel unless it is changed to exclude a vessel such as the ARCTIC FJORD that is owned 75 percent by U.S. citizens at the present time. TCW Special Credits understands that all vessels currently operating in U.S. fisheries are subject to rationally-based management policies that assure the sustainability of the nation's fishery resources. TCW Special Credits also understands that one of the sponsors' goals is to reserve these resources for U.S. citizens. But in the case of the ARCTIC FJORD, S. 1221 will punish U.S. citizens for having acquired interests in the vessel simply because of its history of prior foreign involvement, contrary to the espoused policy of supporting U.S. investments in the U.S. fishing industry. It is important to emphasize that nothing in the previous history of the ARCTIC FJORD indicates that it was not in compliance, at any time, with all vessel documentation laws then in effect.

TCW Special Credits respectfully requests this Subcommittee to consider these views and keep them in mind if any legislation comes before the Subcommittee for action.

Testimony of
Joseph T. Plesha, General Counsel
Trident Seafoods Corporation

Before the
Subcommittee on Fisheries Conservation, Wildlife and Oceans
Committee on Resources

June 4, 1998

Mr. Chairman, members of the Committee:

Thank you for the opportunity to appear before the Committee. I am Joe Plesha, general counsel of Trident Seafoods Corporation. Our company was founded in 1973. In its twenty-five year history, Trident has never once declared a dividend for its shareholders. Instead the company's earnings have been reinvested into the industry. Trident was a leader in Americanizing the groundfish resources of the North Pacific. We purchased the very first Baader fish fillet machine ever used in Alaska. In the early 1980s, when foreign fishing fleets were still being given billions of pounds of U.S. fishery resources off Alaska, and joint ventures were only beginning, Trident built the first major U.S. groundfish processing facility on the remote Aleutian Island of Akutan. By 1982 we processed over 40,000,000 pounds of groundfish at that plant. During the mid and late 1980s, in reliance on the belief that U.S. owned companies had first priority to our Nation's fishery resources, Trident invested well over a hundred million dollars into pollock processing in the North Pacific. We now process pollock into surimi, individually quick frozen fillets, fish blocks, fish and bone meal, and fish oil.

Introduction
Reserving U.S. fish for American fishermen has been the policy of our Nation for over 200 years. In 1793 Congress passed a law providing that only United States-documented, United States-built vessels owned by United States citizens, may be employed in the fisheries and come into a U.S. port.[1]

Prior to the Magnuson-Stevens Fishery Conservation and Management Act, U.S. jurisdiction over fishery resources extended only twelve miles from our shores and by the 1970s foreign factory fleets had come to dominate the fisheries off our shores. So the policy of giving U.S. citizens priority to America's fish stocks was extended to the 200-mile exclusive economic zone in 1976 with passage of the Magnuson-Stevens Act. The cornerstone of the Magnuson-Stevens Act was to Americanize utilization of our Nation's fishery resources.

International law now provides that coastal nations have a sovereign right to restrict all foreign access to fishery resources 200 miles from

their shores. Virtually all other fishing nations in the world restrict foreign-owned operations from taking valuable fishery resources. Yet foreign-owned and controlled fishing vessels again dominate the harvesting of fishery resources off Alaska. It is likely that over a billion pounds of groundfish in the North Pacific is now taken by foreign-owned fishing fleets.

Every pound of fish these foreign-owned vessels harvest is taken directly from bona fide U.S.-owned fishing vessels. Vessels owned by United States citizens who made investments based on the Congressional intent that our fishery resources be Americanized. Citizens who built their vessels in United States shipyards. Citizens who have watched highly subsidized, foreign-owned and rebuilt vessels, circumvent the intent of the law and take over the fisheries of the North Pacific.

How did foreign fishing interests take control over U.S. fishery resources?

The Anti-Reflagging Act of 1987

The Magnuson-Stevens Act gave preferential access to our Nation's fishery resources to U.S. flag vessels. Vessel documentation laws, however, allowed foreign-owned companies to reflag a foreign-built vessel as a "vessel of the United States" and maintain access to U.S. fishery stocks. As bona fide U.S. fishing companies were Americanizing the fishery during the mid-1980s, there became a growing concern that foreign operators could continue their control over our fishery resources through this loophole.

Hearings were held in Congress during April of 1987 where concerns were expressed regarding, not only foreign flagged vessels being reflagged as vessels of the United States, but also of U.S. flag vessels being rebuilt abroad with large foreign government subsidies.[2]

Soon after its hearings, the House Merchant Marine and Fisheries Committee scheduled a mark-up of the Anti-Reflagging Act legislation for June 9, 1987. There was little question but that members of the Committee were intending to prohibit the reflaging of foreign vessels and require all fishing industry vessels to be rebuilt in the U.S. and be U.S.-owned. The date of the Committee's mark-up was postponed. On July, 28, 1987, the House Merchant Marine and Fisheries Committee marked-up the legislation that ultimately became the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987. The Anti-Reflagging Act mandated that all fishing industry vessels be rebuilt in the United States. In addition, the Anti-Reflagging Act required that the controlling interests in any corporation that owns a fishing vessel be owned by U.S. citizens.

U.S. Ownership Requirement

Arguments in favor of permitting foreign investment into the fisheries to help finance domestic growth were overcome by the broader policy

concerns being raised about allowing foreign harvesting companies to continue their control of the Nation's fisheries resources. Congress spoke expressly and clearly that U.S. harvesting and processing vessels should remain under the control of Americans.[3] The legislation required that the controlling interests in any corporation that owns a fishing vessel be owned by U.S. citizens.

The Anti-Reflagging Act also contained a Ownership Grandfather provision for the few foreign-owned corporations that already owned a specific fishing vessel or had already purchased a particular fishing vessel. Congress intended that if a grandfathered vessel was later sold, it must be bought by a bona fide American-controlled entity.

The House Merchant Marine and Fisheries Committee stated:

> The savings clause in subsection (b) [the Ownership Grandfather provision] does not apply in the event that the ownership or operational control of a vessel protected under the provisions of subsection (b) changes in whole or in part. In such an instance, the controlling interest provisions of subsection (a) [the U.S. ownership requirement] would apply.[4]

Senator Frank Murkowski offered the amendment mandating U.S. ownership when the Anti-Reflagging Act was under consideration on the Senate floor. He also emphasized that the Ownership Grandfather clause applied only to those who had existing investments and did not apply to those who may later purchase fishing industry vessels.

> This provision will not remove the privilege of fishing from any person or company that is presently operating or that can demonstrate that it already has undertaken to purchase a vessel for use in the fishery. It simply ensures that future entrants are controlled by interests of the United States, rather than those of other nations.[5]

U.S. Rebuilding Requirement

To assure that the economic benefits associated with the capitalization of the U.S. fisheries would go to the U.S. shipbuilding industry, the Anti-Reflagging Act required that all fishing industry vessels be rebuilt in the United States. Congress approved a Rebuild Grandfather clause because of its understanding that there were a limited number of non-speculative projects for which particular U.S. owners had already made irrevocable financial investments.

The Members' intent on the Rebuild Grandfather are clearly reflected in statements made in the legislative history accompanying passage of the

Anti-Reflagging Act. Congressman Davis, the sponsor of the U.S. rebuilding requirement, explained the purpose of the provision.

> These grandfather provisions are designed to protect those who have relied on current law and who will have taken certain identifiable and irrevocable steps towards rebuilding a vessel for the fisheries.[6]

As the legislation was being marked-up, Staff Counsel to the Merchant Marine and Fisheries Committee explained to Committee members that,

> What we're recognizing here is that there are some people who have purchased vessels that have commitments now, that are in the process of converting those vessels, that need to continue that business plan or financial obligation.... So, its only those people who have legitimate, ongoing vessels that are now to be grandfathered by this amendment."[7]

Congress adopted a Rebuild Grandfather provision that protected particular vessel owners which had made substantial financial investments in reliance on existing law. The statute itself required a foreign rebuilt vessel be redelivered back "to the owner" by July 28, 1990. The House Report made clear the intent to protect individuals who had already made substantial investments, not speculators who were brokering the right to rebuild vessels abroad.

The House Report explaining the Rebuild Grandfather provision emphasized that point.

> [T]he amendment contains grandfather provisions to protect those who have relied on current laws and who have made certain identifiable commitments toward rebuilding fishing, fish processing, and fish tender vessels in foreign yards.[8]

As did, among others, the Chairman of the Fish and Wildlife Subcommittee, Congressman Studds.

> Similarly, in fairness to those who have made commitments to rebuild fishing industry vessels overseas and relied upon current law, the committee has preserved their right to continue with their plans...[9]

The intent of the Anti-Reflagging Act could not have been more clear. Following the 200-year old policy of our country, Congress wanted to assure that our Nation's fishery resources would be harvested by U.S.-owned and U.S. built (and rebuilt) vessels.

Implementation of the Ownership Grandfather Provision
When the Anti-Reflagging Act became law in 1988, it seemed as if the U.S. industry had finally succeeded in displacing the foreign-owned fishing fleet in the North Pacific. Virtually all of the fishery resources were being harvested by American-owned vessels and we believed that the Anti-Reflagging Act prohibited foreign entities from controlling the industry.

But soon after the Anti-Reflagging Act was passed the Coast Guard's vessel documentation branch began issuing ad hoc ruling letters which allowed fishing industry vessels owned by U.S. citizens to be transferred to foreign-owned corporations. The rulings opened the flood gates for foreign interests to acquire speculative deals to rebuild vessels abroad and to dominate our Nation's fishing industry.*

On October 20, 1988, well after ruling letters allowing foreign-owned corporations to purchase fishing industry vessels had already been issued, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) regarding the American ownership requirements of the Anti-Reflagging Act. The NPRM made no mention of whether the grandfather

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* The ruling letters from the Coast Guard's Vessel Documentation Branch stating that foreign-owned corporations were allowed to purchase fishing vessels include the following:

1988

Anti-Reflagging Act was signed into law on Jan. 1, 1988.
Letter from Thomas L. Willis to Michael D. Walker (Mar. 16, 1988).
Letter from Thomas L. Willis to Phyllis D. Carnilla (Mar. 29, 1988).
Letter from Thomas L. Willis to William N. Myhre (Mar. 31, 1988).
Letter from Thomas L. Willis to William N. Myhre (Mar. 31, 1988).
Letter from Thomas L. Willis to William N. Myhre (Apr. 10, 1988).
Letter from Thomas L. Willis to William N. Myhre (Jun. 22, 1988).
Letter from Thomas L. Willis to William N. Myhre (Jun. 29, 1988).
Letter from Thomas L. Willis to William N. Myhre (Jul. 1, 1988).
Letter from Thomas L. Willis to William N. Myhre (Jul. 5, 1988).
Letter from Thomas L. Willis to William N. Myhre (Jul. 12, 1988).
Letter from Thomas L. Willis to Robert F. Morgan (Jul. 26, 1988).
Letter from Thomas L. Willis to Michael J. Hyde (Nov. 30, 1988).
On Dec. 18, and 20, 1988, the Coast Guard's Maritime & Internal Law Division issues written legal opinions stating that the U.S.-ownership provision of the Anti-Reflagging Act would apply to any vessel that is sold or transferred.

1989

Letter from Thomas L. Willis to Michael J. Hyde (Jan. 19, 1989).
Letter from Thomas L. Willis to William N. Myhre (Jan. 27, 1989).
Letter from Thomas L. Willis to William N. Myhre (May. 10, 1989).
Letter from Thomas L. Willis to Terry L. Leitzell (May. 16, 1989).
Letter from Thomas L. Willis to William N. Myhre (May. 31, 1989).
Letter from Thomas L. Willis to William N. Myhre (Jun. 13, 1989).
Letter from Thomas L. Willis to William N. Myhre (Jun. 30, 1989).
Letter from Thomas L. Willis to William N. Myhre (Aug. 17, 1989).

1990

Letter from Thomas L. Willis to Phyllis D. Carnilla (Jan. 2, 1990).
Letter from Thomas L. Willis to William N. Myhre (May. 10, 1990).
(Note: On Dec. 12, 1990, the Coast Guard adopts its Final Rule regarding the Anti-Reflagging Act's grandfather provisions.)

provision to the Act's U.S. ownership requirements permanently ran with the vessel.

The Coast Guard received comments to the NPRM expressing the view that the savings clause should be read to permanently grandfather every vessel currently in the fisheries. In response to those comments, the Coast Guard Maritime and International Law Division—the legal department in the Coast Guard with responsibility for this matter—issued a formal written opinion on December 19, 1988. The opinion noted that,

> The basic issue is: If one of these vessels (grandfathered under section 7 of the Act) is subsequently sold, should the Coast Guard apply the enacted controlling interest test to the new owner? House Report No. 100-423 [stating that if the ownership or control of a grandfathered vessel changes in whole or in part, the new American ownership requirements would apply] clearly addresses this issue...
>
> The argument is made in some of the comments to the NPRM that the plain language of the statute does not expressly interpret the savings provision in this manner, and that the plain meaning should prevail to the exclusion of the legislative interpretations. I disagree with that argument. The "plain meaning rule" functions as a presumption, not an exclusionary rule. When literal enforcement of a statute would lead to incongruous results which the legislatures clearly did not intend, then a construction must be adopted to avoid such incongruities... In the instant case, the legislative history clearly defines the only rational interpretation of the savings provision of the Act, effectively rebutting the "plain meaning rule.
>
> ...Based on the foregoing clarifications and the general purpose of the legislation, the correct interpretation is that the savings provision terminates once the vessel is sold or transferred. In such cases, the controlling interest provisions would apply to the new owner.[10]

The Maritime and International Law Division's legal opinion was drafted by Lieutenant Commander James Vallone and reviewed, modified and signed by Commander J.S. Carmichael, Acting Chief of the Division. Commander Carmichael is one of the Coast Guard's most respected officers and attorneys, with the reputation as someone who never released a project from his review unless he fully understood it and was in agreement with it, particularly when the issues involved were of significant national and international significance. Commander Carmichael has recently been selected for promotion to Rear Admiral. Further, the December 18, 1988 legal opinion was reviewed by the Office

of Chief Counsel on January 27, 1989, well before completion of formal rulemaking.[11]

Because the Coast Guard's vessel documentation division did not follow its lawyers' written legal opinion, Commander Vallone undertook additional legal research and sought further advise from the senior civilian attorney in the Legislative Affairs Division of the Coast Guard. The Maritime and International Law Division issued a second legal opinion stating, in conclusion, that the additional research "reinforces my opinion set forth in the [December 18, 1988 memo]."[12]

Despite the Coast Guard's unambiguous written legal position, its vessel documentation branch continued to issue ruling letters stating that the grandfather privileges permanently ran with the vessel—allowing foreign-owned corporations to acquire fishing industry vessels.

On November 16, 1990 the Coast Guard's Chief of Operational Law Enforcement wrote a remarkably candid letter to the vessel documentation division with regard to its interpretation of the Ownership Grandfather.

> I contend, consistent with [the December 18, 1988, written legal opinion], that the intent of the Act was to stop foreign control of U.S. vessels, making an exception for those vessels under foreign control at the time to reduce economic impacts on the corporations involved. ...
>
> It is damaging to the U.S. fishing industry to interpret a law designed to reduce foreign control over U.S. fishing vessels in a manner which allows for increase in foreign control.[13]

The Operational Law Enforcement Division's letter was never answered.

On December 12, 1990, a final rule was published with the provision that the grandfather rights run with the vessel forever, even upon its sale or transfer. This rule was finalized despite the fact the only legal basis for it was provided by the lawyers representing foreign interests. Certainly the Coast Guard's only written legal advice reached the opposite conclusion. Although the Office of Chief Counsel would have had to approve the final rule, it was confronted with the problem of over twenty ruling letters issued by the Vessel Documentation Division stating that the Ownership Grandfather provision ran with the vessel upon transfer or sale. I suspect that the dilemma caused the Chief Counsel's office to ignore the written legal advise of its counsel.

Senator Bob Packwood asked the General Accounting Office to report on the effectiveness of the Anti-Reflagging Act. The 1990 United States GAO report noted that,

> The Anti-Reflagging Act's American control provisions have had little impact on ensuring that U.S. fishery operations are controlled by U.S. citizens. This is a result of the Coast Guard's interpretation allowing the grandfather exemption to remain with a vessel even if the vessel is subsequently sold to a foreign-owned company. Consequently, should the Congress desire another result, it may wish to consider changes to the existing legislation.[14]

The Coast Guard's vessel documentation division has been so accommodating to foreign interests that even vessels that are not grandfathered under the Anti-Reflagging Act can be effectively one-hundred percent foreign-owned. A case in point is the *F/V Northern Jaeger*.[15] A foreign company easily circumvented the U.S.-ownership requirements. The corporation "owning" the multi-million dollar *Northern Jaeger* issued ten shares of Class A stock at literally $1,000 per share. Four U.S. citizens (two of whom are lawyers for the foreign owner) own two shares of stock each, and the foreign corporation owns the remaining two shares. On paper, the vessel is 80% U.S.-owned, but the shareholders agreement provides that the foreign company can buy the U.S. shareholders interests for just the $1,000 per share purchase price, plus interest. The U.S. shareholders cannot transfer their shares without the unanimous consent of the other shareholders, including the foreign company. Furthermore, the vessel is then bareboat chartered to the foreign-owned company's subsidiary.[16] Despite these facts, the vessel is claimed to be "U.S.-owned" under the provisions of the Anti-Reflagging Act.

Implementation of Rebuilding Grandfather Provision

I have attached a description of the Norwegian Ministry of Finance's subsidy for one of the very first foreign-rebuilt projects, the Aurora Fisheries Inc.'s vessels. (See Exhibit A.) Aurora Fisheries three vessels were in the fishery by 1988. Despite a year-round fishery, the company failed and the vessels were sold. The foreign bank which financed the project was obviously aware of the tenuous ability of these vessels to be economically viable.

Regardless of the bankability of these projects, capital from foreign banks flooded into foreign shipyards to build even more expensive factory trawler vessels. The financing was described by one industry consultant as follows. "Typically, they'd provide one loan for construction and a second line of credit for operating expenses. And, if the boat was built in a Norwegian shipyard, which most of them were, the government would throw in a 10 to 15 percent subsidy that the bank would accept as equity."[17] Mr. Wally Pereyra, president of ProFish International Inc., noted that "[i]t was possible to come up with a $40 million boat with next to nothing down."[18]

The Anti-Reflagging Act's Rebuilding Grandfather provisions required that the owner of any foreign rebuild vessel (1) was contracted to purchased by July 28, 1987 with the intent that the vessel be used in the fishery as evidenced by the "contract itself" or a Coast Guard ruling letter issued before July 29, 1987; (2) was under a contract to rebuild entered into before July 12, 1988 and (3) was redelivered "to the owner" by July 28, 1990.

Below are descriptions of three vessels which were rebuilt abroad.

During Congressional deliberations of the Anti-Reflagging Act, lawyers represented to Congress that the vessel *State Express* was one of three ships which would be converted to a less than 500 gross ton "Coast Guard inspected reafer vessels, that will provide a critical link in supplying Far East and European markets with U.S. fisheries products." (See Exhibit B.) At the same time, the Coast Guard was being informed that the vessels would be converted "either as catcher/processors or as fish tenders."[19] The vessel was ultimately rebuilt into a 376 foot factory trawler of almost 5000 gross tons, now named the *Alaska Ocean*.

On July 8, 1987, (between the time of the originally scheduled House mark-up and the actual mark-up) Sunmar Holdings Inc. acquired an option to purchase the *State Express*. The agreement required that Sunmar Holdings "convey in writing to Seller its intent to purchase or reject" the vessel by September 6, 1987. On September 4, 1987, the parties agreed in writing to extend the option until November 30, 1987. On November 30, 1987, the parties agreed in writing to extend the option until February 29, 1988. On February 29, 1988, seven months after the purchase cut-off date, Sunmar gave written notice of its intent to purchase the vessel.

On July 10, 1988, two days before the rebuild cut-off date, Sunmar signed a document which contemplated rebuilding the vessel in a Norwegian shipyard. This document, however, contained conditions—such as corporate board approval, obtaining adequate financing, receiving Norwegian subsidies, etc.—which allowed either party to walk away from the project without penalty. This document clearly is not a binding contract under U.S. law. Under U.S. common law, at a minimum, a contract is a set of promises, breach of which the law gives a remedy. Lawyers representing the project said U.S. law did not matter because it was a valid contract under Norwegian law. Even though there is no legal "consideration" under U.S. law, European "civil law systems do not recognize the common law concept of consideration." (See Exhibit C.) The vessel was "redelivered" in Norway on June 19, 1990.

A second example of the speculation that occurred is the 180 foot, 292 gross ton oil supply vessel *Enterprise*. The *Enterprise* was purchased by

North Star Ocean Service, Inc., in late 1986. There is no evidence that this oil field supply company purchased the vessel "with the intent that the vessel be uses in the fisheries."[20]

On June 28, 1988, a Norwegian-owned corporation named Birting Fisheries entered into a shipbuilding agreement which was completely contingent upon the Birting acquiring the vessel to rebuild. After signing the shipyard agreement, and almost a year after the July 28, 1987 cut-off date to purchase vessels, Birting acquired the oil supply vessel *Enterprise* from North Star Ocean Service and rebuilt her into the factory trawler *Ocean Rover*.

A third is the vessel *Acona*. Although the Rebuild Grandfather specifically requires that evidence of the intent that a vessel was purchased for in the fishery be in the "contract itself" the eighty-five research vessel *Acona* was grandfathered based solely on a short "letter of intent" sent to the Coast Guard. The purchase contract itself made no mention whether the vessel would be used in the fisheries. The Coast Guard's ruling letter stated, "[t]he buyers' intention to employ the vessel as fish processing vessels in the U.S. fishing industry is evidenced by the letter of intent to purchase the vessel..." The Coast Guard considered the letter of intent to be an "integral part" of the purchase transaction.[21]

The *Acona* could not have been grandfathered but for this "letter of intent", yet its validity is inherently suspect. It is not on letter head; it is oddly worded; and it is undated except for the gratuitous date hand written in the bottom left corner. According to the seller of the *Acona*, he was asked to sign the undated "letter of intent" well after the actual sale. (See Affidavit of Michael Burns, Exhibit D.) The letter was then allegedly back dated to a time before the actual sale of the *Acona* and submitted to the Coast Guard as evidence of the intent that the vessel was purchased for use in the fisheries.[22]

On July 12, 1988, the cut-off date for entering into contracts to rebuild, the new owner of the *Acona* entered into a rebuilding contract with a Norwegian shipyard. The project was then sold to a foreign-owned fishing company and the vessel was rebuilt into the *American Triumph*. This vessel, which was grandfathered only because an allegedly fraudulent document was submitted to the Coast Guard, is the single largest producer in the Bering Sea pollock fishery.

Southeast Shipyard Case

The Coast Guard's decisions were challenged in Southeast Shipyard Assn. v. U.S.. The Southeast Shipyard's complaint specifically mentioned two vessels, the *Gulf Fleet No. 10* and *Gulf Fleet No. 14*. These two vessels were purchased under a conditional contract purportedly signed on July 27, 1987, the date of the grandfather cut-off, in two separate cities. The "contract" to rebuild the vessels was with a Norwegian shipyard. The vessels were later sold to a foreign-owned

company and the vessels were rebuilt in a Japanese, instead of Norwegian shipyard, under a different design. Despite the suspect validity of the conditional contract to purchase, the transfer to foreign ownership and the new rebuilding contract (both in terms of specifications of the rebuilt vessel and the shipyard which would perform the work) the *Gulf Fleet 10* and *Gulf Fleet 14* were considered grandfathered under both the ownership and rebuild provisions.

The Southeast Shipyard's complaint requested that the government require the vessels to be U.S.-owned. Further, the complaint asked that the Coast Guard investigate the circumstances of the rebuilding contracts and "in light of that investigation" review whether they qualify for the Rebuild Grandfather and declare that at least these two vessels are not eligible for fishery endorsements.[23]

The district court granted Southeast Shipyard's motion for summary judgment in total. The court noted,

> The Anti-Reflagging Act is the latest in a series of steps taken to Americanize the fishery resources off the coasts of the United States, a process that has been ongoing since 1976, and the Coast Guard's interpretation would defeat that process.[24]

The district court's opinion with regard to whether the U.S.-ownership grandfather was properly applied was appealed by the United States under heavy pressure from the Government of Norway. (See Exhibit E.)

The D.C. Circuit Court reversed with regard to the U.S.-ownership grandfather.[25] Their decision was not surprising given the judiciary's general deference to an administrative agency's expertise. The Coast Guard's December 18, and 20, 1988, written legal analysis, however, were never released to the plaintiffs nor presented to the court. Moreover, the district court's order with regard to the rebuilding grandfather was not appealed and is still in force.[26] To my knowledge, the Coast Guard has not enforced the district court's order.

Impact on Goal of Americanizing the U.S. Fishing Fleet

The result of the huge influx of foreign-rebuilt, foreign-owned vessels has been devastating to bona fide American investors in the North Pacific fishery. The Bering Sea pollock fishery is managed on a quota basis. When the allowable catch is harvested, the fishery is closed. In 1989, before the foreign-rebuilt fleet entered the industry, the Bering Sea pollock season lasted the entire year. I estimate that foreign-owned fishing vessels now harvest half of the pollock quota in the Bering Sea. The pollock season is now reduced to just over two months each year and the remainder of the year our investments lay idle.

Moreover, many of the top management positions on these foreign-built vessels are paid to foreign nationals. According to a lawyer representing some of these foreign owned companies, foreign citizens work in the following jobs:

> These positions include Fishing Master, Fishing Mate, Bosun 1 and 2, Technical Representative, Electrician, Baader 1 and 2, Assistant Baader, Factory Engineers, Assistant Factory Engineer, Fish Meal Technician, Factory Engineers, Assistant Factory Engineer, Fish Meal Technician, Factory Managers, Factory Foreman, Quality Control, Surimi Quality, lead Surimi Technician and Surimi Technician.
>
> Over the past year just our firm has processed approximately **two hundred visas for managers, executives or essential skills employees for several factory trawler companies**. In addition, there are several other law firms that also process visas for factory trawlers. (See Exhibit F.)

Trident is a company owned by individuals who started as fishermen back in the 1960s. They have spent their entire adult lives in this industry. In the mid-1970s Bart Eaton, a shareholder of Trident and Chuck Bundrant, Trident's founder, spent months back here in D.C. lobbying in support of the "200-mile bill." Since 1976 when the Magnuson-Stevens Act passed, we have been told by Congress to invest in "Americanizing" our Nation's fishery resources. Trident has invested everything we've earned back into the fishery in this country. We have not been subsidized by foreign governments. We did not build our vessels in foreign shipyards. We have been told that this is an American resource for U.S. citizens. Yet we are now threatened by foreign-owned and rebuilt fishing vessels.

The North Pacific groundfish fishery is wildly overcapitalized and there must be a reduction of fishing power. If there is not a removal of capacity, U.S.-owned companies without the benefit of foreign-government subsidies will increasing face bankruptcy. Congress must make the policy decision whether our Nation's fishery resources are for the benefit of U.S. citizens or foreign nationals. When faced with similar concerns in the 1970s Congress passed the 200-mile bill. We urge Congress to again support bona fide American fishermen over foreign-owned fishing fleets.

---

[1] Revised Statutes §4311, (1793).

[2] See statement of the American Waterways Shipyard Conference, Fish Process Vessel Reflagging—H.R. 438, H.R. 1956 Joint Hearing Before the Subcommittee on Coast Guard and Navigation, and the Subcommittee on Fisheries Wildlife Conservation and the Environment and the Merchant Marine Subcommittee of the Committee on Merchant

Marine and Fisheries, 100th Cong., 1st Sess. 265-266 (April 29, 1987) (Statement of Delmar R. Smith, Chairman, American Waterways Shipyard Conference and Director of Marketing, Bender Shipbuilding & Repair Co. Inc.)

At the time the Anti-Reflagging Act was first being considered by Congress, most conversion of factory trawlers had occurred in U.S. shipyards. I testified on behalf of the United Seafood Americanization (USA) coalition that members of the coalition did not believe it was necessary to include the requirement that all vessel conversion or repairs be in U.S. shipyards. (See infra, p 305.) However, when the Committee on Merchant Marine and Fisheries reported a bill that included a prohibition of rebuilding fishing vessels in foreign shipyards, members of the USA Coalition were strong supports of the legislation, including the prohibition against foreign rebuilding.

[3] Congressman Young noted, [The American Control provision] is a good amendment. It goes back to my opening statement about Americanizing the fleet. If you can tell me we're truthfully Americanizing the fleet, when the financial ownership of a vessel is 90 percent [foreign], and until the Davis amendment, the work was done overseas, and really all you had was the board [of directors of a corporation being American], and that was Americanizing the fleet? I think it's time that we take our industries, our resource industries and make sure they're owned by 51 percent of Americans. Not owned by any foreign bank, that can direct that fishery to how they should conduct themselves within our waters, can actually lobby the council and see our fish are being taken to the extreme from what can be the sustained yield. And I'm asking you to consider this. This is a vote that will make it right to truly fulfill the Studds-Magnuson Act. Americanize this fleet. Americanize it with ownership. Americanize it with crewing. Americanize it with masters. Americanize the shipbuilding, repairing, and laying the keel. Let's have an American vote today. House Merchant Marine and Fisheries Committee markup transcript, July 28, 1987.

[4] H.R. Rep. No. 100-423, 100th Cong., 1st Sess. p. 17.

[5] Cong. Rec. S18335-S18336 (daily ed. Dec. 17, 1987) (statement of Sen. Murkowski).

[6] House Merchant Marine and Fisheries Committee markup transcript, July 28, 1987. (Statement of Congressman Davis)

[7] House Merchant Marine and Fisheries Committee markup transcript, July 28, 1987. (Statement of Duncan Smith)

[8] H.R. Rep. No. 100-423, 100th Cong., 1st Sess. p. 12.

[9] Cong. Record, Nov. 9, 1987.

[10] American Control Provisions of the Commercial Fishing Vessel Anti-Reflagging Act of 1987 from Chief, Maritime & International Law Division to Chief, Administrative Law Branch, Dec. 18, 1988.

[11] U.S. Dept. of Transportation Route Slip, Jan. 27, 1989.

[12] American Control Provisions of the Commercial Fishing Vessel Anti-Reflagging Act of 1987 from Chief, Maritime & International Law Division to Chief, Administrative Law Branch, Dec. 20, 1988.

[13] Commercial Fishing Industry Vessel Control Provisions, from Chief, Operational Law Enforcement Division to Chief, Merchant Vessel Inspection and Documentation Division, Nov. 16, 1990.

[14] U.S. General Accounting Office Report to the Honorable Bob Packwood, Oct. 25, 1990.

[15] The *Northern Jaeger* was grandfathered under the U.S. rebuild requirement of the Anti-Reflagging Act, but not from U.S. ownership requirements.

[16] Letter from William N. Myhre to Thomas L. Willis, July 7, 1987

[17] Seafood Leader, Nov./Dec. 1993 p. 111.

[18] Seafood Leader, Nov./Dec. 1993 p. 111.

[19] Letter from Phyllis D. Carnilla to Thomas L. Willis, July 7, 1987.

[20] The Rebuilding Grandfather requires that the vessel was purchased "with the intent that the vessel be used in the fisheries if that intent is evidenced by... (ii) a ruling letter issued by the Coast Guard before July 29, 1987... pursuant to a ruling request evidencing that intent." There was a ruling letter issued Mr. Tom Willis on June 17, 1987. That ruling letter did not mention that the boat was to be used in the fisheries, moreover the ruling letter request did not indicate that the vessel was purchased for use in the fisheries.

[21] Letter from Thomas L. Willis to William N. Myhre (Apr. 4, 1989), p. 2.

[22] Letter from William N. Myhre to Thomas L. Willis (Mar. 10, 1989).

[23] Southeast Shipyard Assn., v. U.S., No. 90-1142. Complaint, p. 9. May 16, 1990.

[24] Southeast Shipyard Assn., v. U.S., No. 90-1142. Memorandum, p. 10. Apr. 30, 1991.

[25] Southeast Shipyard Assn., v. U.S., 979 F.2d 1541 (D.C. Cir. 1992).

[26] The district court entered an order on Jan. 14, 1992, denying the government's motion for clarification of its original order granting plaintiffs' summary judgment. Of course, any vessel properly grandfathered under the rebuild provision would be allowed to be subsequently transferred losing its rebuild grandfather. Those which were not properly grandfathered under the rebuilding grandfather, however, would lose their fishery endorsements.

AURORA FISHERIES, INC.

Notes to Financial Statements

(2) Cash
Included in cash is $394,188 held in a restricted foreign bank account. The balance represents subsidy payments by the Norwegian government and all subsidy payments are pledged as security for the notes payable to bank (see Note 4).

(3) Marketable Investment Securities
Marketable investment securities consist of United States (U.S.) Treasury Bills at a cost of $428,894. The securities have a face value of $460,000 and mature June 1989. The unamortized portion of the discount was $16,850 at November 30, 1988. The market value of the securities was $440,578 at November 30, 1988 and the securities are pledged as collateral for the anticipated U.S. Customs Service entry duty on the F/T Royal King and F/T Royal Princess (see Note 8).

(4) Foreign Subsidies
The Company has an agreement with the Norwegian Ministry of Finance (Ministry) whereby the Ministry will make semi-annual payments (subsidies) to the Company over a five year period beginning October 1988. The subsidies are calculated using a subsidy rate of 9.1% per annum on the outstanding balance of an amount equal to 80% of the vessels' construction cost (hypothetical loan) or approximately $26.4 million (principal). The principal balance is reduced semi-annually by an amount equal to one-tenth of the original principal amount. The subsidies are denominated in the Norwegian currency of kroners. The funds will be held in a restricted Norwegian bank account and will not be disbursed to the Company until the notes payable to bank are paid in full. *

All assets and liabilities related to this transaction have been converted to U.S. dollars on November 30, 1988 resulting in a foreign currency transaction gain of $55,885 for the two months ended November 30, 1988.

(5) Inventories
A summary of inventories at November 30, 1988 is as follows:

Seafood	$5,713,610
Supplies, packaging, materials and fuel	716,525
	$6,430,135

EXHIBIT A

SUNMAR FISH TENDER CONVERSION PROJECT

Sunmar, one of the nation's largest operators of U.S. flag reefer/fish tender vessels, is currently involved in an expansion project that cannot be completed unless grandfathered from any enactment prohibiting the overseas conversion of vessels for use in the United States fishing industry.

Sunmar Holdings, Inc.: Sunmar and its sister companies have provided an established transportation network for the North Pacific fishing industry for a number of years. In the past year, Sunmar introduced two state-of-the-art U.S.-flag fish tender vessels. Sunmar recently was the high bidder on three U.S.-built offshore supply vessels (STATE GLORY, STATE EXPRESS and STATE TRUST) that had been forfeited to the Maritime Administration (MarAd); Sunmar, relying on existing law, bid for these vessels with the intent and expectation that they could be converted overseas to fish tender vessels. Purchase contracts reflecting that intent were entered into prior to July 28; intent was further reflected in a Coast Guard ruling obtained prior to that date.

The Project: By this project, Sunmar is preparing to enhance significantly its service to the growing U.S. factory-trawler fleet through the introduction of three modern, Coast Guard inspected reefer vessels, that will provide a critical link in supplying Far East and European markets with U.S. fisheries products. Sunmar expended considerable time and money in identifying the MarAd vessels as best suited for its purposes, as well as for various engineering and feasibility studies. Sunmar was the high bidder by several hundred thousand dollars for each of the vessels and is presently negotiating shipyard contracts. Sunmar's financial calculations, business projections, and ultimately its bid price for the vessels were made in reliance on existing law and assumed that the vessels could be converted overseas. Absent that ability, the project will not be financially viable.

Documentation Status: The Sunmar vessels are U.S.-built and have U.S. Certificates of Documentation. However, those Certificates became invalid when MarAd took title to the vessels. Moreover, a vessel undergoing conversion may not even be considered a vessel within the meaning of the Coast Guard regulations and at a minimum the conversion process itself would invalidate the documentation. No purpose would be served by reinstating these Certificates until conversion of the vessels is completed.

Conclusion: Any effort to restrict the ability of U.S.-built vessels to be rebuilt overseas should permit completion of existing projects, such as Sunmar's, which were undertaken in reliance on existing law and for which the vessels already are subject to a contract for purchase for use in the U.S. fishing industry and are the subject of Coast Guard rulings confirming such use.

10/15/87

EXHIBIT B

Exhibit F - 2

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CHRISTA McCLURE
OF COUNSEL

ALSO ADMITTED IN
* MARYLAND
** NEW YORK

October 13, 1988

Phyllis D. Carnilla, Esq.
1700 17th Street, N.W.
Suite 301
Washington, D.C. 20009

RE:Conversion Contract between
Sunmar Holding Inc. and Ulstein Hatlo A/S dated June 10, 1988.

Dear Mrs. Carnilla:

At your request I have examined the above-named document with regard to your question: Did Sunmar Holding Inc. and Ulstein Hatlo A/S enter into a binding contract for conversion and if so at what time? By its own terms, and as discussed more fully below, this document is governed by the law of contracts under civil law systems. I am familiar with such civil law systems as well as the common law system used in the United States, having been educated in both systems. In addition to my Master of Comparative Law degree from George Washington University School of Law I hold a Doctors of Laws degree from Bonn University.

With respect to the governing law for this analysis, Article XVI of the Conversion Contract between Sunmar Holding Inc. and Ulstein Hatlo A/S ("Conversion Contract") provides that the instrument as a whole as well as its individual provisions shall be governed by the law and regulations of Norway. Like most legal systems in continental Europe, the law of Norway is to a large extent based on Roman law. This holds particularly true for the law of contracts. Consequently, in all so-called civil law systems the law of contracts is governed by the same principles.

I. Characteristics in the law of contracts under Civil Law.

A. Purpose.

The Conversion Contract presents itself as a mutual agreement to achieve a specific purpose. Generally, under civil law a contract is valid when:

EXHIBIT C

1. Each contracting party is legally competent.
2. Each party declares its intent unequivocally.
3. Each party assents to the contract purpose.
4. The assent is mutual and/or reciprocal.
5. The contract purpose is not illegal.
6. The contract purpose is possible.
7. There is no fraud by either party.

Civil law systems do not recognize the common law concept of CONSIDERATION. Instead, a mutual contract must have for its basis a legally acceptable CAUSA or, for lack of a better word, a PURPOSE. This purpose must be one recognized by the public in the course of daily interactions as a basis for transactions. The parties to a contract have to agree on such a purpose as recognized by the law generally. It is this purpose then, as agreed upon, that determines which legal principles and laws govern the transactions specifically (sales, lease, a.s.f.). The purpose underlying the contract must be a typical objective directly pursued by the contractually established obligations of each party which indirectly leads to a specific legal result.

B. Elements of a contract.

Once the parties to a contract have agreed on the purpose, then the question arises how this purpose shall be pursued. This is determined by the ESSENTIALIA NEGOTII or essential elements of the contract. The essential elements of a contract define the major rights and obligations of each party towards the purpose. This systematic separation of purpose and element, of "this is what we want" and "this is the way how we want to go about it" is important. If the parties fail to agree on a legally recognized purpose, the contract is void or did not come into existence. However, should one or more essential elements be absent or impossible, the contract, as a rule, remains valid. In such a case, the original intent of the parties and their expectations determine the outcome. As long as some interest of one of the parties can still be satisfied, the parties remain obligated to salvage as much of the intended contract as possible. The contract continues to exist albeit reduced or modified. Any intent to the contrary has to be expressed in the contract.

II. Application of principles to Conversion Contract.

According to the civil law principles outlined above, the purpose of the Conversion Contract is the conversion as clearly expressed on page two, i.e. the conversion of the ship for operation in fisheries. The actual performance of work according to specifications, time frames, dates for installment payments, amounts, a.s.f. are essential elements which may or may not be certain. The Contract provides already for some contingencies but does not preclude others. The parties assented to the purpose unequivocally; their mutual intent to achieve the objective is expressed in clear terms. Particularly of interest is the fact that, as the Contract is worded, Sunmar Holding Inc. will remain

obligated to pay the Contract price even if one or more of the subjects cannot be lifted within the contemplated time frame. Since the lifting has not been made a condition sine qua non under Article II, under the civil law principles the company would remain bound by the Contract and obligated to solve the problem by mutual agreement.

III. Conclusion.

Pursuant to Article XVI, the Conversion Contract is governed by the law of Norway. Accordingly, the Contract has to be based on the mutual consent of the parties to the Conversion Contract on a purpose recognized by law. This purpose has been defined in the Contract as the conversion of the ship for operation in fisheries. The timing of conversion work, installment payments, trial, delivery, among others, present essential elements of the Contract subject to the parties' determination. The parties' intent to pursue the contractual purpose is clearly expressed in the document. There seems to be no open misunderstanding on or lack of any legal requirement. Under the principles of civil law, Sunmar Holding Inc. and Ulstein Hatlo A/S entered into a legally binding contract for conversion. The Contract became effective on the date of signing by both parties. That date is June 10, 1988.

I hope that this brief analysis answers your question. Should you need more detailed information, please feel free to call me at any time.

Sincerely,

Christa McClure

Exhibit F - 1

ADVOKATFIRMAET
HØYER, TØMMERDAL, SPERRE, REKDAL & BOLGVÅG

Mr. Erik Andreassen
Ulstein Hatlø A/S
6065 Ulsteinvik

6002 ALESUND,

6.10.88
PNS/RB

Dear Mr. Andreassen

RE. CONVERSION CONTRACT WITH SUNMAR HOLDING INC. FOR CONVERSION OF M/S "STATE EXPRESS".

The above specified contract was entered into 10.06.88. The contract was notarised on 11 July 1988.

Article XVI of the contract - Interpretation - states that all disputes between the parties shall be resolved in accordance with Norwegian law.

In addition to the document known as the contract, and which totals 40 pages, three so called addenda were drawn up between the parties at the time the contract was entered into on 10.06.88.

1.
Addendum no. 1 states the contract sum and agreed basic prices.

2.
Addendum no. 2 concerns the shipyard's obligation to pay costs incurred by the shipping company in connection with completion of contract and work performed outside this.

3.
Addendum no. 3 raises the following conditions:

a) that the shipping company obtains adequate financing;
b) that interest subsidies are obtained in accordance with the rules of "Eksportfinans";
c) confirmation from the U.S. Coast Guard that the conversion is approved;
d) shipyard's final inspection of M/S "State Express";
e) approval of the contract by the shipyard's Board;
f) that the shipyard has sufficient capacity to complete the assignment within the deadline set by the contract;
g) laid down that the shipyard has the right to subcontract the

The specified addenda also state that the conditions set out above shall be lifted not later than 30.10.88.

In a telex from Sunmar Shipping Inc. of 4.10.88, the following problems were raised:

Was the ship-building contract Sunmar Holding Inc. held with Ulstein Hatlø A/S still valid as at 11 July 1988 having signed the contract with its accompanying addenda?

Although there is no direct reference in the enquiry of 4 October, 1988, I take the liberty of supposing that this question has some connection with the conditions laid down in addendum no. 3 of the contract.

By way of introduction, let me clarify that the conditions laid down in addendum no. 3 of the contract are perfectly regular and in keeping with common Norwegian contract convensions regarding shipbuilding or conversion of vessels of this size. The legal significance of such conditions is based on Norwegian law which states that if the circumstances that the conditions presuppose will occur do not occur, then the contract will be invalidated. For example, if the shipyard's Board does not give its approval to the contract, the shipyard's rights and obligations according to the contract no longer apply.

In legal terms, it is fair to say that if the events which are presupposed will occur when the parties sign the contract do not occur, there are very reasonbale grounds for rescission of the parties rights and obligations.

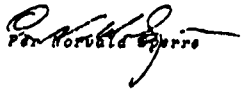
On the other hand, in accordance with Norwegian law, the conditions stated in addendum no. 3 may also be seen to regulate comprehensively any agreed grounds for rescission of the parties rights and obligations over and beyond those which result from common Norwegian law regulations concerning force majeure. In other words, the parties cannot exempt themselves from their obligations set out in the contract by referring to other events which it was thought would occur but which do not occur. For example, if there were to be a price increase in Norway on all work carried out by sub-contractors, far beyond any expectations the shipyard had foreseen at the time of entering into the contract, this would not give the shipyard reasonable grounds for withdrawing from the contract.

Also in addendum 3, 30.10.88 has been set as a deadline for the right to lift the conditions. The consequence of not lifting the conditions within this period will be that one of the parties may then plead that the contract is void. If the parties agree, however, there is nothing in Norwegian law which states that this deadline cannot be extended.

Thus, as you can see from what I have said, there clearly existed, in accordance with Norwegian law, a valid contract between the parties as of 10.06.88 when the contract with addenda was signed. Furthermore, due to neither of the parties pleading reasonable grounds for withdrawal from its rights and obligations before 11.7.88, according to the contract as substantiated in addendum no. 3 or in common Norwegian principles of law, it must be stated that also at that date there existed a valid contract between the parties.

Should you need further advice, I shall be happy to assist.

Yours sincerely



AFFIDAVIT

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Michael F. Burns, being first duly sworn, deposes and states as follows:

1. I am over the age of eighteen years. I have personal knowledge of the facts stated herein, and they are all true and correct.

2. I was the owner of the vessel ACONA, Official Number 646737, in early 1987.

3. I sold the ACONA to Thorn Tasker under an Earnest Money Agreement for Purchase of Vessel dated February 19, 1987. A copy of that agreement is attached as Exhibit 1. The sale of the ACONA was closed soon thereafter at the offices of Landweer and Associates in Seattle, Washington.

4. After I had sold the ACONA I signed, at Mr. Tasker's request, an undated letter regarding the terms of our purchase and sale agreement. A copy of that letter is attached as Exhibit 2, except that the letter was not signed by Mr. Tasker nor dated when I signed it.

5. At no time was I aware that the letter would be submitted to the United States Coast Guard.

FURTHER AFFIANT SAYETH NAUGHT.

MICHAEL F. BURNS

SUBSCRIBED AND SWORN to before me this 19 day of December, 1997.

NOTARY PUBLIC, STATE OF WASHINGTON
My Commission Expires: 4-19-98

DOCK STREET BROKERS
5101 Ballard Avenue N.W.
Seattle, Washington 98107
(206) 789-5101

EARNEST MONEY AGREEMENT

FOR PURCHASE OF VESSEL

I, THORNE TASKER, (hereinafter referred to as ("Buyer") offer to purchase the vessel named ACONA through Dock Street Brokers, 5101 Ballard Ave. N.W., Seattle, Washington 98107 (hereinafter referred to as ("Broker") which is owned by MICHAEL BURNS (hereinafter referred to as ("Seller") on the terms and conditions stated herein.

1. The vessel is the 85 foot RESEARCH vessel, official number 646737, including her engines and equipmetn. The vessel shall conform to the description and representation of the Seller's specification sheet attached here. Buyer agrees that neither Seller nor Broker has made any oral or written representations concerning merchantability, seaworthiness, or fitness for any particular use, except as stated in the attached specification sheet or as listed as follows:

NONE.

2. The purchase price is [redacted] Dollars ([redacted]) including the earnest money. I have placed [redacted] Dollars ([redacted]) earnest money in trust with Broker. The Balance of the purchase price shall be payable as follows: [redacted] EARNEST MONEY CASH ON CLOSING, BALANCE OF [redacted] DUE 6 MONTHS AFTER CLOSING SECURED BY ATTACHED PROMISSORY NOTE AND PREPAYABLE AT ANYTIME WITHOUT PENALTY.
The Broker shall hold the earnest money to be disbursed solely as provided in this agreement.

3. Seller shall deliver the vessel to Buyer with good title, free from all mortgages, liens, encumbrances, and other obligations

EXHIBIT 1

2201159

of liability except: Provided If Vessel Hauled Out [redacted] Paid By Seller (See P2)

It is understood and agreed that on or before closing Seller may clear any mortgages, liens and encumbrances out of the proceeds of this sale.

4. This offer to purchase is conditioned upon an inspection and marine survey of vessel satisfactory to Buyer. Buyer may obtain an inspection by an independent marine surveyor selected and paid for by Buyer. It be understood and agreed that any such marine survey will be performed within _____ days of acceptance of this offer. It is further agreed that the marine survey shall be considered satisfactory to Buyer unless Buyer gives written notice to Broker on or before _____ (date). Subject to the above described right of Buyer to inspection and survey, the vessel is sold "as is."

5. The vessel and her equipment shall comply with all applicable United States Coast Guard regulations as of the date of closing, except: _____

6. This offer "is, is not subject to Buyer's obtaining financing. Buyer agrees to submit a written application for financing within _____ days of acceptance of this offer and make reasonable efforts to obtain financing. In the event Buyer fails to apply for financing by that date or in the event Buyer fails to notify Broker by _____ (date) that Buyer has not received financing approval, Buyer shall forfeit the earnest money deposit to Seller subject to the provisions of paragraph 9. In the event Buyer's application for financing is rejected and BUYER or Buyer's financing institution sends written notice to Broker on or before _____ (date), Buyer is entitled to a refund of the entire earnest money deposit.

7. Seller assumes all risk of loss of subject vessel before closing. In the event the vessel becomes a total or total constructive loss prior to closing, this Agreement will immediately

terminate at the discretion of Buyer.

8. The vessel is currently moored at SEATTLE, FISHERMAN'S TERMINAL and shall be delivered, where is to Buyer upon closing.

9. In the event Seller rejects this offer or does not comply with any of the above stated conditions, Buyer shall be entitled to immediate refund of the entire earnest money deposit. In the event Buyer for any reason forfeits the earnest money deposit, it is understood and agreed that Broker shall be entitled to retain the sum of $1,000.00 to cover Broker's expenses, and the balance of the earnest money shall be delivered to Seller as liquidated damages. Upon forfeiture of the earnest money, Buyer shall be under no obligation to Seller to complete purchase of the vessel or to Broker for Broker's commission and expenses.

10. In the event there is any dispute as to whether Buyer has forfeited the earnest money deposit, Buyer and Seller agree to hold Broker harmless and to refer such dispute for settlement to arbitration by a single arbitrator, if Buyer and Seller can agree upon one arbitrator and otherwise to the arbitration of three arbitrators, one to be appointed by Buyer, one to be appointed by Seller and the third to be chosen by the two arbitrators so appointed in accord with the Arbitration Act of the State of Washington.

11. The closing date shall be on or before 21st, MAY. Buyer and Seller designate Broker as closing agent. Closing shall take place at LAWYERS AND ASSOC, SEATTLE.

12. Expenses of vessel documentation shall be paid by Buyer. Preparation of Bill of Sale and Satisfaction of Mortgage shall be paid for by Buyer.

13. It is agreed that time is of the essence and that all of the deadlines in this Agreement are critical to the parties.

14. This Agreement constitutes the entire agreement of the parties and may not be changed or modified in any respect including, but not limited to, the date for obtaining survey inspection, and date of closing except by a writing signed by the parties.

13. Disclaimer of Warranties: It is expressly understood and agreed that Seller and Broker shall not be deemed or held to be obligated, liable, or accountable upon or under any warranties or guarantees, expressed or implied, including, but not limited to ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS under the Uniform Commercial Code, or by operation of law, or otherwise, in any manner or form beyond the express agreements as set forth in the attached specifications sheet or beyond the express agreements listed in paragraph 1 above.

BUYER: [signature] DATE: Feb 19 1987

Address: 316 4 ST [illegible]

Telephone: 907-276-5242

FIVE THOUSAND Dollars ($ 5.000)

Earnest Money received as set forth above:

DOCK STREET BROKERS [signature] DATE: Feb 19, 1979

This offer is accepted:

SELLER: [signature] DATE: 2/19/1987

Address:

Telephone:

I received a true copy of this Agreement signed by the Seller on _____ (date).

BUYER: [signature]

2201162

Earnest Money Agreement

Exhibit B

Mr. Thorne Tasker
c/o Alaska Joint Venture Fisheries, Inc.
310 K Street, Suite 310
Anchorage, AK 99501

Dear Mr. Tasker:

This letter is to establish the basic terms of agreement between us for the sale of the M/V Acona, an 85' research vessel, O/N #646737.

The sales price shall be [redacted], payable in cash at the time of closing. I will extend limited financing up to [redacted] for approximately 30 days if you so desire. Any such financing shall be secured by the vessel. My agent, Dock Street Brokers, will prepare the necessary documents.

We agree to conclude a purchase agreement within the next 30 days, and I will make the vessel available for inspection to you during that period. Such inspection shall include testing of systems, and dry docking at your expense, if you so desire. I understand that you intend to complete work that I started to convert the vessel for fishing, and I will cooperate with your naval architects in providing plans and vessel specifications.

If you agree with the terms outlined above, please acknowledge this letter by signing below.

Sincerely,

Michael Burns
Owner M/V Acona

Acknowledged:

Thorne Tasker
1/21/87

EXHIBIT 2 2201158

PRESTON
GATES ELLIS
& ROUVELAS
MEEDS
ATTORNEYS AT LAW

Suite 500
1735 New York Avenue, NW
Washington, DC 20006-5209
(202) 628-1700
Fax: 202-331-1024

MEMORANDUM

TO: American Fisheries Coalition

FROM: Bill Myhre

RE: Status Report

DATE: October 16, 1991

We had a series of meetings this week with officials from the Department of Transportation and the Office of the United States Trade Representative (USTR) concerning overall U.S. policy issues related to the foreign investment restrictions of the American control provisions of the Anti-Reflagging Act; these meetings are summarized below. With respect to the litigation itself, there have been no further filings in the docket or other developments in the case since our last report.

1. Department of Transportation Meetings

Together with Per Kibsgaard-Petersen, Phyllis Carnilla and I met with several Department of Transportation (DOT) officials in two separate meetings on Tuesday, October 15th. In our first meeting, with the Office of Chief Counsel of the Coast Guard, Mr. Kibsgaard-Petersen outlined the concerns of Norwegian interests with respect to the heavy reliance by Norwegian investors and bankers on Coast Guard rulings and the potential retroactive application of the Southeast Shipyard decision. He pointed out that a failure to appeal the decision would have implications beyond the specific vessels and investors involved in the North Pacific. There was general sympathy to the concerns he had expressed and assurances that the Coast Guard would not take steps to disrupt the status quo, at least during the period pending the court's action on the Motion for Clarification. It seemed clear to us that if the Motion for Clarification were denied the Coast Guard would recommend that the Department appeal the case.

EXHIBIT E

Representatives of the Assistant Secretary for Policy and International Affairs, and the Assistant General Counsel for Litigation in the Department of Transportation, were equally sympathetic to the concerns outlined by Mr. Kibsgaard-Petersen. The representative from the DOT General Counsel's office confirmed that there had been little discussion of the issue at DOT since the Motion for Clarification was filed.

DOT officials also confirmed our understanding that interests favoring the Judge's decision have communicated with DOT officials concerning the policy implications of the case, although it was not clear whether these communications have continued in recent weeks. We were urged to continue to make our concerns known to the Department. There was a clear recognition of the competing political interests surrounding this issue and how the issue might relate to the inshore/offshore dispute.

These DOT officials also confirmed that high level talks had occurred between the Norwegian Deputy Minister of Commerce and the U.S. Deputy Secretary of Transportation. These meetings, as reported earlier, emphasized the concern of Norwegian investors and lenders in the outcome of the case.

2. USTR Meetings

We met with one of the directors in the Office of the Assistant USTR for Services, Investments, Intellectual Property & Science & Technology. Although this official was familiar with the policy issues raised by the case, he was astonished to learn the magnitude of the investments potentially jeopardized by the decision. He was highly sensitive to the international concerns raised on behalf of the Norwegian investors. There was a clear understanding of the trade problems that the case could create and a genuine willingness to involve others in the Administration with similar interests in foreign investment policy. We discussed the importance of having USTR, Treasury and State weigh in at the time of an appeal decision on the litigation.

We were pleased with the opportunity to have these meetings which were occasioned by Mr. Kibsgaard-Petersen's visit to Washington. It served to remind appropriate officials of the importance of the decision.

3. Norwegian Embassy Meetings

We also met with the Counselor for Shipping and Civil Aviation at the Norwegian Embassy who is responsible for transportation matters and this case in particular. She was very cooperative in briefing us on the meetings of the Norwegian Deputy Minister of Commerce and the background briefing of Norwegian Prime Minister Gro Harlem Brundtland. She indicated that this was of course one of a number of trade issues, both fisheries and otherwise, presently outstanding between the two

countries. She was also helpful in identifying those U.S. government officials with whom she had been in touch.

4. Legislative Matters

Earlier this week, in a four column article, the Washington Post turned its attention to Senator Stevens and his reputation as "a politician not to mess with when his home state is involved." The article discussed at length a Stevens' amendment to a transportation appropriations bill which would exempt MarkAir from new airline safety rules by prohibiting funds from being spent to enforce the rules. The article characterizes Senator Stevens as having "stretched the bounds of constituent service". The amendment was added over the objections of the Department of Transportation. Many in Congress feared the amendment would set a troublesome precedent for waving safety rules based only on economic considerations. The Chairman of the Aviation Subcommittee of the House Public Works and Transportation Committee called the amendment "bizarre" and said "we wouldn't tolerate it anywhere else."

The article illustrates not only Senator Stevens' penchant for mischief on appropriations bills but that finally his behavior is receiving some public attention. We have continued to monitor various appropriations bills that are moving through Congress. Senator Stevens is a conferee on several other bills such as defense appropriations. Neither the House conferees nor the date of conference have been announced. We will be watching this legislation for possible amendments.

SIVILØKONOM MNSF
PER KIBSGAARD-PETERSEN
FINANSRÅDGIVNING
KONSUL FOR FINLAND

Telefax
Til/To KRISTIAN WESTAD
Fra/From PER K-P
Dato/Date 28/1 Ant. sider/No. of pages 1
Post-it Kontorformularer 3M/Best. nr. 7660

Pacific Orion Seafoods Inc.
1700 Westlake Ave. N. Suite 410
Seattle WA 98109.

Ålesund, January 28.1992

att. Kristian Westad

SOUTHEAST SHIPYARD ASSOC. V. US GOVERNMENT.

Back in Norway I have been in contact with Arne Sivertsen of the ministry for foreign affairs. He confirmed that the embassy had been instructed to follow up towards the State Department through a diplomatic note presented by ambassador Vibe. The content of the note will as far as I understand be the main items of the embassy's talking points, which should be satisfactory.

I am trying through different political channels to arrange a series of meeting in Oslo and Stavanger to cover the oil industry lobby. This will take place late this week and early in week 6. I will be reporting back as soon as there is progress.

Best regards,
Per
Per Kibsgaard-Petersen

copy on fax: Bill Myhre/Phyllis Carnilla

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ROYAL NORWEGIAN EMBASSY
WASHINGTON, D. C.

The Royal Norwegian Embassy presents its compliments to the Department of State and has the honour to draw the Department's attention to an investment matter which is presently causing the investors as well as the Norwegian authorities considerable concern. The case involves Norwegian investments in U.S. fisheries amounting to several hundred million dollars which have recently been placed in jeopardy.

Over the years, numerous Norwegians have invested in the fishing industry in the State of Washington in conformity with U.S. laws. These investments have benefitted the communities in creating employment opportunities for local citizens.

In 1987 the Commercial Fishing Industry Vessel Anti-Reflagging Act (the "Anti-Reflagging Act") was passed. The Act required for the first time that fishing vessels be majority owned by American citizens and, if rebuilt, be rebuilt in U.S. shipyards. In recognition of those who had made investments in reliance on existing law, Congress fashioned two grandfather provisions. The first, the "Rebuilding Grandfather", permitted certain vessels to be rebuilt overseas if they were contracted and delivered within certain preset dates. Similarly, with the "Ownership Grandfather", Congress exempted all existing U.S.-documented fishing industry vessels as of July 28, 1987 from certain new citizen stock ownership requirements; only newly documented vessels were required to meet the more stringent citizenship standards.

A number of Norwegian controlled companies received specific Coast Guard rulings applicable to each of their vessels. These rulings confirmed that the companies would be able to permanently operate the vessels as fishing vessels of the United States according to the law which existed prior to 1987, i.e. despite the fact that the vessels were rebuilt in foreign countries and that the entities owning the vessels were in turn wholly owned by foreigners.

In reliance on the language of the rulings, the various companies proceeded with their investments and placed the vessels in service. The Coast Guard subsequently promulgated

The Department of State
Washington, D.C.
No. 15/92

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final regulations reconfirming the advice given in the rulings.

Recently, however, the Federal District Court in Washington, D.C., reached a decision in the case of Southeast Shipyard Association v. United States of America. The decision overturned Coast Guard's interpretation of the Anti-Reflagging Act concluding that the interpretation was contrary to the intent of Congress. The owners feared that because of the Court's decision, the grandfather rights might not attach to the vessel, and the rebuilding grandfather rights for which the vessel owners qualify under the Anti-Reflagging Act might terminate if there were any change "in whole or in part" in the ownership or operational control of these vessels since July 28, 1987. This would have meant that even the most routine operational decisions or modest corporate adjustments could have resulted in a termination of the rebuilding grandfather and permanent forfeiture of fisheries privileges for the vessels in question.

U.S. Coast Guard filed a motion asking for the court's clarification and amendment of judgement in order to clear up potential misunderstandings relating to the decision.

However, on 14 January 1992, the court ordered the motion denied. At the same time the order stated that the grandfather status of a qualified foreign rebuilding shall not be affected when a vessel is subsequently transferred.

These last developments still leave the ownership problem unsolved. Norwegian interests have invested considerable amounts of money in the U.S. fishing industry and Norwegian banks have extended loans of approx. $ 300 million. These loans were made in express reliance on individual Coast Guard rulings that were believed to effectively insure investors that the value of their investments were safe.

Coast Guard has now alerted the owners that within the span of a few days, ownership transfers will have to be made so that the requirements of the 1987 law can be met. Alternatively, the fishing rights will be repealed for these vessels. The timing is most unfortunate since the fishing season which only lasts a few weeks has just started.

The situation is further exacerbated by the inability of the Norwegian interests to appeal the decision since they are not a direct party in the Southeast Shipyard Association case. It appears that the only certain way of ensuring that the court will grant a stay is for the Coast Guard to become part of an appeal.

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MUNDT, MacGREGOR, HAPPEL, FALCONER, ZULAUF & HALL

ATTORNEYS AT LAW

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KATHLEEN C. VAN OLST

February 26, 1992

Commandant J.W. Kime
United States Coast Guard
2100 Second Street Southwest
Washington, D.C. 20593-0001

Re: Emerald Seafoods, Inc. - Waiver under
46 U.S.C. § 8103(b)(1)

Dear Admiral Kime:

This letter is to help document the number of foreign nationals currently working on board U.S. flag fish processing vessels and that an industry-wide shortage currently exists due to circumstances which are beyond the control of the fishing industry.

I am an attorney that has been practicing immigration and naturalization law for the past ten years. My resume is attached hereto. At the present time I am employed at the law firm of Mundt, MacGregor, Happel, Falconer, Zulauf & Hall in Seattle, Washington. Our firm resume is also attached as Exhibit B. Some of the areas of practice of our firm includes admiralty and maritime law, immigration and nationality law, business, corporate and litigation. In conjunction with the admiralty and maritime practice, it has become evident for the need for our immigration attorney to assist clients in processing the necessary visa applications on behalf of workers to be employed in the United States.

Accordingly, this office has processed both nonimmigrant and immigrant visa applications on behalf of Nationals from countries such as Norway, Japan, Denmark, Korea, etc. to accept employment either on a temporary or permanent basis with the U.S. employer. As part of most every application which is submitted to the Immigration and Naturalization Service or to a U.S. Consul abroad, the employer must demonstrate that it has recruited or sought to train U.S. workers for the positions being offered on many U.S. factory trawlers operating in the North Pacific. These positions include Fishing Master, Fishing Mate,

EXHIBIT F

Bosun 1 and 2, Technical Representative, Electrician, Baader 1 and 2, Assistant Baader, Factory Engineers, Assistant Factory Engineer, Fish Meal Technician, Factory Managers, Factory Foremen, Quality Control, Surimi Quality, Lead Surimi Technician and Surimi Technician.

The nonimmigrant visas may be issued from one year to five years depending on the country and the reciprocity schedule which the U.S. maintains with that country. During the past year I have seen various trends in the length of time issued on a visa for an essential skilled employee. Currently, the average length of time for a visa is two years. However, a year ago we were seeing only one year visas. Over the past year just our firm has processed approximately two hundred visas for managers, executives or essential skills employees for several factory trawler companies. In addition, there are several other law firms that also process visas for factory trawlers.

We also handle the immigration visas for numerous other industries including pulp and paper and forestry industries, computer industries, construction materials, import/export, trading, tourism, financial planning and other industries. The same rules apply to these industries as well, and we have been successful in obtaining visas for essential skill employees in these industries. However, visas for workers on factory trawlers are more difficult to obtain.

Should you have any questions, please feel free to contact the undersigned.

Sincerely yours,

MUNDT, MacGREGOR, HAPPEL,
FALCONER, ZULAUF & HALL

Janet H. Cheetham

JHC:jcp
Enclosures
LUSCC.113

cc: CDR. Chip Boothe

TESTIMONY

OF

EUGENE ASICKSIK

PRESIDENT AND CHIEF EXECUTIVE OFFICER

OF THE

NORTON SOUND ECONOMIC DEVELOPMENT CORPORATION

REGARDING THE

AMERICANIZATION OF THE UNITED STATES FISHING FLEET

BEFORE THE

SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS

OF THE

HOUSE COMMITTEE ON RESOURCES

June 4, 1998

Mr. Chairman and members of the Subcommittee, I am Eugene Asicksik, the president and chief executive officer of the Norton Sound Economic Development Corporation (NSEDC).

Exercising authority delegated by the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), in 1991 the North Pacific Fishery Management Council (NPFMC) established, and in 1992 the Secretary of Commerce (Secretary) by regulation implemented, the western Alaska community development quota (CDQ) program to enable residents of fifty-five western Alaska communities to participate in the commercial pollock fishery that is conducted in the Bering Sea portion of the two-hundred-mile United States exclusive economic zone (EEZ). The NPFMC and the Secretary then allocated 7.5 percent of the total allowable catch of Bering Sea pollock (approximately 100,000 metric tons) to the program.

In 1991 and 1996 the NPFMC expanded the western Alaska CDQ program to include, first halibut and sablefish, and then crab and other groundfish species. And in 1996, Congress amended MSFCMA to mandate the NPFMC and the Secretary to allocate to the western Alaska CDQ program a percentage of the total allowable catch of each Bering Sea fishery.

To participate in the western Alaska CDQ program, the 7,000 residents of fifteen Seward Peninsula-Bering Straits region communities in northwestern Alaska established NSEDC. NSEDC then applied for a percentage of the 7.5 percent of the total allowable catch of Bering Sea pollock that the NPFMC and the Secretary allocated to the program, and in 1992 was awarded 20 percent (presently 22 percent) of the 7.5 percent.

Each of the six CDQ organizations that the fifty-five communities that are eligible to participate in the western Alaska CDQ program have organized has contracted with a fishing company that operates at-sea processing vessels to harvest either all or a portion of the organization's percentage of the CDQ pollock allocation. To assist it to harvest its percentage of the pollock allocation, NSEDC contracted with Glacier Fish Company, a U. S. company that owns and operates two mid-water trawl catcher-processor vessels, the Northern Glacier and Pacific Glacier. Since 1992 both vessels annually have harvested NSEDC's percentage of the 7.5 percent CDQ program pollock allocation. As part of its contractual relationship with NSEDC, Glacier Fish Company employs residents of NSEDC's fifteen member communities on its vessels. NSEDC has used the revenue that it has received from Glacier Fish Company to finance fisheries-related economic development activities within the Seward Peninsula-Bering Straits region.

Over the past six years, NSEDC's involvement with Glacier Fish Company has successfully advanced the goals of the western Alaska CDQ program. The relationship with Glacier Fish Company was so successful that in January 1998 NSEDC purchased a one-half ownership interest in the company. NSEDC's acquisition of an equity interest in the offshore sector of the Bering Sea pollock fishery further advanced the goals of the CDQ program. And it substantially increased the Alaskanization of the fishery.

As a consequence of its one-half ownership interest in Glacier Fish Company, NSEDC now owns a one-half ownership interest in the Northern Glacier and Pacific Glacier. The Northern Glacier has a registered length of 175.6 feet, is 1866 gross registered tons, and has engines that produce 3,000 shaft horsepower. The Pacific Glacier has a registered length of 253.5 feet, is 3124 gross registered tons, and has engines that produce 6600 shaft horsepower.

Because NSEDC has an important interest in Congress's, the Secretary's, and the NPFMC's regulation of fishing within the Bering Sea portion of the EEZ, I and the board of directors of NSEDC very much appreciate this opportunity to inform the Subcommittee of our views regarding the Americanization of the U. S. fishery.

In 1976 MSFCMA established two national fishery management objectives. The first was the conservation of fishery resources within the EEZ. The second was the Americanization of the harvesting and processing of fishery resources within the EEZ.

In addition to those objectives, a group of U. S. fishermen and processors who participate in the Bering Sea pollock fishery have suggested that Congress establish reduction of overcapitalization in the Bering Sea pollock fishery as a national fishery management objective.

As a threshold matter, NSEDC believes that each of those objectives - i. e., conservation, Americanization, and reduction of overcapitalization - is a separate subject, and that analytical confusion results when the three subjects are considered as intertwined elements of a single whole.

Insofar as Americanization is concerned, NSEDC strongly supports not only the Americanization of the catching and processing of pollock and other groundfish that are harvested in the Bering Sea portion of the EEZ, but also the **Alaskanization** of the catching and processing of those species; which is why NSEDC purchased a fifty percent ownership interest in Glacier Fish Company.

NSEDC Supports Requiring 75 Percent of the Controlling Interest in All United States Flagged Fishing Vessels to Be Owned by United States Citizens

Since only U. S. flagged vessels now fish in the EEZ, in a superficial sense, the Americanization of the U. S. fishing fleet has been achieved. However, U. S. citizens do not own a controlling interest in a number of U. S. flagged vessels. So with respect to the ownership of vessels, the Americanization of fishing within the EEZ that MSFCMA mandated in 1976 has not been fully effectuated. For that reason, NSEDC recommends that Congress require 75 percent of the controlling interest in all U. S. flagged vessels to be owned by U. S. citizens.

NSEDC also urges that recommendation for a second reason. While various participants in the Bering Sea pollock fishery disagree on the solution to the problem, all agree that the fishery is overcapitalized. How to reduce overcapitalization in a manner that is both fair and equitable to vessel owners and does not compromise the increased Americanization of fish processing within the EEZ is an extremely complex problem.

One means to reduce overcapitalization would be for the NPFMC to establish, and the Secretary to implement, a quota-based management program that would rationalize the conduct of the fishery. However, because there is disagreement about the long term consequences of quota-based management programs, in 1996 the 104th Congress directed the National Academy of Sciences to study, and to no later than October 1, 1998 submit a report regarding, such programs. The 104th Congress also amended MSFCMA to prohibit fishery management councils from recommending the establishment of quota-based management programs until the Academy's report has been considered by the 106th Congress.

In conducting the aforementioned study, the 104th Congress directed the National Academy of Sciences to identify mechanisms whose implementation will prevent foreign control of the harvest of U. S. fisheries under quota-based management programs. One way to help ensure that a quota-based management program for a fishery conducted within the EEZ does not institutionalize foreign control of the fishery is to require 75 percent of the controlling interest in U. S. flagged vessels that participate in the fishery to be owned by U. S. citizens. Consequently, the 105th Congress's imposition of that ownership requirement now will facilitate the 106th Congress's consideration of the utility of quota-based management programs by allowing the utility or disutility of such programs to be considered based on their advantage or disadvantage solely to U. S. citizens.

Finally, in addition to recommending that Congress require 75 percent of the controlling interest in all U. S. flagged fishing vessels to be owned by U. S. citizens, NSEDC also recommends that Congress enact measures that will increase Americanization of the processing and marketing of fishery resources harvested within the EEZ by ensuring that transfer pricing and similar accounting subterfuges do not prevent the full value of U. S. fishery resources from being realized.

NSEDC Opposes a Phase-Out of Large Fishing Vessels

The Subcommittee has requested testimony regarding the extent to which the national fishery management objective of Americanizing the harvesting and processing of fishery resources within the EEZ has been achieved. As mentioned, that subject has nothing to do with the subject of conservation.

However, while I have not had an opportunity to read the testimony that Greenpeace has submitted to the Subcommittee, at the hearing the Senate Committee on Commerce, Science and Transportation held on S. 1221 on March 26, 1998, Greenpeace argued to the Committee that phasing out large fishing vessels will advance the national fishery management objective of conserving fishery resources within the EEZ. For that reason, it is reasonable to expect that Greenpeace will offer similar testimony at this hearing.

Assuming so, NSEDC would like to inform the Subcommittee of its strong disagreement with Greenpeace regarding the relationship between vessel size and environmental consequence. Contrary to Greenpeace's bald assertion to the Senate Committee on Commerce, Science and Transportation that "big is always bad," the National Marine Fisheries Service (NMFS) more accurately informed the Committee that "conservation impacts on U. S. fisheries" are not "necessarily linked to the size of vessels deployed in a particular fishery" because "the size of a vessel does not necessarily reflect its fishing capacity." The reason is that, as NMFS explained, "a 150 ft catcher vessel is capable of harvesting as much fish in one tow as a 300 ft factory trawler that has devoted most of its space to processing operations rather than fishing capacity," and "the nets deployed on large catcher vessels may be as large or larger than the nets deployed on factory trawlers." And as David Evans, the deputy assistant administrator of NMFS, explained during the Senate hearing in answer to a question asked by Senator Ron Wyden, when they fish for Bering Sea pollock with the same trawl gear, large fishing vessels that process their catch at sea and smaller vessels that deliver their catch to shore-side processing plants have similar bycatch rates.

Further, the NPFMC staff has recommended against comparing any differences between catcher-processor vessel and catcher boat bycatch rates because the methods that are employed on board the two types of vessels to observe, report and determine bycatch rates are significantly dissimilar.

Since vessel size, tonnage, and horsepower do not in and of themselves determine, nor possibly even influence, conservation results, NSEDC believes that Congress should not mandate a phase out of large fishing vessels. Instead, Congress should consider requiring fishery management councils to include vessel size, tonnage, and horsepower requirements as mandatory elements of fishery management plans by amending section 303(a) of MSFCMA to add an additional paragraph to read:

> (15) specify the maximum registered length, gross registered tonnage, and total shaft horsepower of fishing vessels of the United States that may participate in the fishery.[1]

With an Important Caveat, NSEDC Has No Position Regarding Whether Congress Should Reduce Overcapitalization in the Bering Sea Pollock Fishery by Requiring Certain Reflagged Fishing Vessels That Presently Participate in the Fishery to Surrender Their Fishery Endorsements

In 1987 Congress enacted the Commercial Fishing Industry Vessel Anti-Reflagging Act (Anti-Reflagging Act), Pub. L. No. 100-239. The Anti-Reflagging Act inter alia prohibits United States vessels that have been rebuilt in a foreign country from fishing within the EEZ and other waters of the United States unless a vessel has satisfied the requirements of one of several exemptions described in the Act. The exemption contained in section 4(a)(4) and (b) of the Act authorized a vessel that was built in the United States but rebuilt in a foreign country to obtain a fishery endorsement if

> (1) the vessel was rebuilt under a contract entered into before six months after the date of enactment of the Anti-Reflagging Act;

---

[1]It also should be noted that the 165 foot, 750 gross registered tons, and 3,000 shaft horsepower criteria that S. 1221 employs to identify vessels that should be phased out of fisheries conducted within the EEZ are patently capricious standards to employ to implement a vessel phase-out. See Attachment No. 1: Memorandum from Donald C. Mitchell to Eugene Asicksik, May 29, 1998.

(2) the vessel was purchased or contracted to be purchased before July 28, 1987 with the intent that the vessel be used in the fisheries, and that intent is adequately documented; and

(3) the vessel was redelivered to the owner before July 28, 1990.

Pursuant to section 4(a)(4) and (b) of the Anti-Reflagging Act, the Coast Guard issued fishery endorsements to a number of U. S. flagged vessels that were rebuilt in foreign shipyards and which presently fish for pollock in the Bering Sea portion of the EEZ.

Since those endorsements were issued, there has been continued controversy regarding whether the Coast Guard correctly interpreted and implemented the intent of Congress embodied in section 4(a)(4) and (b) when it issued fishery endorsements to approximately eighteen of the aforementioned vessels. Individuals who believe that the Coast Guard did not correctly interpret and implement the intent of Congress embodied in section 4(a)(4) and (b) have suggested that Congress should reduce overcapitalization in the Bering Sea pollock fishery by requiring as many as one-half of the eighteen vessels to surrender their fishery endorsements.

NSEDC and other U. S. citizens own one hundred percent of the controlling interest in the Northern Glacier and Pacific Glacier. And the Northern Glacier and Pacific Glacier are not vessels that are members of the aforementioned group of eighteen vessels. For those reasons, NSEDC has not conducted its own inquiry regarding, and consequently has no opinion regarding, the question of whether the Coast Guard correctly interpreted and implemented the intent of Congress embodied in section 4(a)(4) and (b) of the Anti-Reflagging Act.

Although it has no opinion regarding the correctness of the Coast Guard's interpretation and implementation of section 4(a)(4) and (b), NSEDC notes that, if Congress requires nine of the aforementioned vessels to surrender their fishery endorsements, the vessels doing so will reduce overcapacity in the processing sector of the Bering Sea pollock fishery. However, if the vessels' retirement subsequently is invoked by the NPFMC or the Secretary as a rationale to justify a reallocation of additional amounts of pollock from the Northern Glacier and Pacific Glacier and other catcher-processor vessels in which no less than 75 percent of the controlling interest is owned by U. S. citizens to Japanese owned or controlled shore-side processing plants, Congress's compelled surrenders of fishery endorsements will have substantially hindered, rather than advanced, the Americanization of the processing of pollock

within the Bering Sea portion of the EEZ.[2]

Nearly 70 percent of the processing capacity of the shore-side plants that process Bering Sea pollock is owned by Japanese companies that manufacture and market surimi for the Japanese market.[3] And the same Japanese companies own, or have a substantial ownership interest in, a substantial number of the catcher vessels that deliver pollock to the companies' plants. In addition, three "motherships," which process (but do not themselves fish for) pollock also are owned, financed, or operated by Japanese companies.

On the other hand, the Northern Glacier and Pacific Glacier, in which NSEDC owns a fifty percent interest, and a substantial number of the other catcher-processor vessels that harvest and process Bering Sea pollock are owned by U. S. citizens. The principal exception is vessels owned by the American Seafoods Company, a U. S. corporation that is owned by nonUnited States citizens.

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[2]Should it occur, such a reallocation would diminish the economic value of pollock caught by all United States fishermen by eliminating competition for the purchase of, while at the same time increasing the supply of, fish available for the surimi market. See NSEDC Attachment No. 2: Letter from A. Nicolov, president of the United States Surimi Commission, to Richard Lauber, chairman, NPFMC, at 9 (July 29, 1992)(reporting that a reallocation would "shift . . . several hundred thousand tons and hundreds of millions of dollars worth of surimi and other pollock products away from the 25 or so independent U. S. companies who operate the at-sea surimi fleet and an allocation of that tonnage and product to the two companies [Maruha and Nissui] who are our primary competitors in the Japanese market . . . Those two companies alone control in excess of 40% of the surimi production in the U. S."). A reallocation also would harm United States consumers by reducing the production of pollock fillets for the United States market.

[3]In addition to processing pollock for surimi, Glacier Fish Company's vessels, the Northern Glacier and Pacific Glacier, also produce deep skin block. Both deep skin block and pollock fillets generally are marketed in the United States and command higher prices per pound than does surimi, which is marketed in Japan. Catcher-processor vessels such as the Northern Glacier and Pacific Glacier produce the vast majority of the fillets and deep skin block that is processed from Bering Sea pollock. By contrast, the shore-side plants and motherships principally produce surimi.

Insofar as advancing the important policy objective of increasing the Americanization of the processing of Bering Sea pollock is concerned, shore-side processing plants owned by nonUnited States citizens and catcher-processor vessels owned by nonUnited States citizens are similarly situated. For that reason, it indeed would be ironic if Congress's efforts to increase U. S. citizen ownership of U. S. flagged fishing vessels and reduce overcapitalization in the Bering Sea pollock fishery were to result in a reallocation of pollock from the catcher-processor sector of the fishery (which Congress, by mandating that 75 percent of the controlling interest in all vessels be owned by U. S. citizens, would Americanize) to the shore-side processing plants and motherships (which would continue to be owned or controlled by Japanese corporations).

Because a reallocation of Bering Sea pollock from an Americanized offshore sector to a much less Americanized shore-side sector would so dramatically contravene achievement of the national fishery management objective of Americanizing the harvesting and processing of fishery resources within the EEZ, NSEDC respectfully requests that the Subcommittee recommend to Congress that it direct the NPFMC and the Secretary to ensure that that result not occur.

Thank you.

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May 29, 1998

TO: Eugene Asicksik
Norton Sound Economic Development
Association

FROM: Donald C. Mitchell

SUBJECT: Source of Large Fishing Vessel Criteria
in S. 1221

If enacted, section 301 of S. 1221, the bill that is pending before the Senate Committee on Commerce, Science, and Transportation, will phase out fishing vessels that are greater than 165 feet in registered length, or are of more than 750 gross registered tons, or that have engines capable of producing a total of more than 3,000 shaft horsepower by prohibiting the Coast Guard from issuing such vessels a fishery endorsement, unless a particular vessel previously had been issued a fishery endorsement that was effective on September 25, 1997 and has not subsequently been surrendered. And section 302 of S. 1221 amends section 302(b) of the Fisheries Financing Act to prohibit the Federal Government from guaranteeing loans for the construction or rebuilding of fishing vessels that exceed those limits.

You have asked me to determine the history of the 165 feet, 750 tons, and 3,000 horsepower criteria and to identify the policy rationale for using those criteria to implement a vessel phase out in the Bering Sea and elsewhere in the EEZ.

As to the 165 feet and 3,000 shaft horsepower criteria, prior to their inclusion in S. 1221, they were used by the drafters of H. R. 1855, which passed the U. S. House of Representatives in July 1997, and S. 1192, the companion bill to H. R. 1855 which Senators Snowe, Kerry and Kennedy introduced in the Senate, as the standard for prohibiting fishing vessels from participating in the Atlantic herring and mackerel fisheries unless fishery management plans for those fisheries authorize vessels longer than 165 feet or which have engines capable of producing more than 3,000 horsepower to participate.

When it reported the bill to the U. S. House of Representatives, the Committee on Resources explained that the drafters of H. R. 1855 intended the 165 feet and 3,000 horsepower criteria to prohibit the Atlantic Star, a large (because it contains on-board freezer storage) fishing vessel which intended

to enter the Atlantic herring and mackerel fisheries in November 1997 from doing so until the Mid-Atlantic and New England Fishery Management Councils write, and the Secretary of Commerce implements, fishery management plans for those fisheries. See H. R. Rep. No. 105-209 (1997).

While the vessel length and horsepower limitations that were included in H. R. 1855 may be appropriate for temporarily resolving the situation regarding the Atlantic herring and mackerel fisheries, there is no basis in fact for concluding that application of the same limitations would be appropriate for vessels that participate in the Bering Sea pollock fishery. Indeed, all that is known about the 165 feet and 3,000 horsepower limitations is that they establish a standard for entry into the Atlantic herring and mackerel fisheries that the Atlantic Star cannot satisfy.

At the hearing that the Committee on Resources held on H. R. 1855, neither Representative Saxton (the principal sponsor of the bill) nor Representatives Delahunt, LoBiondo and Tierney (the other sponsors who participated in the hearing), nor any witness explained why the sponsors selected 165 feet (rather than 100 feet or 300 feet) and 3,000 horsepower (rather than 2,000 horsepower or 4,000 horsepower). See generally A Bill to Establish a Moratorium on Large Fishing Vessels in Atlantic Herring and Mackerel Fisheries: Hearing on H. R. 1855 Before the Subcomm. on Fisheries Conservation, Wildlife and Oceans of the House Comm. on Resources, 105th Cong. (1997).[1]

The U. S. House of Representatives passed H. R. 1855 on July 28, 1997. As had occurred during the Committee on Resources hearing, at no time during the debate on the bill did any proponent of its passage or any other member of the U. S. House of Representatives explain either the source of, or the rationale for, the 165 feet and 3,000 horsepower limitations. See 143

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[1]Why did the drafters of H. R. 1855 select 165 feet? Brad Gilman, a Washington, D. C., attorney-lobbyist who specializes in fisheries issues, testified at the June 26, 1997 hearing on H. R. 1855 and assisted in drafting H. R. 1855. When I recently asked Mr. Gilman why the drafters selected 165 feet as the vessel length standard, he informed me that the Herring Committee of the New England Fishery Management Council surveyed the New England herring fleet and determined that the largest vessel in the fleet was 155 feet in length. The Committee then added a 10 foot fudge factor and selected 165 feet as the maximum length of vessels that should be allowed to participate in the Atlantic herring fishery (a standard that the Committee members knew when they invented it that the Atlantic Star could not meet). Since the Herring Committee suggested doing so, the drafters of H. R. 1855 then wrote the 165 feet standard into their bill.

CONG. REC. H5832-34 (daily ed. July 28, 1997).

Since the bill's passage by the U. S. House of Representatives, the Senate has taken no action on H. R. 1855. When the Senate's inaction became apparent, on September 25, 1997 during debate in the U. S. House of Representatives on H. R. 2267 (the Departments of Commerce, Justice and State Appropriations Act of 1998), Representative Harold Rogers, the chairman of the House Appropriations Committee Subcommittee on Commerce, Justice, State and Judiciary, offered, and the U. S. House of Representatives accepted, an amendment to H. R. 2267 whose text was drawn from that of H. R. 1855. And as the proponents of H. R. 1855 had during the House debate on that measure, the proponents of the Rogers amendment informed the House that adoption of the amendment was necessary in order to prevent factory trawler/freezer vessels from entering the Atlantic herring and mackerel fisheries. See 143 CONG. REC. H7893-96 (daily ed. September 25, 1997).

The Rogers amendment was included as section 616 of the House version of H. R. 2267. No similar provision was included in the Senate version of H. R. 2267. However, when the text of the version of H. R. 2267 that was enacted into law was negotiated by the Senate-House Conference Committee, the Committee accepted, and then rewrote, section 616 of the House bill. The rewrite added two new provisions to the Rogers amendment.[2]

The first prohibited vessels of more than 750 registered tons (as well as vessels greater than 165 feet in registered length or that have engines that produce more than 3,000 shaft horsepower) from participating in the Atlantic herring and mackerel fisheries during fiscal year 1998. The second prohibited funds from being expended to permit vessels that exceeded those length, tonnage, and horsepower limitations to catch, take, or process fish within the EEZ (except territories) "unless a certificate of documentation had been issued for the

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[2]As passed by the U. S. House of Representatives, the Rogers amendment, section 616 of H. R. 2267, read as follows:

> None of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in length or greater than 3,000 horsepower, as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, and the authorization required under part 648.8(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U. S. C. 1801 et seq.).

vessel and endorsed with a fishery endorsement that was effective on September 25, 1997 and such fishery endorsement was not surrendered at any time thereafter." See Pub. L. No. 105-119, section 616, 111 Stat. 2440, 2518 (1997).

In its report on H. R. 2267 the Conference Committee provided no explanation of the rationale for its inclusion of either of those provisions into the version of section 616 that was enacted into law. See Conf. Rep. No. 105-405 at 193 (1997).

Since, as explained above, the 165 feet, 750 tons, 3,000 horsepower criteria are patently arbitrary, there is no cogent policy rationale for Congress prohibiting vessels that are greater than 165 feet in registered length, or are more than 750 registered tons, or that have an engine or engines that are capable of producing a total of more than 3,000 shaft horsepower from fishing within the EEZ. For that reason, when he testified at the hearing that the Subcommittee on Oceans and Fisheries of the Senate Committee on Commerce, Science, and Transportation held on S. 1221 on March 26, 1998, David Evans, the deputy administrator of the National Marine Fisheries Service (the agency to which Congress has delegated authority to implement MSFCMA) informed the Subcommittee that NMFS does not believe "that a single set of physical vessel standards is equally desirable or necessary in all our fisheries." Deputy Administrator Evans then recommended that

> [L]ength, size, and engine power limits should be evaluated on a fishery-by-fishery basis through the Council process . . . Such an approach would obviously begin with the Regional Fishery Management Councils, which can best develop appropriate vessel standards for the fisheries in their jurisdiction. These Council recommendations would then go forward to the Secretary of Commerce for review and approval, as in any other action relating to Fishery Management Plan implementation.[3]

Please let me know if you need additional information regarding this subject.

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[3]Testimony on S. 1221 by Deputy Assistant Administrator David Evans, National Marine Fisheries Service, at 4-5 (March 26, 1998).

Aleutian Speedwell, Inc.
American Seafoods Company
Arctic Alaska Fisheries Corporation
Arctic Storm, Inc.
Birting Fisheries, Inc.

Glacier Fish Company, Ltd.
Golden Alaska Seafoods, Inc.
Oceantrawl Inc.
Pacific Orion Seafoods, Inc.
ProFish International, Inc.

United States Surimi Commission
Organized under the 1982 Export Trading Company Act
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July 29, 1992

Mr. Richard Lauber, Chairman
North Pacific Fishery Management Council
605 West Fourth Avenue
Suite 306
Post Office Box 103136
Anchorage, Alaska 99510

VIA FEDERAL EXPRESS

Re: Amendment 18 to the Bering Sea/Aleutian Islands Groundfish FMP

Dear Mr. Lauber:

I am writing on behalf of the United States Surimi Commission (the "USSC" or the "Commission") to comment on the above-referenced amendment to the Bering Sea/Aleutian Islands ("BSA") groundfish fishery management plan (the "shoreside preference" amendment). As will be discussed below, the USSC believes that the proposed amendment should be rejected for a variety of reasons, not the least of which are the anti-competitive effects that the management measures would have on the U.S. at-sea surimi industry's ability to compete in world markets for surimi and other pollock products.

THE SHORESIDE PREFERENCE PROPOSALS SHOULD BE REJECTED BECAUSE OF THE ANTI-COMPETITIVE EFFECTS THEY WOULD HAVE ON THE ABILITY OF INDEPENDENT SURIMI PRODUCERS TO COMPETE IN WORLD MARKETS.

In order to fully appreciate the significance and implications of the proposed amendment, it is necessary to put the shoreside preference proposals into a historical perspective and to describe the underlying forces that are presently vying for control of the U.S. pollock resource and the Japanese market for surimi. We will start with a brief description of the USSC

NSEDC Attachment No. 2

and the reasons for its formation; and will then discuss the evolution of the pollock industry in the North Pacific and why the proposed amendments would adversely affect the U.S. at-sea surimi industry.

A. The United States Surimi Commission. The USSC is an export trading company that was organized under the Export Trading Company Act of 1982. The Commission operates under a Certificate of Review issued by the Department of Commerce. The members of the Commission are independent U.S. companies that are engaged in the at-sea production and sale of surimi to Japan and other export markets.[1] Our members own and/or operate a fleet of approximately 20 factory trawlers that fish in the U.S. Exclusive Economic Zone off Alaska. Collectively, our membership represents about 75% of the U.S. vessels engaged in the at-sea production of surimi off Alaska.[2]

The USSC was founded as a result of difficulties that independent U.S. companies were encountering in connection with their efforts to market U.S. produced at-sea surimi in Japan. Although there is a small but growing market for surimi in other countries, Japan has traditionally been and remains the principal market for surimi in the world. As NMFS has reported:

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[1] Surimi is an odorless, tasteless product that is used in, among other things, the manufacture of "analogue" products such as artificial crab and shrimp. Although other species of fish can be used in the production of surimi, the characteristics of pollock make it the species of choice for most of the surimi-based ("kamaboko") products manufactured in Japan. Furthermore, at-sea produced surimi is considered to be a superior product and has traditionally sold at a premium price in the Japanese market (see Exhibit 1).

[2] In addition to the at-sea producers of surimi, there are more than 40 other factory trawlers engaged in the at-sea production of pollock fillets and blocks who would also be adversely affected by the proposed measures.

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> It appears that with respect to surimi, there are currently two suppliers (the Japanese and U.S. surimi industries) and one consumer (Japan's analogue product manufacturers).[3]

Indeed, the primary motivation behind the development of the U.S. surimi fleet (and the $500-$750 million investment made in that fleet) was to help meet the surimi demands in Japan as the Japanese flag surimi fleets were phased out of the U.S. EEZ. For this reason, the unexpected difficulties that our members had in penetrating the Japanese market had to be taken quite seriously. One of the primary problems that we faced was the dominant position that two Japanese companies, Nippon Suisan and Taiyo, held in the Japanese marketplace and the control that those two companies exerted over the importation and distribution of surimi and surimi products in Japan.

> Five years ago there were only two major importers of surimi [into Japan] - Nippon Suisan and Taiyo. Through a complicated system of ownership, these two companies essentially controlled all market channels for surimi.[4]

The Commission was founded as a vehicle for U.S. at-sea surimi producers to help cope with the competitive disadvantage at which they found themselves vis-a-vis the Nippon Suisan and Taiyo dominated surimi cartel that carefully regulated and controlled access to the Japanese surimi market.

B. Evolution of North Pacific Pollock Industry. For more than 30 years, the pollock industry in the North Pacific was dominated by Nippon Suisan (also known as "Nissui") and Taiyo. In the 1960's and the early 1970's, these two companies operated

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[3] See Addendum I to the Regulatory Impact Review/Initial Regulatory Flexibility Analysis of Proposed Inshore/Offshore Allocation Alternatives, Amendments 18/23 to the Groundfish Fishery Management Plans for the Gulf of Alaska and Bering Sea/Aleutian Islands, "An Overview of the Pollock Processing Industry" (hereinafter "Addendum I"), p. A.4.

[4] Id.

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large fleets of factory trawlers, motherships and catcher vessels that fished in what was to become the U.S. Fishery Conservation Zone in the Bering Sea and Gulf of Alaska. Using those fleets, they controlled the harvest of pollock and the at-sea production of surimi throughout the North Pacific.

The same two companies, Nissui and Taiyo, also controlled the importation of pollock and pollock products such as surimi into Japan through a complex system of import quotas and other trade restrictions. In addition, they employed an elaborate system of interlocking distributorships throughout Japan as a way of controlling the supply of product to secondary users (the analogue product manufacturers) and ultimately the consumers. This enabled them to establish and maintain vertical control of the pollock market at the wholesale and retail levels throughout Japan.[5] As a result, they enjoyed a virtual "lock" on the Japanese surimi market. Access to the pollock resource was an indispensable factor in their ability to maintain the dominant position they enjoyed in the Japanese marketplace -- a position that was secure until the passage of the Magnuson Act in 1976.

1. Implementation of the Magnuson Act. The unregulated harvest of fish from our coastal waters by foreign fleets such as those operated by Nissui and Taiyo was a primary motivating factor in the passage of the Magnuson Fishery Conservation and Management Act of 1976 (the "MFCMA"). As you well know, the MFCMA was designed to regulate total harvest of fish within 200 miles of the U.S. coast (the "Fishery Conservation Zone," later known as the "Exclusive Economic Zone" or "EEZ") and to develop opportunities for U.S. fishermen to participate in the pollock and other groundfish fisheries in Alaska.

Following passage of the Magnuson Act, Nissui and Taiyo vessels were allowed to continue their fishing operations in U.S. waters but under strict quotas established by the U.S. government. By the early 1980's, the U.S. fishing industry was beginning to develop the capacity to harvest pollock but, since there were no U.S. processors capable of or interested in processing pollock, American fishermen had no place to sell the fish.

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[5] Id.

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2. Development of Joint Venture Fishing Operations. Only after Congress passed the American Fisheries Promotion Act in 1980, thereby amending the MFCMA so as to deny fishing allocations to countries that did not assist in the development of the U.S. fishery, did Taiyo and Nissui begin to buy fish from U.S. fishermen via joint venture fishing operations -- operations whereby U.S. catcher vessels delivered fish to Taiyo and Nissui processing ships on the high seas.

Although joint venture operations enabled U.S. fishermen to sell the fish they caught, the terms of sale were strictly controlled by the foreign companies whose motherships constituted the only pollock market that was available to American fishermen at the time. Furthermore, while the growth of joint venture fishing operations in the early to mid-1980's gradually eroded the amount of fish that was available to Nissui and Taiyo in the form of direct harvest, joint ventures still enabled those two companies to maintain their access to the resource and their ultimate control over the manufacture, distribution and sale of surimi and other pollock products in Japan.

3. Development of U.S. Factory Trawler Fleet. It was not until the last half of the 1980's, with the development of the U.S. factory trawler fleet, that the U.S. industry began to develop the technology and capacity to harvest and process surimi at sea in direct competition with Nissui and Taiyo joint venture operations (see Exhibit 2). Still, Nissui and Taiyo were able to limit access to the Japanese market via their tight control over the elaborate import quota system in Japan.[6] It was not until the late 1980's that, once again through pressure from Congress, the U.S. Trade Representative was able to negotiate some relaxation in Japanese trade barriers to U.S.-produced pollock products and an opportunity for U.S. companies to share in the import quota for pollock into Japan.[7]

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[6] Id., p. A-7.

[7] Even then, Nissui and Taiyo remained in control because a majority of the Import Quota ("IQ") designated for U.S. produced pollock was allocated to the traditional importers in Japan. As the two biggest fishing companies, Nissui and Taiyo were allocated the lion's share of the IQ under which U.S. produced

Once the technology barrier was broken and trade barriers began to loosen, the U.S. factory trawler fleet began a rapid expansion in the latter part of the 1980's and the U.S. production of surimi began to increase rapidly. Nissui and Taiyo still dominated the surimi distribution system throughout Japan, however, and the newly emergent U.S. at-sea surimi companies (which were generally small independent operations) found themselves incapable of selling their product at anywhere near the price levels that had traditionally been paid for at-sea produced surimi. As discussed above, it was in response to this predicament that the USSC was founded. Since then, a number of new marketing channels have been developed and marketing opportunities for U.S. produced at-sea surimi improved dramatically throughout 1991. The U.S. industry had finally begun to establish something approaching a level playing field vis-a-vis its primary competitors in the Japanese marketplace. This situation was accurately described at page A-4 in the Addendum I analysis:

> During 1991 it is expected that the Japanese surimi market will be quite competitive because of the projected shortage of surimi and the loss of market control by the dominant surimi companies. Prices will rise as a result. . . . Five years ago there were similar numbers of distributors and manufacturers as today, but they had to line up with either Nippon Suisan and Taiyo. With the growth in the number of U.S. companies and declining production in Japan, Nippon Suisan and Taiyo no longer could control the market.

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surimi had to be imported into Japan. Thus, even though IQ became available for U.S. produced pollock, the U.S. producers generally had to import their products using Nissui and Taiyo IQ. A description of how the IQ allocation system works on pollock roe was recently reported in Bill Atkinson's News Report (see Exhibit 3). As noted by Mr. Atkinson, this system is generally the same for all IQ's in effect at the present.

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> In addition to other fishing companies such as Nichiro and Hoko, trading companies such as Mitsui became importers of surimi, building relationships with the American factory trawlers which are not (except for the newest entrant "EXCELLENCE") owned or aligned with Nippon Suisan and Taiyo.
>
> The 80 distributors and the 3,100 kamaboko manufacturers now have more options with respect to sources of supply. In this new situation, these companies, especially the kamaboko manufacturers, have a greater control over quality and greater access to the actual surimi manufacturers so that they can order the types of surimi that meets their needs.
>
> . . .
>
> In the past, Nippon Suisan and Taiyo would control the market such that they would receive high prices from the distributors and pay low prices to U.S. manufacturers. In the current situation, competitive forces are now causing prices in Japan to rise at all levels as well as to the U.S. manufacturers.

The progress that our industry was making came to an abrupt end earlier this year with the implementation of the 1992 shoreside allocation scheme. Once Nissui and Taiyo's shoreside plants were assured of an increased share of the U.S. pollock resource, the marketing opportunities for independent pollock producers changed dramatically and the "seller's market" of 1991 has again reverted to the "buyer's" market we confronted in the late 1980's and early 1990's.

4. Strategic Maneuvers by Nissui and Taiyo in Response to Americanization of the U.S. Pollock Fishery. As noted above, access to the pollock resource has been and remains an indispensable factor in Nippon Suisan's and Taiyo's efforts to maintain market share and control over the Japanese market for pollock products. When their catcher vessels and then their processing vessels began to be displaced from the U.S. zone, and as their

control over the Japanese market began to erode, Taiyo and Nissui responded in two ways to ensure their continued access to the pollock resource. First, they moved their fishing and processing activities out of the U.S. fisheries zone and into the international waters of the Bering Sea (the "Donut Hole"), where foreign fleets harvested an average of approximately 1.3 million tons of pollock each year between 1987 and 1990.[8]

Second, Nissui and Taiyo began to invest heavily in U.S. shorebased processing plants in Dutch Harbor. With the addition of the two newest plants in 1991 (see Exhibit 4), Taiyo and Nissui now directly own or control 80% of the shorebased pollock processing capacity (four of five plants) and 88% of the shorebased surimi capacity in the Bering Sea (see Exhibit 5).[9] These shoreside plants play an integral role in their global strategy to secure the access to the resource they need to maintain their dominant share of the Japanese surimi market.

C. Implementation of the Shoreside Preference Proposals Would Enable Nippon Suisan and Taiyo to Increase their Control Over the North Pacific Pollock Resource and the Japanese Market in Violation of National Standard No. 4. Having succeeded in establishing dominant positions in the Bering Sea's shorebased

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[8] See report prepared by the National Marine Fisheries Service for the "Third Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea," held November 18-20, 1991, in Washington, D.C.

Beginning in late 1990, a dramatic decline in the Donut Hole fishery occurred, with catches plummeting from 1.45 million tons in 1989 to approximately 300,000 mt. in 1991. This collapse in the Donut Hole fishery deprived Nippon Suisan and Taiyo of a critical source of pollock and created an opportunity for U.S. producers to help fill the void in supply. Taiyo and Nissui have since negotiated access to pollock stocks in Soviet waters and may even be involved in the newly developed "Peanut Hole" fishery in the Sea of Okhotsk.

[9] In addition, Trident reportedly markets its surimi through a marketing agreement with Nissui. If that is true, Taiyo and Nissui actually control 100% of the shorebased surimi production in the BSAI.

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processing industry, Taiyo and Nissui now stand to be the primary beneficiaries of the shoreside preference measure currently under consideration by the North Pacific Council; and are poised to reassert their vertical control over the pollock resource and the Japanese surimi market. 50 C.F.R. § 602.14, National Standard No. 4 states that:

> An allocation scheme must be designed to deter any person or other entity from acquiring an excessive share of fishing privileges, and to avoid creating conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist.

Since 80% of any shoreside allocation in the Bering Sea will be shared between Nissui and Taiyo, the effect of an allocation scheme such as contained in Alternative No. 3 will be a shift of several hundred thousand tons and hundreds of millions of dollars worth of surimi and other pollock products away from the 25 or so independent U.S. companies who operate the at-sea surimi fleet and an allocation of that tonnage and product to the two companies who are our primary competitors in the Japanese market (see Exhibit 6). If the proposed measure is adopted, the members of the USSC will once again find themselves at a serious competitive disadvantage vis-a-vis Nippon Suisan and Taiyo. Those two companies alone would control in excess of 40% of the surimi production in the U.S. This would be a clear violation of National Standard No. 4.

Thus, the U.S. factory trawler fleet that painstakingly dislodged the Taiyo and Nissui catcher boats and processing fleets from U.S. waters over the past 15 years now finds itself in jeopardy of being preempted from that fishery in favor of the shoreplants owned and operated by those same two companies; and USSC members find that their hard fought foothold in the Japanese marketplace is in serious jeopardy. It is for these reasons that the USSC so strongly opposes the shoreside preference proposals. Not only is an investment of $500 to $750 million at stake, but the long-term viability of the independent U.S. surimi industry hangs in the balance.

The U.S. would not give Honda or Toyota a guaranteed share of the U.S. automobile market in exchange for an agreement by either of those companies to build an automobile assembly

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plant in Tennessee. Nor would the U.S. consider a regulation banning General Motors or Ford from selling cars in a three state radius around such new Japanese auto plant(s). Yet that is exactly what the proposed regulations would do for the Nissui and Taiyo plants in the Bering Sea. Such protectionism is anathema to the way we do business in the United States and should be rejected out of hand.[10]

CONCLUSION

In conclusion, I would like to note that the emphasis on Nissui and Taiyo in these comments should not be taken as a criticism of foreign investment in general and/or Japanese investment in particular. That is not our purpose. Foreign investment has played a critical and welcome role in the development of the U.S. fishing industry. We do not fault the investments that Nissui and Taiyo have made in our industry. What we are critical of is proposals that would afford Nissui and Taiyo investments preferred status or preferential allocations vis-a-vis the rest of the U.S. industry. They made shoreside investments under the existing regulatory scheme. If those investments do not prove to be successful or competitive, so be it -- that is the nature of competition. The last thing the U.S. government should do is grant their plants special protection and preferred allocations that disadvantage the relatively small independent U.S. companies that made significant investments in the offshore industry. This is especially true where special protection would only help Nissui and Taiyo to reassert their dominant positions

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[10] While there is clearly some degree of foreign investment in the factory trawler fleet (approximately 20%-30% according to a report proposed by the GAO in July of 1991 for Senator Frank Murkowski), it is only a fraction of the foreign ownership in the shoreside plants. (Foreign ownership in the offshore fleet will decline further as a result of recent court rulings that affect foreign ownership of vessels but do not limit foreign ownership of shoreside facilities.) Furthermore, the 20-30% foreign investment in the at-sea fleet has come from very diverse sources -- primarily from Europe (Norway and Denmark) and, to a lesser extent, Korea and Japan. It does not involve the foreign companies that have controlled the North Pacific pollock industry for decades.

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in the Japanese marketplace. For these reasons, we urge your prompt rejection of the shoreside preference proposals.

UNITED STATES SURIMI COMMISSION

By _____
A. Nicolov, President

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Attachments

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Statement of Frank Bohannon
Vice President, United Catcher Boats

Americanization of the U.S. Fishing Fleet

Before the
Subcommittee on Fisheries Conservation,
Wildlife and Oceans
Committee on Resources
U.S. House of Representatives

June 4, 1998

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(64)

Thank you for the opportunity to testify before the Subcommittee. My name is Frank Bohannon and I am Vice President of United Catcher Boats (UCB). I have been a fisherman for 35 years and I own 100% of the fishing vessel Neahkahnie. My son took over running the vessel several years ago and my wife Dia and I now manage the day to day business of the vessel. We are an American family fishing operation interested in the conservation and management of the U.S. fisheries.

United Catcher Boats (UCB) is a non-profit West Coast based organization representing the interest of the vast majority of the catcher boat fleet that harvest fish in the Bering Sea, Gulf of Alaska, Aleutian Islands and off the Pacific Coast. For those not familiar with catcher boats, we are fishing vessels that only harvest fish and deliver our catches to offshore and shoreside processors. Our vessels harvest pollock and other groundfish species in Federal waters of the North Pacific and off the West Coast. The catcher boat fleet is an extremely important component of the fishing industry as evidenced by the fact that in 1997, catcher boats harvested roughly 50 percent of the annual Bering Sea pollock quota, or 520,000 metric tons.

In your invitation letter, Mr. Chairman, you asked me to address the issue of whether the goals of Americanizing the U.S. fishing fleet and U.S. ownership of harvesting vessels have been achieved. As I will explain in my testimony, UCB feels strongly that the Americanization of the U.S. fisheries has not been achieved because of the misapplications of the 1987 Anti-Reflagging Act and a standard of U.S. ownership that is weaker than the Jones Act requirements. We agree with the conclusions of a 1990 GAO Report prepared for Senator Packwood (B-237971), which found that, "the act's American control provisions have had little impact on ensuring increased American control of the U.S. fishing industry. This results from the Coast Guard's interpretation of the act's grandfather clauses, which exempt vessels from meeting the American control provisions if the vessels were licensed under U.S.

law and operating in U.S. coastal waters before July 28, 1987 – about 6 months before the act was passed. The Coast Guard has interpreted that the grandfather exemptions remain with the vessels even if the vessels are subsequently sold to foreign-owned companies. This interpretation give foreign-owned companies continued access to U.S. fisheries".

ANTI-REFLAGGING ACT OF 1987

More than 10 years ago I testified before Congress on the Anti-Reflagging Act of 1987. As a representative of UCB's predecessor group, The American High Seas Fisheries Association, I stated that we wanted (1) full Americanization of U.S. fisheries off Alaska, (2) sound conservation and management of the resources and (3) preservation of the American fishermen's freedom to sell his catch, at sea or ashore. UCB continues to support those goals.

It is important to understand what was happening in the fishing industry before 1987 in order to appreciate why Congress passed the Anti-Reflagging Act, what has happened since then and why the legislation has not resulted in the Americanization of our fisheries. Individual members of UCB were the first American fishermen to harvest the Bering Sea and Gulf of Alaska groundfish fisheries. Most of us built our boats specifically to develop these resources. We took the financial and physical risk to help create a new U.S. fishery which had historically been dominated by foreign fishing fleets. Recall that in 1979 Congress passed a law that prohibited the reflagging of foreign built fishing vessels, so all of our boats were required to be built in American shipyards. But while Congress prohibited fishermen from reflagging foreign fishing vessels in 1979, it decided to continue the practice of allowing foreign-built processing vessels to be reflagged on the basis that this could accelerate the development of the U.S. processing sector.

During the mid-eighties my vessel was involved in joint ventures with foreign processing vessels because these were our only markets. Congress encouraged us to participate in these ventures as a way of Americanizing the

harvest of U.S. fishery resources by U.S. fishermen. The Magnuson-Stevens Act created a three-tiered allocation system. First priority of access to the resource was given to U.S. catcher boats and U.S. processors. Second priority of access was given to U.S. catcher boats acting in conjunction with foreign processors in joint venture operations. Foreign catchers and processors who wanted access to U.S. fish stocks without involving U.S. harvesters or processors were assigned third and last priority. This preferential allocation system was specifically designed by Congress to encourage the full development and Americanization of U.S. fishery resources.

By 1987 there were approximately 130 catcher boats involved in joint ventures because there were very limited shoreside markets for our fish. We sold our fish to foreign owned, foreign-flagged processing vessels since these were the only practicable markets available to us. As a result of our increased fishing effort directed foreign fishing had all but ceased. Joint ventures provided the only viable markets for U.S. harvested fish. At that time U.S. processors utilized only about 15% of the Alaskan groundfish resource so the potential for expansion in the U.S. processing sector was significant. As decisions were being made about investment in U.S. processing, there was great concern over the possibility that foreign-flagged, foreign owned processing vessels would reflag and enter the U.S. fisheries as offshore processors providing markets for U.S. catcher boats. Under this scenario these vessels, which at the time could be wholly owned by foreign companies, would be eligible for a first priority allocation under the allocation system thus perpetuating domination of the fishery by foreign controlled processors.

This threat of foreign control of the U.S. processing sector led to the introduction of the Anti-Reflagging Act of 1987. In the House Merchant Marine and Fisheries Committee Report on the bill (Rept. 100-424) it states that the primary purpose of the bill "is to prohibit the reflagging of foreign-built processing vessels". Very little consideration was given to the harvesting sector since U.S. fishing vessels or catcher boats already had to be U.S. built.

THE PROBLEM

United Catcher Boats believes that the Congress was misled during the hearings on the 1987 Act. The hearing records show that the majority of the debate was about protecting the U.S. processing industry from "foreign mega companies and state owned companies (that) would continue domination of the North Pacific ground fishery by reflagging their vessels". (Senate testimony of, Mr. Terry Baker, testifying on behalf of the Alaska Factory Trawler Association) This statement couldn't have been about the harvesting sector because U.S. harvesters were already taking 100% of the total allowable catch in the North Pacific and Bering Sea in 1987; and, under the provisions of the Magnuson Act, directed foreign fishing (harvesting) was terminated.

Not once during Mr. Baker's testimony against reflagging did he mention harvesting. However, he did mention the "American processing industry", "domestic processing industry", and "bottomfish processing industry" several times. In avoiding the issue of harvesting and seeking protection for American Factory Trawlers Association (AFTA) processing interests, the debate remained focused on protecting U.S. processors. AFTA knew full well that their boats would harvest in direct competition with the much smaller American catcher boat fleet that had pioneered the harvesting sector of this fishery. By eliminating foreign joint venture processing partners through the 1987 Act, large, mostly foreign owned factory trawlers would have a distinct advantage over our smaller catcher boats. This is exactly what happened. During the time of the hearings on the Anti-Reflagging Act (Summer 1987), there were just a few U.S. documented factory trawlers operating in the North Pacific. Four years later, the factory trawl fleet with many foreign owned and built ships had grown to over 30 vessels. During the 4-year period from 1987 through 1990, our share of the resource was reduced by approximately 800,000 mt, from 1,157,535 mt to 372,328 mt. Or, put another way, we were reduced from harvesting 92% of the catch in 1987 to only 26% in 1990, a 66% reduction in the U.S. harvesting of groundfish in the North Pacific. Obviously, we feel the last 10 years have not been fair to us.

I find it interesting that AFTA has changed its name this year, prior to this debate. They have dropped the "American" and "Factory Trawler" designation in favor of "At Sea Processors Association" (ASPA). I would hope that no one on the Subcommittee misunderstands this time. These large vessels not only process but also harvest the fish in direct competition with the much smaller catcher vessels that pioneered this fishery. And, as their web site indicates, two-thirds of ASPA's membership vessels are the foreign owned component of the factory trawler fleet. It is no wonder that in 1987 AFTA opposed reflagging and opposed a foreign ownership limitation.

In a few instances factory trawlers provide meaningful over the side markets to catcher vessels and most of these are from the American owned vessels. These are very important markets to catcher vessels and we would like to see more of them. These markets provide a competitive balance between the shoreside and offshore processing sectors and the catcher boats that sell fish.

I have fished for one of these offshore markets for the last 3 years and I would like to tell you something about them. They are a very good example of what should have happened after the Anti-Reflagging Act and what the American factory trawler fleet should emulate. The vessels are the *F/V ARCTIC STORM* and *F/V ARCTIC FJORD*. Together they catch two-thirds of their fish and provide a market for catcher vessels by purchasing the other one-third. They provide two full time markets for catcher boats in the pollock fishery and eight full time markets during the Pacific Coast whiting fishery.

In summary, Mr. Chairman, the "great risk of reflagging the foreign processors" occurred not in the form of existing foreign motherships reflagging. **It came in the form of seventeen or so foreign owned factory trawlers (rebuilt in Norway during 1987 - 1990) squeezing through the foreign rebuild grandfather provision of the Anti-Reflagging Act.** The 1987 Act had a severe negative impact on the catcher boat fleet and perpetuated the foreign dominance in the offshore processing sector through foreign owned and controlled factory trawlers.

FAIRNESS AND PREEMPTION

I would now like to talk about the issues of fairness and preemption. As I mentioned earlier, the 1987 Anti-Reflagging Act focused on processing not harvesting. But the impact on the harvesting sector was dramatic. Prior to the passage of the 1987 Anti-Reflagging Act, catcher boats harvested 92% of the Bering Sea pollock. We also had established offshore markets for cod, pacific whiting and many species of flatfish. The 1987 Act took these markets away from us. By 1989 our pollock catches were cut in half. Fish allocations and markets were taken away from us. Although the offshore pollock market has returned to a certain degree and we have a strong shoreside pollock and cod market, we continue to suffer from a lack of competitive markets for many species that we had previously harvested and sold to our foreign partners prior to 1987. So when others at this hearing complain that legislation to remove their vessels is not fair, I hope you will keep in mind the plight of the catcher boat fleet and price we paid (and are still paying today) as a result of the 1987 Act.

With respect to preemption, I would submit that the 1987 Act provided the mechanism for the pioneers of the fishery to lose our historical share of the catch to the large, foreign owned component of the factory trawler fleet. Due in part to the misinterpretation of Congress' intent by the U.S. Coast Guard of the ownership grandfather provision, a massive preemption of those of us who developed this fishery occurred by the foreign owned component of the factory trawler fleet. Where once the pollock resource was primarily harvested by small, independently owned catcher boats, large foreign owned factory trawlers now dominate the fishery. In fact, the same foreign company that harvests 42% of the offshore pollock fishery off Alaska boasts that it now has 37 modern ships around the world and harvests 10% of the world's groundfish resource (March 1997 edition, Fishing News International). With all the attention on the processing issue in 1987, no one understood that these foreign-built vessels, owned by foreign interests would come back to our waters with stern ramps and fishing gear. Vessels that should have never been allowed to come into the

fishery in the first place returned with massive fishing capacities in a short four-year period. These vessels received the same priority access to the resource that we received and clearly our smaller catcher boats could not compete with these huge fishing machines.

No sector of the fishing industry felt the impact of the Coast Guards' misinterpretation of the 1987 Act more than the catcher vessel component of the harvesting sector. We knew that Congress did not intend for the law to allow foreign companies to buy and sell ownership in certain U.S. vessels, thus perpetuating their dominance in the fishery. We thought the law was clear, the ownership grandfather provision attached to the owner, not the vessel. When changes in ownership occurred, the new owner would be required to meet the new American ownership requirement. Indeed, the U.S. District Court for the District of Columbia agreed with us in 1992 when it found that the Coast Guard misinterpreted the ownership requirement of the 1987 law and ordered the Coast Guard to revoke the fishery endorsements of these vessels. The fact that this decision was overturned was even more troubling.

Some will question why those of us who are seeking a legislative cure waited ten years. They want you to believe that this debate is really about allocations, not fairness and will urge you to oppose legislation. The record needs to be clear on this point. Senator Stevens and others have been trying to fix this problem since 1992, when the District Court decision was overturned on appeal. In fact, I am submitting for the record (attachment #1) memorandum distributed to Congress that were prepared by representatives of the foreign owners of the affected vessels warning that Senator Stevens would try to legislatively repeal the fishery endorsements of their vessels. They knew at least six years ago that the Coast Guard's actions were being questioned by Congress. Prudent businessmen would have been much more cautious about investing millions of dollars in purchasing factory trawlers that could be eliminated from the fishery. Yet the record shows that one Norwegian company followed a shrewd business plan to purchase as many grandfathered factory trawlers as possible even after they knew that Congress might act to reverse the

Coast Guard's inappropriate action. At the very minimum, this foreign company could have created an American company in order to compiy with the 51% U.S. ownership requirement. But their purpose was clear, they wanted to perpetuate foreign control over U.S. fishery resources

In late 1987, the North Pacific Council convened the Future of Groundfish (FOG) Committee to analyze the major problems facing the North Pacific fishing industry and the fisheries. In June of 1988 the FOG Committee made its recommendations to the NPFMC. The FOG Committee predicted that two major problems will occur unless the Council acted in a timely manner: 1) excess capacity and 2) increasing conflicts over allocations between user groups. To address these two issues, the FOG Committee recommended the Council implement a moratorium on new vessels entering the North Pacific fisheries with a cut-off date of June 30, 1988. Secondly, it recommended the Council implement a limited access program (license limitation or ITQs) no later than January 1989. These recommendations were supported by nearly all sectors of the industry, except the group representing the at-sea catcher/processors.

The Council failed to implement a vessel moratorium in a timely manner, due in part to effective lobbying by the at-sea catcher/processing sector. Had the Council acted on the FOG Committee's recommendations in 1988 and implemented a vessel moratorium with a June 1988 cut-off date, many of the foreign owned vessels would never had entered the North Pacific fisheries. The Council and industry members were keenly aware that the harvesting sector was already fully capitalized by 1988 and attempted to limit, albeit unsuccessfully, capacity before the foreign shipyards had completed their final rebuilds destined for the North Pacific. The last of the foreign owned factory trawlers entered the fishery in 1991. By this time, the Council had yet to recommend a vessel moratorium.

Sadly, the detrimental effects these foreign vessels have had on the fishery in less than 10 years have been real, and confirm the insight the FOG

Committee had in back in 1988. The effects of overcapitalization fell directly on the existing catcher boat fleet. Ten years ago, my vessel fished throughout the entire year, and harvested enough tonnage annually to create a viable business. I surmise that very few operations, either in the harvesting or processing sector, were profitable in 1997 or are in 1998. Over the past five years, I have witnessed more than a dozen catcher/processor companies file for bankruptcy, to see their vessels be assimilated into the empire of a foreign fishing/processing company. I have watched as a number of my fellow catcher boat captains, who pioneered the North Pacific in the late 1970's, unwillingly sell their vessels to large corporations. Fishing less than three months out of the year for little or no profit has not only taken the fun out of the fishery but has ruined fishing as a profession.

Finally, some have suggested that this debate is nothing more than a fish grab, but I want to assure this subcommittee that it is not. The effect of Senator Steven's legislation will be to remove foreign fishing from our waters. Section 201(d) of the MSFCMA only allows foreign fishing if there is a portion of the optimum yield that will not be harvested by U.S. fishermen. Ironically, this fishery was harvested totally by American fishermen 10 years ago. United Catcher Boats would like to go on record by stating that the fish freed up by the removal of the foreign vessels be allocated to the U.S. fishing fleet based on National Standard 4 of the Magnuson-Stevens Act. This standard insures that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

THE SOLUTION

UCB strongly encourages this subcommittee to support legislation similar to that which Senators Stevens, Breaux, Murkowski, Hollings and Wyden have introduced. Congressional action is the only way that foreign control of our fishery resources will finally come to an end. We believe the key elements to be included in legislation are as follows:

Removal of foreign owned fleet: UCB believes that that those foreign owned factory ships that sneaked through the loopholes in the 1987 Act and have not

provided any meaningful markets for U.S. harvesters must be removed from the fishery. This non-citizen, new entrant fleet contributed greatly to the overcapitalization of the industry, should not have been allowed to enter our fisheries in the fist place and have had a decade of fishing opportunities at the expense of the pioneers of the fishery.

Ownership: A new 75% U.S. ownership requirement should be established for all fishing industry vessels. In order for a vessel to be eligible for a fishery endorsement, it would have to be owned by a corporation, partnership or other entity which has at least 75 percent of the controlling interest vested in citizens of the United States. This standard, known within the maritime community as a Section 2 citizen (Sec. 2 of the Shipping Act of 1916) is the same standard used for coastwise trade eligibility. Virtually all of our vessels already meet this requirement and we strongly support a tougher U.S. ownership requirement to more fully Americanize the ownership requirements for U.S. fishing industry vessels.

No Return: The legislation should contain a provision that will prevent the issuance of any new fishery endorsements for fishing vessel that have reflagged and left our fisheries to seek employment elsewhere. The owners of these vessels have made a business decision to fish in Russia or other foreign waters and in light of the overcapitalization of our fisheries, we do not think these vessels should be allowed back in our fisheries.

National vessel size limitation:. UCB recommends that if Congress wants to establish vessel size limits within our fisheries that it direct the management councils to do so. While most of our harvesting vessels are under the 165-ft. threshold proposed in the Stevens bill, several are not. I am aware that in the New England groundfish fishery, the council has already placed limits on the ability to lengthen or repower his vessel. Many of our fisheries are already under limited entry, meaning that the threat of new, large vessels entering the fisheries is not great. UCB would support a requirement that directs the councils to review this issue on a fishery by fishery basis and prescribe appropriate vessel size limitations in those fisheries where it is needed.

Excessive control: As catcher boat owners, UCB wants more competition in the marketplace so that we receive the fairest price for our fish. We hope that the Subcommittee will consider a provision that will ensure that no company would obtain excessive control within the fisheries as a result of the enactment of S.1221 or similar legislation. In removing the foreign owned fishing fleet, we would like to see additional markets open up, as opposed to closing markets for our catch and further consolidating control of the fisheries.

CONCLUSION

United Catcher Boats believes S.1221 or similar legislation is critical to our survival. In 1976 the Congress approved the 200-mile limit bill with the vision that one day our fisheries would be fully Americanized. The Magnuson-Stevens Act has gone a long way in reserving U.S. fishery resources for U.S. citizens. But the job is not yet done. By approving S.1221 or similar legislation, this subcommittee can once and for all close the door on foreign fishing in our waters and end the dominance of foreign controlled companies that skirted Congressional intent to perpetuate presence in fisheries reserved for U.S. citizens.

UCB would be pleased to assist the Committee in developing sound legislation. Because the number of legislative days remaining in this Congress is so few, we hope that you will act quickly. Again, thank you for the opportunity to testify and I would be happy to answer any questions.

ATTACHMENT 1

POTENTIAL STEVENS' ANTI-REFLAGGING ACT AMENDMENT SHOULD BE TABLED PENDING COURT OF APPEALS DECISION AND SHOULD BE CONSIDERED, IF AT ALL, ONLY IN THE CONTEXT OF FULL HEARINGS AND DEBATE

On September 9, 1992, at Senate Commerce Committee oversight hearings on the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), Senator Ted Stevens (R-AK) proposed an unprecedented "decapitalization" of the fisheries as a way to deal with the increasing management problems facing the industry. Earlier in the year at Coast Guard Reauthorization hearings, he announced that he was "seriously considering" retroactive legislation to accomplish a similar result by overturning Coast Guard rulings on the Rebuilding Grandfather provisions of the highly controversial Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987. Hearing Record U.S. Coast Guard Fiscal Year 1993 Budget, before the Senate Commerce Committee, at 60 (April 8, 1992). There is considerable concern that he will seek to legislate such a result before Congress adjourns in October.

The practical result of his suggestion would be to revoke permanently fishery endorsements for as many as two dozen U.S.-flag fish processing vessels. The Seattle-based vessels' owners are extremely concerned, particularly since each vessel represents investments of between $15 and $65 million, investments which were made in reliance on the plain language of the statute as confirmed in individual Coast Guard rulings.

The vessels' owners are urgently asking Congress to resist any effort to amend the Anti-Reflagging Act, its grandfather provisions, Coast Guard rulings or other action which would summarily revoke these fishery endorsements for the following reasons:

- *The Coast Guard's interpretation of the Anti-Reflagging Act's Grandfather provisions is the subject of litigation presently pending in the Court of Appeals. If there is to be any Congressional intervention at all, it should await the Court's decision. Briefing in the case has been completed and oral argument is scheduled for October 1, 1992. Southeast Shipyard Assoc. v. United States , Civil Action No. 90-1142 (D. D.C. Jan. 14, 1992), appeal docketed, No. 92-5014 (D.C. Cir. Mar. 4, 1992).*

- *Due process and simple fairness require that affected vessel owners be given the opportunity to be heard before such drastic action is taken. This is particularly true where owners relied in good faith on Coast Guard rulings and regulations in investing literally hundreds of millions of dollars in these vessels.*

- *The issue of whether "decapitalization" is a legitimate fisheries management policy objective should be addressed through hearings and the normal legislative process, not by summarily revoking fishery licenses in the final hours of the session.*

- *There has been absolutely no notice to those owners, investors, lenders, vendors, and others who could be very substantially hurt, not to mention the thousands of employees who would lose their jobs if these fisheries licenses were revoked.*

- *Such an amendment is wrong on the merits; see attached.*

9/17/92

POSSIBLE VEHICLES FOR STEVENS' DECAPITALIZATION AMENDMENT AND STATUTES POTENTIALLY AFFECTED

The Washington State owners of the North Pacific groundfish fleet are concerned about a potential legislative effort by Senator Ted Stevens (R-AK) to enact his fishing fleet "decapitalization" proposal before the end of the Congressional session. As a senior member of the Appropriations, Commerce, Governmental Affairs, Small Business and Rules Committees such an amendment could come from a variety of directions.

1. Potential Legislative Vehicles

a. Maritime Legislation

- Driftnet bill (S. 884; H.R. 2152)
- Coast Guard Authorization (S. 2702; H.R. 5055)
- Marad Authorization (S. 2701; H.R. 4484)
- FMC Authorization (S. 2700; H.R. 4156)
- NOAA Authorization (S. 1405)
- Reimbursement for Overseas Inspection (H.R. 4485)
- At least 26 other bills have been reported by either Senate Commerce or House Merchant Marine & Fisheries, or have passed either house, or both (full list available)

b. Appropriations Legislation

Senator Stevens has been known to attach substantive amendments to appropriations bills in conference. He is a Senate conferee on Commerce, Justice, State, Appropriations (S. 3026/H.R. 5678); Interior Appropriations (H.R. 5503) and Military Construction Appropriations (H.R. 5428). Other potential targets are Defense Appropriations (H.R. 5504) and Labor/HHS/EDUC Appropriations (H.R. 5677).

2. Statutes Potentially Affected

Although no known draft language has been circulated, any proposed amendment dealing with any of the following should be closely scrutinized:

- The Vessel Documentation Act 46 U.S.C. § 12101-12122, especially 46 U.S.C. § 12108.
- The Commercial Fishing Industry Vessel Anti-Reflagging Act, Pub. L. 100-239.

- Any amendment mentioning by name the litigation in Southeast Shipyard Assoc. v. United States, Civil Action No. 90-1142 (D. D.C. April 30, 1991; Jan. 14, 1992), appeal docketed, No. 92-5014 (D.C. Cir. Mar. 4, 1992).

- Any Amendment to the following titles of the United States Code: Title 46 (Shipping); Title 33 (Coast Guard); or Title 49 (Dept. of Transp.).

- The Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801-1882.

- Any appropriations, authorization, or other legislation which precludes funding for, or otherwise limits the Departments of Justice, Transportation (Coast Guard) or Commerce (NOAA or NMFS) from performing their normal functions, e.g., renewing vessel certificates of documentation, pursuing litigation, allocating fishery resources, etc.

GREENPEACE

TESTIMONY OF GREENPEACE
before the
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS
at an
OVERSIGHT HEARING ON
THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976
and the
ANTI-REFLAGGING ACT OF 1987
with respect to the goal of Americanization of U.S. fisheries

PRESENTED BY
GERALD LEAPE
LEGISLATIVE DIRECTOR

JUNE 4, 1998

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PECH 5/0CS

Good afternoon Mr. Chairman, Members of the subcommittee,

My name is Gerald Leape. I am the Legislative Director for Ocean issues for Greenpeace in Washington, D.C. Thank you for the opportunity to testify today on the failures of the Magnuson-Stevens Fishery Conservation and Management Act of 1976 and the Anti-Reflagging Act of 1987 to achieve their intended goal of Americanization of ownership of harvesting vessels that are allowed to operate in U.S. fisheries. We are primarily concerned with the detrimental impact that these failures have had on the fisheries, the fish stocks and the marine animals that depend on healthy fish stocks to survive.

Below, we present the environmental case in support of introducing legislation that will address this very important issue. At the end of this statement, we make specific recommendations for inclusion in legislation. Our recommendations build on the conservation elements that are contained in S. 1221 as introduced. We also make the environmental case for banning factory trawlers from U.S. fisheries. Our arguments spotlight the role that factory trawlers have played, and are playing, in the destruction of U.S. fisheries and marine ecosystems – with special emphasis on the on-going problems in the nation's largest fisheries in the North Pacific. If strict action isn't taken to reduce the catch in the North Pacific, Greenpeace believes that the Bering Sea Pollock fishery could be drained out by the year 2.000. I have attached a graph from the NMFS to reinforce this concern.

As you know, Greenpeace has been actively involved in fisheries conservation and management issues, domestically and internationally, for nearly a decade. In the course of our work, we have come to see that the world's oceans are under a very serious and growing threat from overfishing and excess fishing capacity. Not only have major fish stocks been depleted, but excess fishing pressure is placing many more species at risk. From the North Pacific to the waters around Antarctica, marine mammals, seabirds, sharks and key fish species are being overexploited, caught and killed as bycatch, or threatened by the industrial fisheries for species which are critical links in the marine food chain. Failure to seize this historic opportunity not only to decrease the current level of fishing capacity, through enactment of legislation, but also to set parameters for future fishing capacity will diminish the hopes of many of our nation's small-scale fishermen . As our fish stocks decline, increasing numbers of these small-scale fishermen from coastal communities on both coasts, whose families have fished for generations, are being put out of work which is having a devastating economic impact on the rest of the community. As a representative of Tyson Seafoods, the second largest owner of factory trawlers in the North Pacific said recently in a newspaper in Seattle, "With the pollock fishery at just 10 weeks, its getting increasingly difficult for them to make the same sort of family wages available up until the early 1990s".

This committee took historic steps last summer when it passed H.R. 1855 which gave the mackerel and herring fisheries in the mid-atlantic and New England a break from the imminent threat of a foreign factory trawler that was threatening to enter the herring fishery, for whom a management plan was in the process of being developed and the

mackerel fishery that was in the process of orderly development. Your willingness to take action has allowed a reasonable management plan process to be undertaken for herring that we hope will be completed before next summer. Along those lines, we urge you Mr. Chairman, to work closely with the Senate to ensure that your bill, as is currently encompassed in S. 1221, is enacted as part of the legislative package on this issue that needs to be signed by the President before October 1, 1998. We look forward to working with you Mr. Chairman to achieve that goal.

For these reasons, we are very pleased to see the U.S. Congress continue to demonstrate leadership in tackling these issues, by holding this hearing today.

Thank you again for this opportunity to present our views.

Too Many Big Boats: Excess Capacity and Fisheries Decline

Fishing is an ancient human tradition, and for most people, conjures up images of fishermen braving the elements to catch a few fish for market. But in the last 50 years, fishing has been transformed into a hi-tech, global industry that has the power to radically alter marine ecosystems. All around the world, overfishing and destructive fishing practices are destroying fish stocks, damaging marine ecosystems and threatening the livelihoods of tens of millions of people.

One of the primary causes driving the fisheries crisis is the fact that the capacity of the world's fishing fleet to catch fish greatly exceeds the amount of fish that can be caught on a sustainable basis. In other words, there are simply too many boats, especially large-scale, industrial vessels, like factory trawlers, chasing fewer and fewer fish. As a result, many fish stocks are dangerously depleted, and entire ecosystems are being turned upside-down. The threats posed by excess fishing capacity to the world's fish stocks have been acknowledged in major international agreements, including the UN Agreement on the Conservation and Management of Highly Migratory Fish Stocks and Straddling Fish Stocks and the FAO Code for Responsible Fishing which called on governments to reduce excess capacity in fisheries within their zones of national jurisdiction.

To understand the extent of the capacity problem globally, Greenpeace commissioned research to assess the capacity of the world's fleet and whether governments' were taking effective steps to reduce the capacity of their national fleets. The research, done by Chris Newton, former Chief of Fishery Information, Data and Statistics Service, and John Fitzpatrick, former Chief of the Fishing Technology Service of FAO's Fishery Industries Division, is compiled in a report to Greenpeace International titled Assessment of the World's Fishing Fleet 1991-1997, to be published in April 1998.

The report's findings show clearly that the expansion in size and capacity of the world's fishing fleets has continued to increase, and that new vessel orders emphasize the construction of ships with large tonnage, specialized toward those using gigantic mid-

water trawls or auto long-lines of up to 50,000 hooks, as well as those pursuing deep water fishing with trawls or long-lines. In addition, the authors calculate that while the world's fishing fleet increased by 3% in terms of tonnage between 1992 and 1997, the world's fleet actually increased by 22% in terms of potential fishing capacity, through new additions to the fleet and refits. Finally, Newton and Fitzpatrick conclude that in order to reduce fishing effort worldwide and relieve fishing pressure on overexploited stocks, to help their recovery to much greater levels of abundance, the international community should require a 50% reduction in the present size of the industrialized fleet.

In the United States, the problems and risks created by excess fishing capacity are nowhere better exemplified than in the country's largest fishery for Alaska pollock, where the glut of factory trawler capacity exceeds the total allowable catch limit by at least two to three times. The factory trawler fleet, which has ranged between 45 and 65 vessels in recent years, catches nearly a full one-fifth of the total U.S. catch each year, from a handful of fisheries in the North Pacific and the Pacific northwest. Some 36,000 smaller fishing vessels account for the rest of the catch.

Factory Trawlers in U.S. Waters: The New England Legacy

Fishermen throughout New England sprang to action last year to defend their fisheries and communities from a powerful, 369-ft factory trawler, Atlantic Star, which had set its sights on the east coast Atlantic herring and mackerel fisheries. Many of these men and women were alive and fishing while the foreign fleets systematically overfished Georges Bank for the better part of the 1950s to the 1970s.

Although modest by today's standards, the foreign factory trawlers of those days represented an enormous increase in fishing power and mobility compared to any other class of fishing vessel. Fish catches quickly soared to record levels which were not sustainable, resulting in depletion of major commercial stocks of cod, herring, hake, haddock and flounders. As one stock was depleted, the factory fleets shifted their effort to other species -- pioneering a technique of high-volume "pulse fishing" which results in the serial overfishing of one stock after another. By 1965, foreign factory trawlers comprised over 70% of the fishing capacity (in gross registered tons). The U.S. fleet, comprised of small vessels, totaled only 8% of the total fishing capacity. Record catches of cod, herring, haddock and hake were followed by steep declines in these species. The abundance of commercially exploited groundfish and flounders declined by almost 70% between 1963-1974, dropping to the lowest levels ever observed:

- Foreign factory trawlers began fishing for silver hake on southern Georges Bank in the early 1960s. Total catches peaked in 1965 at more than 300,000 tons. The U.S. fleet of small-boat fishermen took less than 20,000 tons of silver hake that year.

- Catches of southern red hake peaked at over 100,000 metric tons in 1966, dominated by distant-water factory trawlers. Catches dropped off sharply after 1967, but

continued to be dominated by foreign factory fleets until passage of the Magnuson Act. A similar rapid increase in red hake landings by foreign factory ships occurred on the northern Georges Bank between 1972-76, when approximately 93% of the catch was taken by factory trawlers.

- Georges Bank haddock catches increased from about 50,000 metric tons annually before 1965 to nearly 150,000 metric tons in 1965-66 due to intense fishing by distant-water factory fleets. Landings and abundance estimates then declined rapidly. Although domestic catches did not exceed 30,000 metric tons after 1977, the biomass of haddock never recovered and continued to drop to all time lows by the early 1990s.

- The Georges Bank herring fishery began in the early 1960s with the arrival of foreign factory trawlers. Landing peaked at an all-time high of 373,600 metric tons in 1968, but rapidly declined as the stock collapsed.

As stocks of New England groundfish rapidly declined under the intense foreign pressure, the distant-water fleets shifted their effort increasingly to Northern cod off Newfoundland. From 1959-68, Newfoundland cod landings skyrocketed, reaching an all-time high of 810,000 metric tons in 1968, while estimates of harvestable biomass dropped by 82% from 1962-1977, by which time the Grand Banks fishery was on the verge of commercial extinction. The stock never fully rebounded and rapidly declined under renewed pressure from the domestic Canadian offshore trawler fleet, leading to complete collapse and closure (in 1992) of the once-legendary fishery.

Foreign Factory Trawlers Rake North Pacific

In the seas off Alaska, events were strikingly similar. Modern factory trawling commenced in this area in the 1960s, when large Japanese and Soviet factory stern-trawlers replaced less efficient side-trawlers. Catches of Pacific ocean perch, Pacific herring and yellowfin sole reached record levels by the early 1960s, followed by collapses as each stock was fished down. As stocks of one species crashed, the fleets shifted their effort to another.

With the introduction of the pollock-surimi fishery, the number of Japanese factory trawlers in the eastern Bering Sea increased tenfold between 1964 and 1972. It was during this time that record harvests of pollock were extracted from that region. Landings increased from 175,000 metric tons in 1964 to 1.9 million metric tons in 1972, most of which was caught by the Japanese fleet.

In its 1974 statement to the International North Pacific Fishery Commission, the United States concluded: "*It seems to us that Japanese fishermen continue to conduct a 'pulse' fishery in the northeast Pacific... The only forecast we can make of this situation is that Japanese fishermen will move from species to species and stock to stock, while our*

scientists are kept busy documenting their successive demise as they now are documenting the decline of Pacific ocean perch."

The following year, all major commercial species of the Bering Sea region were considered fully exploited or over-exploited, including the two most abundant, pollock and yellowfin sole and the United States expressed growing anxiety to its North pacific counterparts: *"We note that the Sub-Committee on Bering Sea Groundfish remains deeply concerned about the deteriorating condition of the Alaska pollock stock and sees no grounds for optimism regarding the resource... It is the view of the United States that the gravity of the current situation requires that a major reduction in fishing effort on the resource take place and the annual all-nation catch of pollock in the eastern Bering Sea not exceed 1 million metric tons. The United States further believes that it may even be necessary to limit the all-nation catch to 850,000 metric tons or less to allow the resources to rebuild to a more productive level."*

From its inception in 1964 to 1994, the eastern Bering Sea pollock-surimi fishery removed an average of 1.1 million metric tons annually, totalling approximately 37 million metric tons in all not including bycatch estimates prior to 1991. In the process, several key stocks were overfished, including stocks within U.S. waters, under U.S. management:

- The massive "Donut Hole" fishery conducted by foreign factory trawlers in the international waters of the Bering Sea (1987-92) virtually wiped out the large pollock aggregations in that region.
- The related Bogoslof pollock roe fishery (1987-92) was dominated by domestic factory trawlers, but it too collapsed and the stock continues to declined today. Since the aggregate of these4 two stocks is managed as the Aleutian Basin stock, its depleted status could only be classified as "overfished".
- Foreign factory trawlers served as processing platforms in the boom-and-bust Shelikof Strait pollock fishery between 1981-85, which led to a drastic decline in the Gulf of Alaska pollock biomass from which the stock is only now beginning to rebound. Without the Magnuson Act, those factory trawlers would have done the fishing themselves. As it was their processing capacity and mobility enabled the catcher boat fleet to ssutain a rate of fishing that would have been inconceivable otherwise.

U.S. Factory Trawlers Drive Destruction of North Pacific: It's Deja-vu All Over Again

The domestic factory trawl fleet in the North Pacific did not exist prior to 1983. It grew rapidly from 12 vessels in 1985 to 45 by the end of 1988, while catching capacity grew from 250,000 metric tons to 800,000 tons. Additions to the fleet in the period from 1988-1990 added 15 large pollock surimi/fillet factory trawlers with a production potential estimated to be several times the size of the vessels which entered the fleet between 1985-

1987. These vessels were rebuilt in foreign countries after the passage of the Anti-Reflagging Act. However, all of these vessels ultimately received exemptions from the Coast Guard under the Act's grandfather clause. It was during this time, that the domestic factory trawl fleet began to dominate pollock fishery, harvesting for the first time in 1989, more pollock than the catcher boats.

By 1991, 50 factory trawlers in the pollock fishery, comprising only 2.5% of all groundfish vessels that year, caught over 1 million metric tons of Alaska pollock -- three-quarters of the Bering Sea pollock quota. The following year, there were some 65 factory trawlers and an estimated $1.6 billion investment in the fleet. In 1994, 24 of the largest class of surimi factory trawlers comprised only 1.5% of the total number of groundfish vessels fishing in the Bering Sea/Aleutian Islands yet they accounted for 30% of the entire groundfish catch.

This explosion of factory trawler capacity, and dramatic in flux of capital, has had profound effects on the conduct of the fishery and the health of the marine environment. Modern factory trawlers are very expensive, some costing as much as $40 million. The more expensive a ship is, the more fish it will need to catch to remain profitable. Debts create financial pressures which are incompatible with sustainable fishing practices, and drive vessels to fish harder. In fact, the Alaska-based shoreside sector has only managed to avoid complete pre-emption from the groundfish fishery as a result of direct management allocations by the North Pacific Fishery Management Council, through the community development quota program and the inshore/offshore allocation. Both of these programs were established in 1992 as a direct result of the fact that domestic factory trawlers were taking the vast majority of the pollock quota - 70 percent by 1991.

The presence of these vessels in the North Pacific, with their massive capacity to catch and process fish has radically transformed the fisheries there. Excess fishing capacity and debt-driven economics encourage wasteful, dangerous and destructive fishing practices. Seasons have been shortened and intensified, creating a race for the fish. Fishing on spawning stocks had increased tenfold. Bycatch totals have soared, with factory trawlers contributing two to three times that of the catcher boat fleet. Stocks of pollock and Atka mackerel are in decline and showing signs of overfishing. The eastern Bering Sea pollock fishery has become increasingly concentrated into the southeastern section of the Bering Sea, as other areas have been closed to fishing and the factory trawlers migrate south and east after larger fish. Management efforts to slow down the harvest, lower annual catch quotas, spread out fishing effort, and reduce bycatch are all undermined by this surplus factory trawler capacity. As long as these vessels are present in the fishery, these destructive trends will continue.

1. Shortened Seasons

As more factory trawlers have entered the eastern Bering Sea pollock fishery, the quota has been reached more quickly each year. Shorter seasons foster destructive and unsustainable fishing practices, and heighten the competition between vessels for the fish.

As the race to catch fish intensifies, vessel owners are forced to upgrade their boats to become more efficient and competitive. In the end, the need to ensure a return on those investments often wins out over the need to protect the fish for the future.

The dramatic curtailment of the Bering Sea pollock season reflects the impact of adding so much factory trawl capacity in the 1990s:

- In 1989 the pollock fishery was still open year-round. In 1991, the season was reduced to only 148 days. By 1994, the factory trawl season was only 70 days long. In 1997, the factory trawlers fished for 55 days. In 1992, the North Pacific Fishery Management Council ended their practice of mandating a buffer between the TAC they would set for the Bering Sea Pollock fishery and the ABC that had been recommended to them by their scientists

- When the pollock season was reduced to three months or less, many boats could not make payments on their loans. Most continue to fish every year, however, thanks to buyouts by wealthier competitors, particularly by the Norwegian subsidiary American Seafoods.

2. Overfishing

Factory trawlers require high volumes of fish to remain profitable, and the economics of excess capacity and overcapitalization drive factory trawlers to fish as hard as possible. Unfortunately, in light of these needs, the North Pacific Fishery Management Council appears compelled to keep annual quotas high in an attempt to accommodate this fleet:

- Total pollock catches in the Bering Sea/Aleutian Islands from 1990-96 were 8,786,189 metric tons, an average of 1.255 million metric tons annually not including discards These figures are higher than the historical average, higher than any catch total in the 1980s and higher than any recorded catch in the eastern Bering Sea since 1975.

Despite National Marine Fisheries Service' claims to the contrary, there are myriad signs that several key commercial stocks are being overfished in a single-species context:

- Aleutian Island pollock (age 3+ biomass) has declined steadily since the early 1980s and appears to be at about 20% of its earlier abundance.

- Biomass estimates for eatern Bering Sea pollock has declined by more than half since the mid- 1980s and by 38% from 1994-1997 - while the average total allowable catch in the 1990s has remained well above the 30 year average catch of 1.1 million metric tons, meaning that the pollock fishery is removing a larger portion of the total pollock biomass every year.

- For much of the 1990s, the Bering Sea pollock fishery has been supported by one large year class of fish from 1989, which is rapidly dwindling. Increasingly over the course of the 1990s it has become a recruitment-driven fishery. Its future now hinges on the hope for the survival of a large 1996 year class as three-year-old "recruits" in 1999 to sustain the million-plus metric ton quota. Given the rapidly dwindling numbers of older fish, precaution urges greater protection of the spawning stock in order to avoid undermining the reproductive capacity and future of the stock.

- Until the 1990s, the Aleutian Atka mackerel catch never exceeded 38,000 metric tons. Beginning in 1992, the North Pacific Council raised the annual catch limits to 43,000 tons, increasing to 80,000 tons by 1995 and 106,157 tons in 1996. In 1997, the estimated stock size was down 50% compared to the 1991-1994 time period, suggesting that these record-high catch levels are not sustainable, and are driving down the stocks.

There are additional warning signs of overfishing, when one looks beyond individual fish stocks to the ecosystem as a whole. Several species of marine mammals and seabirds which are major pollock predators are experiencing significant declines in heavily fished areas of the North Pacific:

- The northern fur seal population was listed as depleted under the Marine Mammal Protection Act in 1989.

- Large declines have been documented in the harbor seal populations of western Alaska.

- Substantial declines of pollock-eating seabirds, specifically murres and kittiwakes, in the Bering Sea have been recorded beginning in the mid-1970s, coincident with the growth of the pollock fishery in the region.

- Large declines in Steller sea lions in western Alaska led to their listing under the Endangered Species Act as threatened in 1990 and endangered in 1997.

In its 1996 Report on the Bering Sea Ecosystem, the National Research Council identified fishery effects on prey availability as the only factor with a high likelihood of playing a major role in the Steller sea lion's on-going decline. The report went on to state, "It seems extremely unlikely that the productivity of the Bering Sea ecosystem can sustain current rates of human exploitation as well as the large populations of all marine mammals and birds that existed before human exploitation -- especially modern exploitation -- began."

3. Localized Depletions

In much the same way as the seasons have shortened, excess capacity and overfishing have dramatically altered the geographic distribution of the eastern Bering Sea pollock fishery. As pollock stocks have been overfished in the Bogoslof and Donut Hole, necessitating the closure of those areas, and Aleutian Island pollock has steadily declined, the fishery overall has shifted eastward, into a relatively small area of the southeastern Bering Sea. As a result, pollock removals from areas now designated as Steller sea lion critical habitat have increased substantially, ranging from 100,000-300,000 metric tons during 1977-86 to 650,000-870,000 tons during 1992-96, heightening the risk of localized depletion.

While catcher boats fishing for pollock catch a higher percentage of their quota from critical sea lion foraging areas, the factory trawler catch from these nearshore areas was reduced by the creation of the catcher vessel operating area (CVOA), which overlaps significantly with critical sea lion foraging habitat off the eastern Aleutian Islands. The CVOA was put in place in 1992 to move factory trawlers farther offshore during the pollock "B" season, in part to alleviate the competitive pressure on catcher boats from factory trawlers, but also to reduce pressure on the stock from locally high harvest rates.

During the "A" season for spawning pollock, however, the CVOA is not operational, and the overwhelming majority of that catch comes from nearshore areas between 20-60 nautical miles in designated sea lion foraging areas encompassed by the CVOA in the "B" season. In 1991 and 1994, 96-100% of the observed pollock "A" season catch came from within the CVOA area by factory trawlers and catcher boats alike. In 1996, the "A" season catch dropped to between 46-75% as both sectors shifted more effort to the north and west of the CVOA. Nevertheless, about 70% of the pollock targeted by factory trawlers in the "A" season were taken from Districts 517 and 509 in the southeastern Bering Sea. In 1997, areas 517 and 509 accounted for 91% of the factory trawlers' "A" season total, a sizable portion of which came from within critical habitat.

In addition, research and fishery data indicate that locally high exploitation rates in the factory trawl fishery for Atka mackerel are causing localized depletion within Steller critical habitat along the Aleutians. New information strongly suggests that local harvest rates are far higher (50-90%) than the overall rate for the managed stock as a whole (18-20%). Roughly 75-85% of the fishery removals occur in designated critical sea lion habitat, within 20 nm of rookeries and haulouts.

Atka mackerel is the most common summer prey resource of Steller sea lions in the west-central Aleutian region. Locally high exploitation rates appear to cause temporary reductions in the size and density of local Atka mackerel populations which could affect Steller sea lion foraging success during and after the fishery.

4. Increased Roe Fishing

By 1994, factory trawlers in the Bering Sea were deriving more than one-fourth of their annual revenues from lucrative pollock roe. For many, financial success has hinged on the outcome of the roe fishery. Although roe-stripping - retaining only the roe, and discarding the fish carcass - has been officially prohibited in the pollock fishery, the volume of roe fishery is unprecedented. The declining size of the Bering Sea spawning stock over the course of the 1990s makes the roe fishery even riskier, since the reproductive population is most vulnerable to trawl gear at spawning time:

- Densely-schooled, spawning fish are highly susceptible to overfishing. Episodes of intense fishing on spawning stocks in the Shelikof Strait (1981-1985) and Bogoslof/Donut Hole fisheries (1987-91) were followed by steep declines in pollock abundance in both areas.

- In 1989, factory trawlers caught 53% of the entire Gulf of Alaska pollock quota in the first quarter of the year on spawning pollock, preempting shore-based boats and prompting a ban of pollock factory trawlers in the Gulf of Alaska as well as a ban on pollock roe-stripping.

- Since 1990, the catch of spawning pollock in the eastern Bering Sea pollock fishery has soared to approximately half a million metric tons per year -- ten times the volume removed annually from 1977-86.

- In the rock sole fishery, factory trawlers also fish on spawning females in pursuit of high value roe. There is no prohibition on roe-stripping in this fishery and it has one of the highest discard rates (60-70%) of any fishery in Alaska as well as the highest rate of target species discards -- reportedly throwing away four fish for every one retained.

5. High Volumes of Bycatch and Discards

Huge, indiscriminate nets, and physical limitations of on-board processing equipment and storage space, force factory trawlers to catch and waste millions of pounds of sea life every year. Overall, factory trawlers catch more unwanted or unusable fish, and throw more of it away, than any other vessel class in the groundfish fisheries off Alaska, accounting for more than three-quarters of total Bering Sea/Aleutian Islands discards in 1994. That year, 47 factory trawlers discarded a record 572 million pounds in all – more than 3 times the reported discards (170 million pounds) of the more than 2,000 other boats that fished for groundfish that year:

- Factory trawlers off Alaska discard roughly two to three times more bycatch than the Alaska-based catcher boat fleet.

- From 1990-94, the total tonnage of discards in the Bering Sea/Aleutian Islands groundfish fisheries ranged between 197,660 and 314,585 metric tons.
- Even in the Bering Sea midwater pollock fishery, where the bycatch/discard rate is low, the total volume of discarded pollock and other species has been the highest of any Bering Sea groundfish fishery, averaging more than 93,000 metric tons (205 million pounds) per year from 1990-94.
- Total discards for yellowfin sole and Pacific cod averaged 60,000 metric tons per year from 1990-94, second only to the pollock fishery.
- Bycatch and discards rates are much higher for the factory trawl fleet fishing for yellowfin sole, rock sole and other bottom-dwelling fish, including Atka mackerel, Pacific cod, and flathead sole. In 1997, the Bering Sea/Aleutian Island discard rate for yellowfin, flathead and rock sole -- all carried out primarily by factory trawlers -- ranged from 35-55%.
- The rock sole fishery has had the highest rate of total discards, ranging from 60-70% from 1990-94.
- Trawling on hard-bottom habitat in the Aleutian Islands by factory trawlers fishing for Atka mackerel may have destroyed slow-growing, cold-water corals that were once a major component of bycatch in the fishery. After 20 years, the corals are infrequently found in areas where trawling has been most intense.

In 1998, factory trawlers will be required to retain all juvenile pollock and cod in those fisheries. While this program, known as improved retention/improved utilization, will reduce the amount of fish discarded, it will not reduce the bycatch of unwanted fish in the nets. Most of the retained young pollock and cod will likely be ground up into fish meal in on-board plants.

The full retention/full utilization program is supposed to be part of a multi-tiered approach mandated under the Sustainable Fisheries Act to reduce and minimize bycatch. The Act allows for such programs after vessels have undertaken efforts to avoid non-target species: reduce the catch of non-target species through gear adjustments and other means, and return non-target species to the sea alive. It is only after all of the above has been completed that the fleet can default to retaining and using bycatch. Improved retention/improved utilization undermines the bycatch directives of the Act, which were intended to promote cleaner fishing, not institutionalize vast amounts of bycatch.

Finally, it is important to note that while bycatch figures for commercial species are counted against quotas for those fisheries, that is not the case for all species unintentionally caught in fishing nets. Untold amounts of non-commercial fish species and other sea life are caught by factory trawlers (and other gear types), removed from the ecosystem and discarded dead.

Atlantic Herring: Promise of Abundance?

In the 1960s, a large international fishery for adult herring commenced when foreign factory ships arrived on Georges Bank. Nantucket Shoals and Jeffrey's Ledge in the Gulf of Maine. From 1965-1972, the total number of foreign ships fishing for groundfish and herring from Georges Bank to Cape Hatteras, North Carolina, increased from about 450 to over 1,000. Much of the fishing effort was directed at herring by Soviet, Polish and German stern trawlers.

Lacking any management controls, a feeding frenzy ensued. During 1961, the Soviet herring fleet on Georges Bank totaled 100 vessels and landed 67,000 metric tons. By 1965, 200-250 Soviet vessels were fishing for herring, hake, haddock and cod on Georges Bank. Herring catches rose to over 150,000 metric tons. In 1967, vessels from Germany, Poland, Japan, Romania and Canada joined the Soviet fleet on Georges Bank and Jeffrey's Ledge. Landings rapidly peaked at nearly 450,000 metric tons in 1968 -- not including bycatch and discards. Catches from the large Georges Bank stock dwarfed the smaller herring fisheries from other regional spawning stocks reaching an all-time high of nearly 375,000 metric tons. Overfishing led to the complete collapse of the Georges Bank herring stock by 1977, which did not begin to recover until the mid- 1980s.

Today, virtually the only fish species on Georges Bank considered healthy and available in large numbers are forage fish such as herring and mackerel. Both herring and mackerel play a critical role in the marine food web, serving as important prey for many species of groundfish, tunas, seabirds and marine mammals. Not unlike the time of the foreign factory ships, herring in federal waters presently has no fishery management plan (FMP). Nevertheless, until recently, U.S. officials were recommending a total allowable catch for herring at levels higher than the record-setting catches of the late 1960s.

It was NMFS's declaration that herring was under-utilized and ripe for the taking that prompted the 369 ft. incinerator ship turned factory trawler, *Atlantic Star*, to seek access to New England's herring stocks. As mentioned earlier, it was the specter of factory trawlers returning to Georges Bank that galvanized fishing industry and environmental support behind last year's legislation to keep factory trawlers and other large-scale vessels out of the Atlantic herring and mackerel fisheries.

Last year's one year moratorium on large-scale vessels was needed to keep the FMP process moving forward and meaningful – a process which had only just begun to gather momentum and support. It is unlikely that the FMP process would have proceeded constructively had the Atlantic Star or other factory trawlers entered the fishery. Closing the fishery to factory trawlers, at least temporarily, has removed immense political pressure from the FMP development process.
Much has been accomplished since the moratorium was enacted last year:

- A thoughtful process is underway to determine the most appropriate spawning areas in order to prevent damage to spawning stocks;

- The Plan Development Team has worked to determine safe levels of fishing for herring:
- The New England Fishery Scientific Committee has advised the New England Council on a proposed overfishing definition for herring:
- Following the lead of the Maine Department of Marine Fisheries, the role of herring in the marine ecosystem is being investigated to ensure that a herring fishery will not rob fish stocks such as cod and haddock of their essential prey or otherwise hinder their recovery;
- Herring processing plants are considering startup operations - unthinkable last year, as many shore-side facilities considered potential competition with factory trawlers:
- Displaced groundfish vessels have begun retrofitting projects to enable them to fish for herring and relieve pressure on groundfish stocks: and
- The New England Council is in the enviable position of developing an FMP for a healthy fishery, which if done properly, could avoid repeating history .

Recommendations for inclusion in legislation

Greenpeace believes that the following elements should be included in any legislation introduced to address the failures of current law to achieve the original goal of both the Magnuson-Stevens Fishery Conservation and Management Act of 1976 and the Anti-reflagging act of 1987.

To ensure the long term survival of the Bering Sea Pollock fishery, other groundfish fisheries in the North Pacific, *every single one of the boats that came in during the period of dispute in 1987 should be forced to leave the fishery in a timely fashion.* Failure to take action now through legislation to address the serious problem of overcapacity in the above fisheries will necessitate even harsher action in the near future.

To ensure that the resulting reduction in fishing capacity from the departure of these boats results in a reduction in the amount of fish caught, *new provisions must be incorporated to direct the North Pacific Fishery Management Council to submit and the national marine Fisheries Service to approve, revised TACs annually, which reflect the approximate reductions in catch attributable to each boat as they are forced to leave the fishery.*

New parameters should be also be set to govern the size and capacity of vessel that will be allowed to fish in U.S. fisheries in the future. Toward that goal, Greenpeace urges inclusion of *a size limit of 165 feet, a weight limitation of 750 gross registered tons, and a shaft horsepower limit of 3,000.* To be fair, outside of the boats that came in under the loophole in the Anti-Reflagging act, these new restrictions would apply to any boat that in the future would wish to participate in, but is not currently doing so, in U.S. fisheries. However, language should be included that would *forbid replacement of the remaining vessels, that exceed these limits, at the end of their useful life.*

Reinforcing the aforementioned provisions, language should be included which would make the *temporary prohibition on federal subsidies for construction of new fishing vessels that exceed these limits, permanent.* In addition, this permanent prohibition should be extended to cover *any vessel expansion that would result in a vessel that exceeded any of these limits.*

Finally, we recommend inclusion of language that will *require that no boats in the fishery be allowed to expand their current fishing capacity.*,

What can be achieved under enactment of legislation to close the loophole in the Anti-Reflagging act?

Many have questioned whether legislation introduced to close this loophole would be directed at addressing any conservation matters. Many have suggested that legislation to address this issue would only concerned with so-called allocation issues or who gets the fish. While it may be true that some in the industry are supporting this legislation in hopes of improving their position within the fishery, and gaining some competitive advantage. to focus so narrowly is to overlook completely the real significance of the opportunity of using this legislation as a vehicle for conserving fish stocks, protecting the marine environment and improving fisheries management.

Enactment of legislation can also put the U.S. in a leadership position in tackling excess capacity, as called for in the FAO Code and UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks.

With respect to the North Pacific, the reduction of excess factory trawler capacity achieved under legislation will present the North Pacific Fishery Management Council with an outstanding opportunity to begin managing the fisheries in a more precautionary, ecosystem-based fashion. By phasing out factory trawlers, a number of things will become immediately possible:

- fishing seasons can be lengthened and the harvest of fish slowed;
- fishing effort can be spread out to reduce its concentration in Steller sea lion critical habitat;
- the upward pressure on quotas will be lessened significantly, allowing for a return to pre 1992 where the TACs were set below the ABCs, making reductions in quotas less disruptive to the fleet and therefore more politically feasible;
- the volume of bycatch will be greatly reduced.

To be sure, removing these 15 factory trawlers will not cure all of the problems facing our nation's fisheries, even in the North Pacific. The Alaska-based catcher boats, and others active in the fisheries, do contribute to many of the environmental problems facing the North Pacific, including overfishing, bycatch, localized depletion and damage to

habitat. The long-term viability of the fisheries and ecosystem will rest largely on the effective management of the catcher boats, once the factory trawlers are gone.

However, it is important to remember that factory trawlers, which represent a very small percentage of the total Alaskan groundfish fleet, are responsible for the lion's share of the problems. Indeed, excess factory trawler capacity is at the root of many of the ecological problems plaguing the North Pacific, and driving the destruction of this ecosystem.

For the Atlantic herring and mackerel fisheries, the Senate, having failed to pass H.R. 1855 last year, has included H.R. 1855 in its version of the legislation that Senator Stevens introduced to address this loophole in the Anti-Reflagging act. That legislation needs to be enacted this session so that the process that have begun for the herring and mackerel fisheries can be completed without the under pressure of a factory trawler in these fisheries.

For the rest of the nation's fisheries, setting limits will also facilitate compliance with the new National Standards on the Magnuson Stevens Fishery Conservation and Management Act . Finally, if the goal is to restore balance and eliminate excess capacity as expeditiously as possible, it makes sense to phase-out the largest ships with the greatest capacity in the overall fleet.

Greenpeace appreciates the opportunity to testify and I would be happy to answer any questions.

FIGURE 2
11/26/97

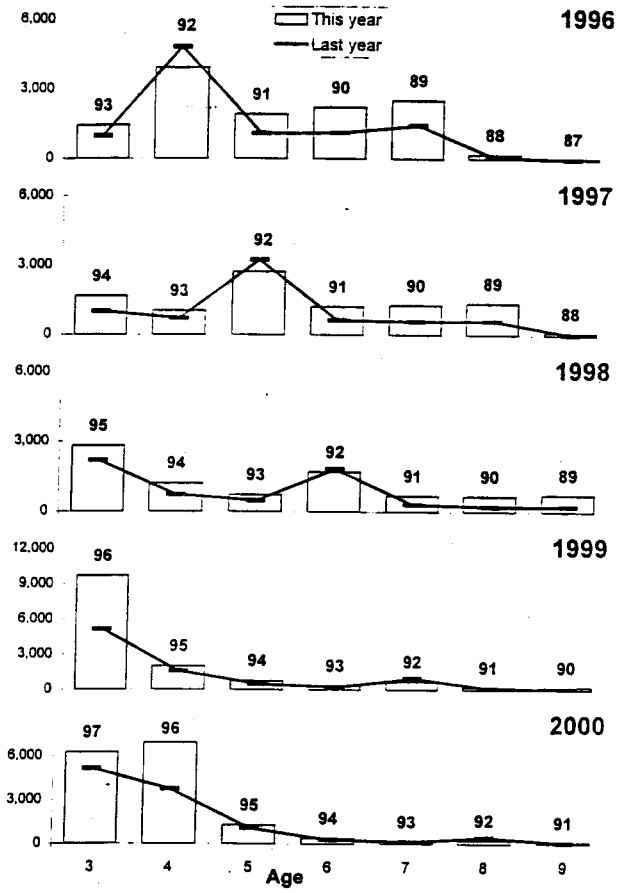

Figure 1.21. Model 4 projected population numbers at age compared with those presented in last year's appendix document (Wespestad et al. 1996).

>Committee on Resources
>Subcommittee on Fisheries Conservation, Wildlife & Oceans
>http://www.house.gov/resources/fisheries/
>voice: (202) 226-0200
>fax: (202) 225-1542

Please note the attached testimony includes some revisions and additions to the draft copy i gave to Joe Love at the committee hearing yesterday.
Please include this for the record.
thanks
dave fraser

Muir Milach, Inc. - Tracy Anne, Inc.

Statement of dave fraser

Captain, FV Muir Milach

Americanization of the U.S. Fishing Fleet

Submitted to

Subcommittee on Fisheries Conservation, Wildlife and Oceans

Committee on Resources

U.S. House of Representatives

June 4, 1998

Americanization of the U.S. Fishing Fleet

In response to the passage of the Magnuson Act in 1976, our partnership had the F/V Muir Milach built in Oregon in 1979. Together with our second catcher vessel, the F/V Tracy Anne, we operate primarily in the Bering Sea delivering pollock and cod at sea to factory trawlers. This activity generates approximately eighty percent of the revenue of our vessels.

As members of United Catcher Boats and it’s predecessor American High Seas Fisheries Association, we support the majority of the comments of Frank Bohannon on behalf of UCB. His statement to the Committee does an excellent job of portraying the history of the catcher vessel (CV) fleet, and the impacts that the 1987 Anti-Re-flagging Act has had on our fleet.

As an individual, on behalf of our partnerships’ vessels, I wish to expand on the statement offered by UCB and offer direction to Congress for renewing its commitment to fully Americanize our fisheries.

The History of Catcher Boat Role in Americanization:

The harvesting of groundfish in the Bering Sea (BS) was Americanized a decade ago by independently owned, US built CVs. The Muir Milach was one of those pioneer vessels. We sold the first pollock to a Japanese Joint Venture in the Bering Sea and were the first JV vessel to fish for Atka Mackrel. During the ‘80s, we fished flatfish, mackerel, rockfish, cod and pollock for JV markets. Now, only pollock and cod markets remain available to us, and pollock prices are lower today than they were in 1981.

In the second half of the 1980s, the opportunity existed for US fishers to acquire ownership of, and to re-flag, foreign processing ships. Had we been allowed to do so, we would have been able to build on a base of US controlled harvesting, to capture the benefits of processing our fish as Americans. As happened to several other US catcher vessel owners who had plans in the works, our opportunity to do so was foreclosed by the passage of the Anti-re-flagging Act.

The Unintended Consequences of the 1987 Anti-Re-flagging Act:

Congress may have had the best intentions in passing the Act in 1987, but the consequences were indeed, unforeseen, unintended, and unimagined.

It is significant that this committee has chosen to examine the broad issue of Americanization of the fishery, rather than focus narrowly on SB 1221 as a response to the impacts that followed in the wake of the Anti-re-flagging Act.

SB 1221 is an important bill, chiefly because at the core it establishes a standard of ownership for vessels in the fisheries of the US. However, the bill has received much attention because of the clause that would remove the fisheries endorsement of vessels which entered the fishery in technical compliance with the language of the Act as it has been interpreted by the courts.

A Moratorium on Size, or a Moratorium on Effort?

There is a need to look holistically at the US fisheries and to recognize that there is more than sufficient harvest capacity to attain OY. A moratorium on new vessels over 165’ does not go far enough. We do need a national moratorium on new entry of harvest capacity into the fisheries by vessels of any size. Over-capacity and over-capitalization are endemic problem

No new vessel entry or vessel replacement should occur without the retirement of like capacity. However, requiring replacement vessels to match exactly the ‘specs’ of the retired vessel is unrealistic. Meaningful indices of capacity need to be developed as was done by the Pacific Fisheries Management Council’s license limitation program. That program allowed the licensing of a new vessel of any size, but only on the condition that equivalent capacity was removed from the fishery. To license a large (250’) CP trawler it was necessary to retire several 60’ to 100’ CV trawlers.

The problem with any such "replacement" or "retirement" of capacity programs or "buybacks," is that often the "retired" capacity simply shifts to another overcapitalized fishery. Congress should direct regional councils to develop the equivalency formulae for their particular fisheries. However, Congress should mandate that a overall moratorium be national and that "retired" vessels stay "retired" and not enter any other fishery.

No Return Provision:

We strongly support making permanent the language contained in last year’s appropriation bill, which prevents the re-entry into US fisheries of vessels that have surrendered their US flag to enter foreign fisheries. Vessels which have left the US pollock and crab fisheries to fish in Russian fisheries under Russian flag should not be allowed back into our over capitalized fisheries.

The Spuriousness of the Greenpeace Case:

In offering rationale for kicking vessels out of the fishery Greenpeace and others have suggested that there are biological reasons for doing so. The supplemental documentation submitted by NMFS to questions by Senator Snowe refutes this suggestion. There is no evidence that the bycatch rates of the "targeted" vessels differ from other vessels in the fishery using similar gear. Size and ownership have no significant correlation with responsible fishing practices. NMFS’s response was comprehensive and accurate, and need not be expanded upon here.

The case for proceeding with the Americanization of our fisheries does not rest on biological issues.

The case for Americanization is simple and clear. The potential rents that can be captured from our natural resources should flow to Americans.

Where Are the Rents From the Pollock Fishery Going Now?

The pre-emption of CVs that occurred with the entry of the CP fleet into the Bering Sea fisheries in the late 1980’s is old news. Even under the current allocation structure, CVs have managed to recapture some of the lost ground and once again harvest just over 50% of the pollock.

What is news is that the de-Americanization of the harvest sector is going on unabated in the Bering

Sea.

The 130 boat CV sector was comprised almost entirely of independently owned vessels in 1987. Today there is a disturbing trend toward vertical integration and processor ownership of the CV fleet. The Inshore/Offshore EA/RIR analysis prepared by the council states:

- *"As of 1998, only one of the Unalaska/Dutch Harbor-Akutan shoreplants had not pursued ownership of catcher vessel"*
- *"Today, all plants, with a single exception, own and/or effectively control part of their delivering fleet."*
- *"…at the low end of the range, one processor owns/controls all or part of 45% of the vessels in its delivering fleet." "At the other end…one of the processors owns/controls all or part of 86% of its delivering fleet."*

Foreign Ownership is a Problem Which Extends beyond the Rebuilt Vessels:

The trend to vertical integration is doubly troubling because the majority of the processing sector is itself foreign owned, and there is absolutely no limit on the degree of foreign ownership of onshore processors.

How are Americans to extract net economic benefits from our pollock fishery when there is a top down vertical integration beginning in the foreign marketing and distribution channels for pollock, and reaching down through a significant portion of the (formerly) US harvest sector?

Information on Foreign Ownership in Bering Sea Pollock Processing and Catching:

The following information is also excerpted directly from the NPFMC Inshore/Offshore EA/RIR analysis, prepared for the June 8th council meeting.

3.9 Foreign Ownership

Among the types of information requested by the Council was a description of the ownership patterns in the pollock industry, including levels of foreign ownership and control of harvest and processing capacity. While some of the major foreign investments in the pollock fisheries are generally known, more specific information was requested by the Council. As we have described for the Council previously, the business and corporate ownership structures of various fishing and processing entities make it extremely difficult to provide definitive information in this regard. Nevertheless we have pursued this issue and have provided a summary of the information collected under Tab 8 of Appendix 1. This information is based on who owns the vessels and plants. The analysts have not attempted to determine any arrangements, such as bare boat leases, where the nationality of the owner is different from the entity leasing the vessel. However, information presented by the public indicates that this may be occurring in the true mothership and possibly other sectors of the industry.

There appear to be three basic sources of information on foreign ownership. The first is the report produced by the Alaska State Legislative Research Agency in early 1994. Because these ownership structures appear to change frequently for a variety of the operators involved, we need to have more recent information than what is in the State report. A second source of information is the Lexis-Nexis computer data base which we have queried for foreign ownership data. Bits and pieces of information in that database come from many diverse sources that are difficult to verify independently. It is hard to meld those bits and pieces together into a credible depiction of the ownership of a particular company or vessel, and there is a high likelihood that we will get it wrong, inadvertently embarrass a company, and then have to make all sorts of public retractions. And this leads to the third source of information which is, of course, the companies and vessel owners themselves.

What we have done since the February 1998 meeting is to meld the State report and more recent Lexis-Nexis information together for each company. We then sent that information out to each company to allow them to comment and revise as necessary. A compilation of the results is contained in Appendix I.

There are 168 vessels or plants which participated in the 1996 pollock Bering Sea and Aleutian Islands fishery. Of the 168 vessels or plants there are 22 catcher-boats which operated in both inshore and offshore sectors (there are 118 different catcher-boats altogether). The count of the inshore plants (eight) does not include the International Seafoods of Kodiak inshore plant or one inshore catcher processor which harvested small amounts of pollock in 1996. In the inshore sector there are 99 vessels or plants, and in the offshore sector there are 88 vessels (one vessel has multi-country affiliation and is subtracted from 89).

Three foreign countries, Japan, Norway, and South Korea have some degree of foreign-affiliation in plants, catcher vessels or processors:

Country of Ownership	Inshore Offshore Plants Catcher-Vessels Catcher- Catcher- True (#) Processors Vessels Motherships				
Japan	4	11 [4]	1 [3]	3 [4]	1
Norway	0	0	18	2	0
South Korea	0	3 [2]	3 [3]	3 [2]	1
Fully US	4 [1]	77	16	41 [5]	1
Total	8	91	37	49	3

1/ Including two anchored processors in Dutch Harbor.

2/ Includes two vessels with inconclusive parent-company affiliation of South Korea.

3/ Has a vessel with multi-country affiliation.

4/ A vessel was Lost at Sea since 1996.

5/ Includes a vessel with inconclusive partial UK affiliation.

Inshore Sector Processing Plants: **Parent-companies that are affiliated with Japan account for 4 of the 8 total plants of the inshore sector, or 50%.** There aren’t any plants in the inshore sector where the parent company is from Norway or South Korea. The remaining four plants, 50% of the inshore sector, are fully US owned.

Catcher-Boats Overall: There are 119 catcher-boats altogether: 91 in the inshore sector and 49 in the offshore sector. When added this makes 140 vessels, and subtracting 21 for those that operated in both sectors again equals 119 different catcher-vessels. **Ownership of catcher-boats by parent companies of Japan account for 14 or about 12%.** A little less than 2% of the catcher-boats have ownership by parent companies foreign-affiliated in Norway. There are two to six vessels where the parent company is from South Korea (four of these vessels are inconclusively of South Korea), or less than 5%. The remaining 95 catcher-boats are fully US owned (which includes one vessel with some inconclusive UK affiliation), or about 81%.

Offshore Catcher Processors: Parent-companies that are affiliated with Japan account for one of the 37 catcher processors in the offshore sector, or about 2 %. **Norway-affiliation includes 18 vessels or about 49%**. South Korea includes two to three vessels (because some vessels have ownership by parent companies of Japan as well as South Korea), or about 5%. There remain 16 catcher processors in the offshore sector which are fully US owned, or 46% of the total.

True Motherships: There are three true motherships operating in the offshore sector. **One is fully-affiliated with Japan (33% of the total)**, one is 10% affiliated with South Korea and 90% US or about 3% of the total, and one is fully US. Ownership by US companies accounts for 63% of the total of offshore motherships.

Excessive Shares:

Displacing foreign rebuilt vessels completely from both harvesting and processing will not increase market opportunities for independent catchers, it only increases the market share of Japanese owned shore plants. In a game of musical chairs, SB 1221, in its present form, doesn't introduce any new chairs. It just adds plush upholstery to some existing chairs, while pulling the seat out from under us.

The result will not be a solution to the "excessive shares" issue; it will simply move American Seafoods from the top of the list, to be replaced by Maruha, Trident and Tyson.

The independent CV fleet that first Americanized the fisher, particularly boats under 125’ like our own, are very dependent upon offshore markets. Half of the catch by CVs less than 125 is delivered offshore. It is critical to our survival that the "targeted" vessels be able to continue to provide viable markets, and that these markets expand rather than contract.

In order to maintain independence of the Catcher Vessel sector, it is perhaps as important in the long run to maintain a vigorous and competitive market for our catch, as it is to limit the catch by our competitors in the factory trawl sector. Once again quoting from the NPFMC Inshore/Offshore EA/RIR analysis:

> 7.4.3 … Market Control
>
> Economic theory confirms that, all else equal, the competitive marketplace works to bring willing buyers and willing suppliers together and, through this process, establishes a ‘fair’ market clearing price for the exchange. **Competition depends, among other things, upon the presence of sufficient numbers of participants on both sides of the market to assure all exchanges are, indeed, made by ‘willing’ demanders or suppliers**. That is, neither side is able to induce the other to enter into an exchange that is not seen to be in each trader’s best interest. As fewer and fewer participants (either buyers or sellers) are present in a market, the potential for market control, distortion, and/or failure increases. Such market failures diminish the aggregate ‘benefit’ deriving from the trade.
>
> **As the number of independent operators in any sector of the BSAI groundfish fishery (e.g., catcher vessels, true motherships, C/Ps, plants) declines, the benefits of the competitive market are reduced.** Ownership consolidation and/or operational

control within sectors, as well as management actions which narrow or dictate operator’s market options in the fishery, increase the probability that market distorting pricing practices will emerge. For example, **if the number of, say, pollock processors is very small, and/or the ability of independent catcher boats to deliver their catch to whomever they choose is restricted, processors may be in a position to exercise some degree of market control (i.e., capture some of the ‘rents’ that would have otherwise gone to the catcher boat, by reducing the price paid for raw catch).**

Further, **if one or more of those processors is vertically integrated (e.g., controlling capacity to harvest, process, re-process, and/or market) and represents a significant share of the effective capacity within these sectors, such firms may exercise a degree of market control which could be ‘price distorting’** . That is, such a firm could be a ‘price setter’, essentially establishing the effective price for the rest of the market (perhaps at several different stages of the market, e.g., ex-vessel, wholesale, retail). All others wishing to sell into that market would be ‘price takers’, accepting the established price or exiting the market.

The above examples demonstrate a form of ‘market failure’. To the extent that they are present in the BSAI groundfish fisheries (particularly those which target pollock), they reduce the overall benefit to the Nation which could otherwise have been realized from the harvesting, processing, and marketing of this important U.S. fishery resource. Actions proposed under I/O3 could result in further consolidation of capacity and control within the sub-sectors identified in the analysis. This would be expected to further reduce the degree of competition in this fishery and increase the likelihood of distorting market failures.

What Should Be the Test of Citizenship for Vessels That Have "Immigrated?"

The test of Americanization of the foreign rebuilt vessels should include factors such as:

- Real US ownership and control, as per the Sec. 2 of 1916 Shipping Act.
- Providing ***meaningful markets*** to the independent US catcher vessels.
- Employment of US/Washington/Alaska labour.
- Contributing to the tax base of the US/Washington/Alaska.
- Producing products for the demand of the US consumer. (i.e.: filets)
- Providing opportunities for Western Alaskans to participate in the fishery.
- Re-entry into US waters and fisheries must have been without fraud and in full compliance with all applicable law as interpreted by the US Judiciary system.

Information on Foreign Rebuilt Vessels Which Have Provided Meaningful Markets in Some Fisheries or Some Years:

The following information is information collected from catcher vessels which have delivered to factory trawl vessels as full time markets in the pollock, cod, and whiting fisheries.

Vessel Name Fisheries Primary Product Form Years Providing Markets

Rebecca Ann Cod/Pollock Filets 1993-1998

Victoria Ann Cod/Pollock Filets 1993-1998

Elizabeth Ann Cod/Pollock Filets 1993-1998

Arctic Fjord Pollock/Whiting Surimi 1995-1998

Endurance Pollock Surimi 1995-1997

Ocean Rover Whiting/Cod Surimi/Filets 1996-1998

Pacific Scout Cod/Pollock Filets 1995-1998

Pacific Explorer Cod/Pollock Filets 1995-1998

Pacific Navigator Cod/Pollock Filets 1996-1998

American Empress Whiting Surimi 1996

A significant market is one that supports a dedicated catcher boat throughout the fishing season, not simply taking occasional deliveries on an opportunistic basis. Another way of looking at whether a market is "meaningful" is to consider the percent of the vessels processing throughput that is provided by one or more catcher vessels. As a general guideline taking 25% to 33% or more from a catcher vessel provides that vessel with a decent market opportunity.

The Cod fishery is one in which there has been a very significant expansion in market opportunities for CVs delivery to CPs in the last two years, following the council decision to split the cod quota between CVs and CPs. There are six "targeted" CPs providing about fifteen CVs with markets in the Cod fishery.

The growth of catcher boat market opportunities delivering to catcher processors (CPs) in Whiting and Cod is a significant contrast to the dwindling market opportunities experienced in the Pollock fishery. This trend is directly related to the allocation structures in place in those fisheries. In the Whiting and Cod fisheries, the allocation is split between CVs and CPs. Catchers work on their own allocation of fish, which they then sell to Factory Trawlers and/or other markets. This is in contrast to the pollock fishery in which the allocation is split between processing sectors and CPs have no real incentive to buy fish, when doing so reduces the amount they are allowed to catch themselves.

The Role of Filet Processing Fleet in Capturing Benefits for the US:

The following information in this section is taken from the NPFMC Inshore/Offshore EA/RIR analysis:

3.8.2 Destination Markets and Cost-Benefit Issues

As indicated above, almost all of the BSAI pollock surimi and roe production is exported, while almost all of the fillet production is used for U.S. domestic consumption. These patterns have an implication for cost-benefit analysis because, as shown elsewhere, the at-sea sector produces a substantially greater amount (as well as proportion) of fillets in comparison to the shoreside sector. Cost-benefit analysis, as

employed in an RIR analytical context, measures the ‘net benefits’ of changed regulations to consumers and to producers. These differential product-mix patterns indicate that, all else equal, as more BSAI pollock is processed onshore, resulting ‘increases’ in consumer benefits from the fishery will accrue (primarily) to foreign consumers. Reductions in at-sea production from the BSAI pollock resource means less product available to the U.S. domestic consumer market. Therefore, in evaluating changes in *"net benefits to the Nation"*, which are based upon the welfare of U.S. citizens, potential losses from, in this example, less fillet production would have to taken into account, while resulting increases in welfare enjoyed by foreign consumers (e.g., as a result of lower prices and increased supplies of surimi) would not be.

Similarly, based on estimates of ‘foreign versus domestic’ ownership of the factors of production, changes in producer benefits should also be adjusted accordingly. That is, changes in producers surpluses which accrue to foreign entities do not count, while those accruing to U.S. entities do, in assessing the *"net benefit to the Nation"* attributable to a proposed action.

Epilogue – The Bitter Irony of the FOG Committee:

Like Mr. Bohannon, I was also a member of the NPFMC’s "Future of Groundfish" Committee in 1987. As his account of that sad period of history makes clear, the failure in 1987 was not just that the Anti-Re-flagging Act has unforeseen consequences. The Council failed in its role as well.

In the early meetings of the FOG committee we were informed of the potential wave of capacity about to be constructed. The committee made a preliminary recommendation to the Council in late 1987 that they impose an immediate moratorium. The only significant dissent within the FOG committee to that recommendation came from the representatives of Trident Seafoods and Arctic Alaska (now Tyson).

The Council did adopt a "statement of commitment" in December of 1987, recognizing that the fishery was fully capitalized. However, as Mr. Bohannon’s statement points out, the Council failed to adopt a moratorium until 1992.

The opposition to the Council acting came not only from representatives of factory trawlers. The lobbyist for the shoreside processors (then on the advisory panel, now Council chair) made a motion to "burn the committee’s report and drive a stake through its heart."

It is very hard to put spilt milk back in the bottle. It is ironic that some of those members of the processing sector, both shoreplants and factory ships, who had the opportunity to prevent this tragedy of over-capacity, are now narrowly focused on ‘kicking out’ certain vessels.

As independent harvesters in our *100% US built and owned vessel’s* 20th year of participation in the Americanization of the fishery, we have a tenuous hold on our place in an increasingly vertically integrated fishery. ***We do not want to be the unintended victims of "friendly fire." We urge the Congress to get back on the track of true Americanization the fishery, but to do so in a manner that results in additional markets opening up, not closing markets for our catch and further consolidating control of the fisheries.***

ASSESSMENT OF THE WORLD'S FISHING FLEET 1991-1997
A REPORT TO GREENPEACE INTERNATIONAL
BY JOHN FITZPATRICK AND CHRIS NEWTON

(EXECUTIVE SUMMARY)

The assessment finds that the expansion in the size and capacity of the world's fishing fleets continued to increase over the period 1991 - 1996. A slow down in new additions occurred in 1995 and 1996. In 1997, the orders for new vessels show a return to construction of vessels with large tonnage. The authors recommend a fifty percent (50%) reduction in the present size of the world's industrialized fishing fleet.

Backdrop of the Assessment

The political 'starting-point' for the ***Assessment of the World's Fishing Fleet 1991-1997*** is the 21st Session of the Committee on Fisheries, Rome, 1995, when the FAO Ministerial Conference on Fisheries adopted the Rome Consensus on World Fisheries, noting that the problem of overfishing in general, and overcapacity of industrial fishing fleets in particular, threatened the sustainability of the world's fisheries resources for present and future generations. The Ministerial Conference urged governments and international organizations to urgently review the capacity of fishing fleets and where necessary reduce them.

The call to eliminate overfishing and excessive fishing capacity is echoed in two other important international fisheries agreements – the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 (relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks), and the FAO Code of Conduct for Responsible Fisheries (FAO Code). The 1995 UN Fisheries Agreement relates primarily to high seas fisheries, while the FAO Code widens application to areas within zones of national jurisdictions.

Too Many Mega-Boats Plundering the Seas

The Rome Consensus, the 1995 UN Fisheries Agreement, and the FAO Code are set against the backdrop of a widely acknowledged crisis in world marine fisheries characterized by the FAO's estimation that 69% of the world's major fisheries are fully exploited, overexploited, or depleted while on average some 27 million tons of unwanted fish 'bycatch' is caught, killed and dumped back into the sea each year, because of unselective fishing practices and gear, and the fact that there are simply too many industrial-scale boats plying the world's oceans. In this regard, Greenpeace believes special attention must be urgently directed at reducing capacity in the "large-scale industrialized fishing" sector, as called for at last year's Earth Summit Special Session of the UN General Assembly (para. 36(c)).

Unfortunately, nations responsible for reducing their fishing fleets' capacity are generally failing to act. In response, in late 1996 Greenpeace commissioned research to assess the capacity of the world's fishing fleet. The research was undertaken by two former chiefs (recently retired) from the Fisheries Department of the UN Food and Agriculture Organization (FAO). They are Chris Newton, former Chief of Fishery Information, Data and Statistics Service (FIDI) and John Fitzpatrick, former Chief of the Fishing Technology Service (FIIT) of FAO's Fishery Industries Division.

They used Lloyd's Maritime Information Services, European Community Register of Fishing Vessels, FAO fisheries department statistics and data from other sources to analyze the sector of the global fishing fleet comprised of "large-scale", "industrialized vessels – those exceeding 24 meters in length and more than 100 gross tonnes (GT); it covers about 70% of the value of the world's fishing fleet (estimated by FAO in 1992 at roughly $319,000 million). By number, of the approximately three-and-a-half million fishing vessels estimated worldwide, only about 35,000, or roughly one percent of the total, are classified as large-scale, industrialized vessels. Yet, these relatively few vessels constitute 50-60% of the world's total fishing vessel capacity.

Findings of the Assessment

Newton and Fitzpatrick begin their report by recalling FAO's cautionary prescription for the vast majority of stocks that are in decline or over-exploited -- to apply effective management action to halt the increase in fishing capacity and to rehabilitate damaged fisheries resources.

The most critical of the range of effective fishery conservation and management measures needed is the application of the *precautionary approach*. The use of the precautionary approach is also specified in the 1995 UN Fisheries Agreement and in the FAO Code. It is widely agreed that, if applied generally, the precautionary approach should result in lower levels of catches from most of the world's major fisheries, thus facilitating the urgently needed recovery of populations of fish considered to be declining due to overfishing. Using FAO's own forecast requirements for reduction of fishing capacity, Newton and Fitzpatrick point out that decreased marine catches in coming years should be expected to be well below 70 million tonnes (using the 1990-94 average level of catches and not including production from mariculture – i.e., "fish farming"). So far, however, marine catches are still rising to the extent that in both 1994 and 1995 they increased to and 85.3 and 84.7 million tonnes respectively (with preliminary figures for 1996 also showing another increase). The authors suggest that this is a strong indication that fishing nations generally are not reducing their excess fishing capacity to ameliorate the imbalance between fishing effort and the productive capacity of fish populations.

In its 1995 state of world fisheries report the FAO estimated the total fishing vessel capacity (as of 1992) to be 26 million gross tonnes. In distribution by continent, Asia held 42% of the world's total fishing fleet, the former USSR 30%, Europe 12%, North America 10%, Africa 3%, South America 3%, and Oceania 0.5%.

The major conclusion of the *Assessment of the World's Fishing Fleet 1991-1997* done by Newton and Fitzpatrick for Greenpeace, is that since 1992 vessels on the register of flag states continued to increase by 720,000 tons in the following 5 years (to 1997), a nominal increase of approximately three percent. Although they show a sharp decrease in the numbers of new fishing vessels in 1995 and 1996, as well as a reduction in the tonnage of these vessels compared with earlier years, the analysis of orders for new vessels during 1997 shows an increase in numbers and a return to the construction of large-tonnage fishing vessels.

More than eighty-two percent (82.2%)of new additions to the world's fleet between 1991 - 1995 was by only 14 states, of which a mere four states accounted for 53% (Table 1). Fifteen per cent of total new additions belonged to four states with open registers, commonly referred to as flags of convenience (FOCs), whose combined total reported marine catches were less than 200,000 mt in 1994. This should be compared with the new additions to the European Union's (EU) fleet at 16%, for a marine catch of over 7 million mt. In terms of tonnage, 80% of new additions were by 19 states, with 5 states responsible for 51%. Of the states responsible for new additions, twelve were in the world's top fish producing countries.

Table 1 (abridged): Fishing Vessel Additions to the World's Fleets 1991 - 1995

Country	No of Additions	Cumulative % of New Vessels to Worlds Fleet	Country	No of Additions	Cumulative % of New Vessels to Worlds Fleet
1. Japan	297	19.2	**8. Liberia**	42	71.1
2. Eur. Union	248	35.2	**9. Morocco**	37	73.5
3. Honduras	153	45.1	**10. China**	32	75.5
4. Russia	125	53.1	**11. Argentina**	31	77.5
5. Peru	109	60.2	**12. Iran**	26	79.2
6. Former USSR	81	65.4	**13. S. Korea**	24	80.8
7. Chile	46	68.4	**14. USA**	23	82.2

Throughout the period 1991-94, additions to the world's fleet continue to exceed deletions. In this connection, there is evidence that the fishing fleets are not being restructured, that capacity is not being effectively reduced, and that states with open registers (commonly referred to as "flags of convenience" are increasing their capacity. The Newton-Fitzpatrick report also highlights that a large proportion of the industrial fishing fleet is old and inefficient and in need of scrapping with the percentage of vessels older than twenty years standing at 48%.

With respect to the deletions and scrapping of vessels from older fleets, while it might have been expected that much of the former USSR fishing fleet (previously one of the world's largest industrial-scale fleet) would have been scrapped, it still represents capacity potential since a number of these vessels either continue to operate outside of their jurisdictional waters (e.g. reflagged) or have been sold to developing countries. In 1991 the former USSR had 3,042 but by 1994 the combined fleet of the new Russian Federation and eight other independent states had risen to 3,058 vessels.

The change in the size of the Russian Federation's fleet in particular reflects sales/scrapping of some ships with the addition of 125 new vessels. Interestingly, the financing for some of these vessels required conditions for a replacement ratio of one new vessel to five existing vessels. This could be an important initiative by financial institutions imposing replacement ratios for new construction to keep the overall fishing power in balance, or indeed to reduce it significantly.

The Soviet vessels that were sold, together with the sale of older vessels from Japan and the European Union in recent years represent "technology dumping" and has led to many of them being referred to as "sub-standard ships". As a consequence, developing countries' fleets are comprised of considerably older vessels.

New additions to the European Union fleet show that replacement vessels have increased gross tonnage (GT) and horsepower. EU data shows that the average gross tonnage for Spanish vessels (Europe's biggest fishing fleet) in 1993 was 338 GT while Lloyds shows the average GT of new Spanish vessels in 1995 at 405 GT. The profile of the EU fleet in 1995 reveals that of 99,783 fishing vessels, only 3,871 are in the industrialized category (24 meters and over), or less than four percent. Yet, this small percentage of the EU fleet accounts for about 57 percent of the EU's total fishing capacity of 2,081,626 GT.

Vessel Efficiency

The efficiency of fishing vessels changes over time, so that a vessel built in the 1990's is not comparable in terms of efficiency with a vessel of the same tonnage built in the 1970's. ***New construction is specialized toward large vessels using mid-water trawls, highly specialized auto long-lines of up to 50,000 hooks and deep water fishing with trawls/long-lines on sea mounts and in deep ridges.*** Technological change has therefore increased the rate of the increase in gross tonnage over time. The change had been relatively slow between 1965 - 1980 as the fleets adopted electronic and hydraulic equipment. Between 1980 - 1995 technology increased rapidly, not only from more advanced electronics and hydraulic equipment, but in refrigeration, fuel efficiency, remote sensing equipment and improved vessel design configurations.

A good example of this "technology coefficient" can be seen for a class of freezer trawler. In this case, using 1980 as the reference point year at a value of one (1), a vessel built in 1965 would have a coefficient of .5 in relation to a vessel in 1980. Its efficiency would be half of the 1980 vessel. A vessel built in 1995, however, would have the equivalency of over 2.

The concepts of "technology coefficients" and "efficiency cross curves" presented in the Newton-Fitzpatrick report to Greenpeace highlight the need to develop new mechanisms for the removal of vessels older than 20 years (unless they have been modernized through refitting). It is also necessary to develop these coefficients for application in fleet restructuring programs. The coefficients indicate the replacement ratios required for new fishing vessels. As such, a new freezer trawler in 1995 would be required to remove nearly 4 trawlers built in 1965. This replacement ratio is only for the equivalent technology and efficiency cross coefficients, and does not address the excess capacity and overfishing issues; the ratio would have to be higher. Without the application of technology coefficients in vessel replacement programs, attempts to curb excess fishing

capacity through length and tonnage requirements will not be effective.

Additions to the world's fleet from 1991-97, therefore, not only increased fleet size by three percent (3%) in terms of tonnage but by an efficiency factor depending on the type of vessel. New additions and refits therefore increase potential fishing capacity beyond estimates of capacity based on tonnage.

In order to estimate the extent of increased potential fishing capacity resulting from new additions to the world's fleet, an average of the replacement ratios for various types of new vessels by vessel type is presented resulting in overall ratio of 3:1. Thus for every new vessel being built, three vessels built before 1980 would be required to be scrapped or removed from the fishing fleet in order to prevent an increase in potential fishing capacity. Since such ratios have not been applied to new additions to the world's fleet, the fleet has increased its potential by 14%. That is to say, the world's fleet increased by 3% in terms of tonnage and 14% in terms of potential capacity. In addition, vessels built after 1980 and refitted 10 to 15 years later, as has been the practice in the last five years, have also contributed to potential fishing capacity. Inclusion of these refitted vessels would increase capacity by another 8%. The overall increase is therefore estimated at 22%.

Reducing Overcapacity

The above calculations based on technology coefficients indicates that the world's fleet would need to have been reduced by 22% in order for its potential fishing capacity to have remained constant as a result of new additions to the fleet and refits. In order to reduce capacity, a greater reduction would be required.

On the basis of adjustments required to offset overall fishing capacity from new vessel construction and refits (22%), together with the minimum estimated provided by earlier global modeling calculated FAO researchers (Newton and Garcia) (23%) for the reduction in the size of the fleet, Newton and Fitzpatrick recommend in their report to Greenpeace that the international community should be requiring almost a 50% reduction in the present size of the fleet. In order to achieve such reductions within a meaningful time frame, states will need to introduce scrapping and decommissioning programs as well as imposing replacement ratios on new vessel constructions so as to prevent the potential fishing capacity of the world's fleet from requiring even greater reductions in fleet size from state intervention through scrapping programs. They suggest that responsible states may wish to consider switching funds available for subsidies for ship construction toward a scrapping and decommissioning program, for instance.

The authors also note that their analysis shows that the adoption of "flags of convenience" continues to increase. More countries are also offering their flags. They suggest that, in the case of existing vessels registered under a national flag, states concerned may be able to prevent their vessels from reflagging by providing legislation that registered national fishing vessels cannot leave their jurisdiction so that any requests for deletion from the registry can be denied.

Two key issues demand urgent international attention if the capacity of the world's fishing fleets are to be made transparent and measurable:

1) a full and authoritative source of information, and

2) a standardized vessel classification and measurement system; neither currently exist in the world.

Newton and Fitzpatrick add, in conclusion, that whereas a 50% reduction in capacity may appear a too severe objective, if states are to effectively introduce the precautionary approach to their national and international fisheries and reduce harvest levels to ecologically sound levels, fleets will face reductions in fishing effort that will cause economic strain. To offset this strain, a reduction in fleet size will be necessary.

Greenpeace International,
May 1998

SUPPLEMENTAL STATEMENT FOR THE RECORD
OF
ALASKA OCEAN SEAFOOD LIMITED PARTNERSHIP
IN CONSIDERATION OF
OVERSIGHT HEARINGS ON
UNITED STATES OWNERSHIP OF FISHING VESSELS
BEFORE THE SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS
COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

June 4, 1998

By this statement, Alaska Ocean Seafood Limited Partnership addresses erroneous statements contained in the testimony of Trident Seafoods Corporation with respect to the rebuilding of our vessel, the ALASKA OCEAN. Specifically, Trident asserts that the vessel which we converted to the ALASKA OCEAN was not the subject of a contract to purchase entered into prior to July 28, 1987; that the vessel was not the subject of a binding rebuilding contract entered into before July 11, 1988; and that the vessel entered the shipyard under a contract for conversion to a fish tender but emerged as a factory trawler. These assertions are totally without merit.

1. The Purchase Contract.

The STATE EXPRESS, which is the vessel that was rebuilt into the ALASKA OCEAN, was the subject of a contract to purchase entered into before July 28, 1987, and any suggestion to the contrary is ludicrous.

In April 1987, Sunmar Holdings placed a bid with the Maritime Administration for the purchase of the STATE EXPRESS and two other vessels. On May 6, 1987, and again on June 3, 1987, Sunmar received notification from the Maritime Administration that Sunmar was the high bidder for the vessels. On July 8, 1987, Sunmar entered into a contract with the United States of America, acting by and through the Maritime Administration, to purchase the three vessels.

It is clear from the contract itself that the parties involved regarded this document as a binding agreement. The document is entitled "Contract of Sale." The document states that "[s]eller agrees to sell" and "[b]uyer hereby agrees to purchase" the vessel. The document also contains all the normal indicia of a contract: it specifies a purchase price; it specifies method of payment; it contains warranties from the buyer and seller to each other; it allocates risk of loss; it sets out events of default; and it provides for liquidated damages.

Notwithstanding the fact that the purchase contract is a perfectly typical contract, Trident nonetheless contends that the contract was not binding because it gave Sunmar the

right to inspect and reject the vessels. To our knowledge, such provisions are standard in vessel purchase contracts. Indeed, we and our sister companies have purchased three vessels from the Maritime Administration and all three contracts have contained identical inspection clauses.

Moreover, our lawyers have advised us that a contract for the sale of a vessel is a contract for the sale of goods and hence is governed by the Uniform Commercial Code.[1] UCC 2-204 provides that a contract for the sale of goods may be made in any manner sufficient to show agreement, even though one or more of the terms is left open, provided the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. As noted above, the purchase contract for the STATE EXPRESS contains every reasonable indication of the parties' intent to enter into a contract, and specifically provides for remedies in the form of liquidated damages.

We have been further advised that, under the UCC, a provision for inspection is quite standard in contracts for the sale of goods and does not make the contract illusory. In fact, under UCC 2-513, the buyer is *given* the right before payment or acceptance to inspect the goods at any reasonable place and time. Thus, a right of inspection governs the *performance* of the contract, not its *formation.* In other words, where there is a contract to purchase an item, the buyer may later avoid the contract if the goods in question do not stand up to inspection; this does not affect the fact that there was a contract in the first place.[2]

Finally, we have been advised that a purchase contract with a right of inspection is not illusory for the additional reason that the buyer may not reject the goods in bad faith. A party cannot use the excuse of an insubstantial defect or nonconformity to reject the purchased item for other reasons, such as a falling market, that are not related to the quality of the purchased item.[3]

In summary, the ALASKA OCEAN (ex: STATE EXPRESS) was the subject of a binding purchase contract entered into before July 28, 1987. What Trident complains of is a

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1 UCC 2-102, 2105(1); *see Southworth Machinery v. F/V Corey Price*, 994 F. 2d 37, n. 3 (1st Cir. 1993).

2 *Gillian v. Atalanta Systems, Inc.*, 997 F. 2d 280, n. 1 (7th Cir. 1993); *Associated Milk Products, Inc. v. Indiana Dept. of State Revenue,* 534 N.E. 2d 715 (Ind. 1989).

3 WHITE & SUMMERS, Uniform Commercial Code, 4th ed. (1995), § 8-3, pp. 440-42.

standard contract provision which has no effect on the binding nature of the contract.[4]

2. The Shipyard Contract.

On June 20, 1988, Sunmar entered into a contract to rebuild the STATE EXPRESS into a factory trawler.[5] Trident contends that this contract was not binding under United States law. This, of course, intentionally misses the point. As Trident itself points out, the contract was not governed by United States law; it was governed by Norwegian law. There can be no question that the contract was binding under Norwegian law, and even Trident does not dispute this fact.[6] Instead, Trident implies that there was something wrong with applying Norwegian law to the contract.

From a common sense standpoint, its seems to be a perfectly logical choice to us, given the fact that the work was to be accomplished in Norway by a Norwegian shipyard, and the fact that the contract provides that contract disputes are to be settled by binding arbitration in Norway. And while Trident might not want to respect the parties' choice of law, the United States courts certainly would. It is well established that our courts will enforce the parties' choice of law, absence fraud between the parties, undue influence, or overwhelming bargaining power.[7]

Once again, Trident complains of the exercise of a right that is routinely exercised by parties to contracts and which is recognized and upheld in the law.

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4 Trident also complains that closing under the purchase contract was postponed several times. Trident conveniently fails to mention that the postponements were approved by the seller, the *United States of America*, and were in at least one instance initiated by the seller. Trident also conveniently fails to mention that the postponements have absolutely no legal relevance; the Rebuilding Grandfather contained no requirements concerning *consummation* of the purchase contract.

5 Trident erroneously states that the contract was entered into on July 10, 1988.

6 Sunmar obtained two written legal opinions, one from an attorney practicing in Norway and one from an attorney educated in both the civil and common law systems, which state unequivocally that the contract is binding under Norwegian law.

7 *Sembawang Shipyard, Ltd. v. Charger, Inc.*, 955 F. 2d 983, 986 (5th Cir. 1992); *see Carnival Cruise Lines v. Shute*, 499 U.S. 595 (1991); *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 12-13 (1972).

3. The Purpose of the Rebuilding Contract.

As noted above, Sunmar entered into a rebuilding contract for the STATE EXPRESS on June 20, 1988. Trident claims that the contract called for conversion of the vessel to a fish tender. To the contrary, page 3 of the rebuilding contract unequivocally states that the vessel shall be converted to a "diesel driven factory trawler."

In summary, and as we have always contended, the ALASKA OCEAN rebuilding project was in full and complete compliance with the law.

STATEMENT OF
THE CAPACITY REDUCTION AND BUYBACK ("CRAB") GROUP

Hearing on
American Ownership of Fishing Vessels Under the Magnuson-Stevens Act
Before
The Subcommittee on Fisheries
Committee on Resources
United States House of Representatives

June 4, 1998

The Capacity Reduction and Buyback ("CRAB") Group is a non-profit association of owners of Bering Sea/Aleutian Islands area crab fishing vessels. The Group was formed in 1997 to take the initiative for an industry-funded buyback of crab licenses in that area, as authorized by section 312 of the Magnuson-Stevens Fishery Conservation and Management Act.

The crab fisheries of the Bering Sea/Aleutian Islands area are seriously overcapitalized. The consequences are that these fisheries cannot be properly conserved and managed, and are characterized by unsafe operating conditions and marginal economic returns. A well conceived and executed industry-funded license buyback would reduce capacity to the point where the restoration of abundant resources and safe and profitable fisheries could be achieved.

This statement, submitted for the record, focuses on S.1221, the American Fisheries Act. The CRAB Group supports that measure and urges that the introduction of a companion measure, with a view to enactment as soon as possible.

CRAB supports S. 1221, because enactment of the measure or of a House companion bill would prevent the return to U.S. waters of vessels that moved to Russian fisheries in order to escape the economic pain of highly restrictive, crab conservation

measures in the Bering Sea/Aleutian Islands area. Those vessels no longer economically depend on U.S. fisheries, and their return to the Bering Sea/Aleutian Islands area would have several, very serious effects both on crab resources and on the fleet that stayed the course under American Flag. Russian fisheries managers have reported declining catches, and accordingly, have refused renewal of certain foreign fishing privileges, and have cut their domestic quotas by 50 percent.

CRAB is grateful that conditions in the Bering Sea/Aleutian Islands area crab fisheries have not escaped congressional attention and action. Fishing for crab in the Bering Sea/Aleutian Islands area is the most dangerous occupation in the United States, a fact specifically recognized by Congress when it enacted, in 1996, the national standard of the Magnuson-Stevens Act that requires fishery management plans to promote safety of life at sea. The dangers of fishing, especially for Bering Sea/Aleutian Islands area crab, and the depressed conditions in that and many other fisheries, also were considered by Congress, when it enacted section 312 of the Act authorizing buybacks of licenses to reduce excess harvesting capacity. These provisions, and others aimed at improving resource conservation, provide the foundation--but only the foundation--for recovery of our Nation's depressed fisheries. S. 1221 builds on that foundation.

If vessels currently operating under Russian flag return to U.S. crab fisheries off the coast of Alaska, total harvesting capacity will increase by at least 10%. See Appendix I. This could easily nullify the effect of conservation efforts for which the longstanding domestic crab fleet has paid a heavy economic price. Moreover, this increase in capacity could render impracticable the planned, industry-funded buyback of crab licenses. Within the limitations of section 312 of the Magnuson-Stevens Act, and as

reflected in preliminary analyses provided to the National Marine Fisheries Service ("NMFS"), the existing American Flag fleet would just be able to afford a buyback that would reduce capacity to a sustainable level. Indeed, the North Pacific Fishery Management Council ("NPFMC") has under consideration regulatory measures that are intended to provide some margin of security for the buyback, through a more restrictive qualifications requirement for crab licenses under the future License Limitation Program ("LLP"). Any formula likely to be adopted by the NPFMC would be complemented or supported by the enactment of S. 1221 or a House companion measure. On the other hand, failure to enact that legislation could leave Council action vulnerable to various sorts of damaging challenges.

Congress needs to know that the industry effort to reduce excess capacity, and thereby to improve safety and conservation in the Bering Sea/Aleutian Islands area, is a serious undertaking and is deserving of support. Congress also needs to consider that the alternatives to an industry-funded buyback are unsustainable crab fisheries or a taxpayer-funded bailout. Enactment of S. 1221 or a House companion measure would be a major contributor to the success of the buyback, and could avert pressures for a solution paid for by the Federal Treasury.

The following is what has been accomplished on the Bering Sea/Aleutian Islands crab license buyback program, to date:

- The CRAB Group has commissioned a survey of the owners of Bering Sea/Aleutian Islands crab harvesting vessels and catcher-processors to determine the level of support that could be expected for a license buyback. The completed survey report has been forwarded to the NPFMC and NMFS.
- The CRAB Group has had its legal counsel prepare a detailed analysis of the standards and procedures for a license buyback under section 312 of the

Magnuson-Stevens Act. This, too, has been provided to the NPFMC and NMFS.

- In response to a draft advance notice of proposed rulemaking ("ANPR"), the CRAB Group has developed model regulations for implementation of the buyback provisions of the Magnuson-Stevens Act, and has submitted the document to NMFS.

- NMFS financial experts and attorneys have prepared a proposed rule to implement the statutory framework for buybacks. It is expected that the proposed rule will be published for public comment in the near future.

- In accordance with the buyback provisions of the Magnuson-Stevens Act, the NPFMC has submitted a request to NMFS for the initiation of the Bering Sea/Aleutian Islands crab license buyback program.

- The CRAB Group has prepared and submitted to NMFS and the NPFMC a draft business plan for industry repayment of a federal loan in support of the Bering Sea/Aleutian Islands crab license buyback.

- NMFS experts have offered thoughtful comments on the draft business plan, and the CRAB Group has provided detailed responses.

- The NPFMC is analyzing new qualifying dates for participation in the crab fisheries under the LLP. These amendments would contribute to the economic viability of the license buyback. The NPFMC has scheduled final action on the amendments for October.

Enactment of S. 1221 or a House companion measure would support what has been accomplished to date, and would give strong impetus to successful completion of the buyback process. CRAB believes that no other single step taken by Congress could so materially contribute to the restoration of a valuable national resource.

CRAB is grateful for the opportunity to provide this statement for the hearing record, and is deeply appreciative of the Subcommittee's interest in this important matter.

STATEMENT OF
THE ALASKA CRAB COALITION

Hearing on
American Ownership of Fishing Vessels Under the Magnuson-Stevens Act
Before
The Subcommittee on Fisheries
Committee on Resources
United States House of Representatives

June 4, 1998

The Alaska Crab Coalition ("ACC") is a trade association representing the owners of fifty fishing vessels which participate in the offshore crab fisheries of the Bering Sea/Aleutian Islands. The mission of the ACC is to promote the sustainability of these crab fisheries through improved safety of fishing operations and conservation of fishery resources. The ACC is proud of its leading role in securing amendments to the Magnuson-Stevens Fishery Conservation and Management Act to improve the safety of life at sea, to reduce wasteful bycatch, and to provide for the elimination of excess harvesting capacity.

In 1997, Bering Sea/Aleutian Islands crab fisheries were worth $300 million at the wholesale level. Exports to Japan were valued at approximately $150 million. When and if restored to sustainable levels, these fisheries would be worth $600 million annually at the wholesale level. Exports would grow, accordingly.

Overcapitalization is the principal factor contributing to the danger and unsustainability of our Bering Sea/Aleutian Islands crab fisheries. Achieving safe fishing conditions and the recovery of the depressed resources is difficult or impossible, so long as harvesting capacity greatly exceeds the allowable catch. In the brutally competitive

race for fish, lives are all-too-often lost and quotas are sometimes exceeded. According to statistics of the federal government, fishing for crab in the Bering Sea is the most dangerous occupation in the United States, and the once major king crab resource remains at historically low levels. The annual occupational death rate in these fisheries, as statistically calculated by the federal government, averaged 350 per 100,000 over the past 10 years, against the national average for all occupations of 7 per 100,000 during that same period.

This statement, submitted for the record, focuses on S.1221, the American Fisheries Act. The ACC believes that the enactment of S. 1221 or a House companion measure would substantially improve the sustainability of the Bering Sea/Aleutian Islands crab fisheries, by permanently precluding the reentry of at least 13 large crab vessels that have abandoned the American flag to pursue fishing opportunities in Russian waters. Absent this legislation, vessels that are no longer economically dependent on our Eastern Bering Sea crab fisheries might return to increase excess capacity by more than 10%, just as resource recovery measures begin to show results. Such an influx of additional excess capacity would forestall, and could prevent, full recovery of the resources. The return of those vessels also would be unfair to those fishermen who have stayed the course in the United States, where they have accepted the severe economic hardship of restrictive conservation measures, in the expectation of enjoying the rewards of future, sustainable fisheries.

A scientific survey of owners of vessels operating in the Bering Sea/Aleutian Islands fisheries shows that a strong majority favors a license buyback program to reduce excess capacity. However, there are limits to what the fleet can afford to buyback. If the

formerly U.S.-flag vessels now operating in Russian waters under Russian Flag were to return to the crab fisheries off the coast of Alaska, the cost of a buyback could be increased dramatically, and perhaps, unaffordably. Even if affordable, it would be unfair for our domestic fleet to find itself in the position of having to pay for the retirement of licenses reclaimed by vessels returning from Russian waters to reflag to American registry. It is problematical whether the industry would continue to support a buyback in such circumstances. A taxpayer-funded program might, then, have to be sought as the only solution remaining available.

The Capacity Reduction and Buyback ("CRAB") Group has taken the initiative for a license buyback in Bering Sea/Aleutian Islands crab fisheries. The details of that effort are provided in the statement of that organization for the record of this hearing. The ACC simply wishes to note that the following steps have been taken in what should be regarded as an exemplary industry self-help program that could be thwarted, in the event that S. 1221 is not enacted:

1) The CRAB Group has funded, and reported to the North Pacific Fishery Management Council ("NPFMC") on, the above-referenced scientific survey of the owners of Bering Sea/Aleutian Islands crab harvesting vessels and catcher-processors to determine the level of support that could be expected for a license buyback.
2) Legal Counsel for the CRAB Group has prepared, and the NPFMC has been provided, a detailed analysis of the standards and procedures for a license buyback under section 312 of the Magnuson-Stevens Act.

3) The CRAB Group has commissioned the preparation of draft, proposed regulations to implement the buyback provisions of the Magnuson-Stevens Act, and has submitted the document to the National Marine Fisheries Service ("NMFS") in response to a draft advance notice of proposed rulemaking ("ANPR").

4) Taking into account responses to the draft ANPR, NMFS financial experts and attorneys have prepared a proposed rule, which is to be published for public comment in the near future.

5) In accordance with section 312, the NPFMC has submitted a request to NMFS for the initiation of the Bering Sea/Aleutian Islands crab license buyback.

6) The CRAB Group has prepared and submitted to NMFS and the NPFMC a draft business plan detailing how the proposed buyback would be financed and the extent to which fleet capacity would be reduced.

7) NMFS experts have reviewed the draft business plan and provided thoughtful comments to the CRAB Group, which has replied in detail.

8) The NPFMC has under analysis new qualifying dates for participation in the crab fisheries under the LLP, which would contribute to the economic viability of the license buyback. A final decision is expected in October of this year.

With the enactment of section 312 of the Magnuson-Stevens Act, Congress took the first step in the direction of enabling a restoration of sustainable crab fisheries in the Bering Sea/Aleutian Islands. The industry, the NPFMC, and NMFS experts are taking full advantage of this critically important opportunity. The enactment of S. 1221 or a

House companion measure would ensure that these costly, but indispensable, efforts would not be frustrated or defeated by the return to our fisheries of vessels that no longer have a fair claim to participation. The ACC urges the prompt enactment of this important legislation.

In closing, the ACC wishes to express its appreciation for the opportunity to provide this statement, and commends the Subcommittee for its attention to this important matter.

STATEMENT FOR THE RECORD
OF
MR. JEFF HENDRICKS, GENERAL MANAGER
ALASKA OCEAN SEAFOOD LIMITED PARTNERSHIP
IN CONSIDERATION OF
OVERSIGHT HEARINGS ON
UNITED STATES OWNERSHIP OF FISHING VESSELS
BEFORE THE SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS
COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

June 4, 1998

On behalf of the Alaska Ocean Seafood Limited Partnership (the Partnership), I welcome the opportunity to present testimony for the record before the Committee on Resources and the Subcommittee on Fisheries Conservation, Wildlife and Oceans as you conduct oversight hearings on United States ownership of fishing vessels.

INTRODUCTION

The Partnership, a citizen of the United States within the meaning of 46 U.S.C. § 12102(c), owns and operates the vessel ALASKA OCEAN; the ALASKA OCEAN is one of the most modern surimi factory trawlers in the United States, and represents an investment in excess of $60 million.[1] The ALASKA OCEAN operates in the North Pacific and Bering Sea groundfish industry for a target species of Alaska pollock.

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[1] I have attached to this Statement a picture of the ALASKA OCEAN, together with an outboard profile of the vessel and a crew organizational chart.

I am the managing partner of Alaska Ocean Seafood and the principal captain of the ALASKA OCEAN. In addition, I am managing partner of the F/V AURORA and the F/V AURIGA, which are stern trawlers that harvest pollock and other species for delivery to Alaska shoreside processors.

My current involvement in the North Pacific and Bering Sea fisheries is the culmination of a generations of involvement in those fisheries. My grandfathers operated halibut schooners and my sons are deck officers on our current vessels. I personally have participated in the crab and groundfish fisheries for almost 30 years, and my companies have made what I consider to be significant contributions to the Americanization of the pollock fishery.

OUR CONTRIBUTIONS TO AMERICANIZATION

In the current climate of overcapitalization in the pollock industry, it is easy to lose sight of the state of the fisheries prior to passage of the Magnuson-Stevens Act in 1976. At that time, foreign fishermen and processors took most of our pollock resource. The Act was designed to achieve a shift of both the harvesting and processing sectors to American individuals and companies. The results of the Act were of course not immediate; it was necessary for American fishermen to develop the capacity to prosecute the harvesting and processing of fish.

In the North Pacific and Bering Sea pollock fishery, catching capacity developed much more quickly than processing capacity through conversion of existing crab vessels to trawlers. As a result, American fishermen had to find processor markets for their fish. After lengthy negotiations between American fishermen and the owners of large Japanese and Korean factory trawlers, the joint venture program emerged. Under that program, American fishermen harvested the pollock and delivered their catch at sea to the foreign factory trawlers.

During this process of Americanization, I was the American fishermen's delegate from Washington to the negotiations with Japanese processors which eventually resulted in the joint venture program. To bring American harvesting capacity to the pollock fishery, my companies converted four vessels to trawlers for a combination of crabbing and joint venture trawling. We subsequently constructed two new vessels built exclusively for joint venture operations and eventual use in shoreside operations. Later, as shoreside processing capacity developed, our vessels began delivering to those facilities as well. Throughout this process, all of our vessels were crewed by residents of Anacortes, many of whom were family members.

Today, of course, virtually all harvesting and processing of the pollock resource is undertaken by Americans. However, the shift of the harvest to American vessels was not accompanied by a simultaneous shift in the processing sector. As late as 1987, American companies processed only about 10% of the harvest, and pollock's real (or added) value comes through its processing. Thus, even though the *harvest* of the resource by American vessels

shifted the value of the harvest to Americans, the value added by *processing* continued to accrue to the owners of foreign factory ships.

In order to continue to evolve with the fishery, my companies, in addition to our efforts with respect to joint-venture operations, made other contributions to the Americanization of the processing sector of the industry. In 1987, I, together with 14 other individual United States citizens, formed a partnership which acquired two offshore supply vessels from the Maritime Administration. We converted the vessels to catcher vessels in a shipyard in Anacortes, Washington. Those vessels, the AURIGA and the AURORA, now harvest pollock in the North Pacific and Bering Sea. Their catch is delivered to shoreside processors, principally in Dutch Harbor, Alaska. Thus, the value of the harvest of these vessels accrues to a wholly American-owned partnership, and the value added by processing accrues to American companies ashore.

Separately, in 1985 I joined with my joint venture partner in the Alaska Ocean Partnership for the purpose of constructing a factory trawler. That vessel, the ALASKA OCEAN, now harvests and processes pollock in the Bering Sea. As a result, both the harvesting value and the processing value of the vessel's catch accrue to an American company.

Moreover, as a result of our efforts, the three vessels provide employment opportunities for some 200 American citizens.

OUR COMMENTS ON INCREASED AMERICANIZATION OF VESSEL OWNERSHIP

The Partnership has no inherent objection to legislative measures that would increase the citizenship requirements for equity in the fishing industry.[2] We do believe, however, that the requirements should apply to all sectors of the industry, not just the harvesting sector. We believe further that such requirements should be applied only prospectively, *i.e.*, only to new entrants in the fisheries.[3]

However, there is far more at stake in currently pending legislative proposals than a change in our equity structure. Despite our long history in the fisheries and our considerable effort to Americanize the fisheries, we now find ourselves threatened by legislative initiatives that would have draconian effects on the Alaska Ocean Partnership. Quite simply, those initiatives wouldn't just require us to increase the citizen equity in the Partnership; they would put us out of business by revoking the ALASKA OCEAN's right to participate in the American fisheries. We refer specifically, of course, to S. 1221, the American Fisheries Act.

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[2] It is significant to note that the ALASKA OCEAN qualifies under the Ownership Grandfather of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987; therefore 100% of the equity in the partnership could be held by non-citizens. However, the Partnership has not availed itself of this Grandfather. 51% of the equity in the Partnership is held by the general partner whose parent company is owned by three individual United States citizens.

[3] Requiring adjustments in the equity of existing companies could well result in unwarranted consequences, such as triggering defaults under existing financing arrangements.

OUR OBJECTIONS TO INITIATIVES SUCH AS S. 1221

Our particular concern rests with Section 201 of S. 1221. As we understand it, Section 201 would penalize certain vessels, such as the ALASKA OCEAN, that were rebuilt overseas as permitted by Section 4 of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987.[4] Section 4, which is commonly referred to as the Rebuilding Grandfather, permitted certain vessels to be rebuilt overseas without a loss of fisheries privileges. Qualification for the Rebuilding Grandfather required (1) a purchase contract coupled with intent to use the vessel in the fisheries; (2) a shipyard contract; and (3) redelivery and documentation, all by specified dates certain. The ALASKA OCEAN qualified for this Grandfather and was rebuilt and documented with a fishery endorsement under its authority. In particular, the Grandfather required a purchase contract before July 28, 1987. The purchase contract for our vessel was entered into on July 8, 1987. Both the purchase contract and a Coast Guard ruling dated July 17, 1987, reflect an intent to use the vessel in the fisheries. The Grandfather required a rebuilding contract before July 12, 1988. Our rebuilding contract was entered into on June 20, 1988. Finally, the Grandfather required completion of the rebuilding and redelivery before July 28, 1990. The rebuilding of the ALASKA OCEAN was completed and the vessel redelivered to us on June 19, 1990.

The Anti-Reflagging Act was signed into law in January 1988. Now, *over a decade later*,

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[4] Pub. L. 100-239, § 4; 46 U.S.C. § 12108 note..

S. 1221 would change the rules contained in the Rebuilding Grandfather by adding a *new* requirement: that the rebuilt vessel have been under the same ownership and control during the entire period from execution of the purchase contract through completion of the conversion. If it was not, and now undergoes a change in ownership or control, it loses its fisheries privileges unless its owner can somehow effectuate the surrender of a fishery endorsement held by a harvesting vessel of equal or greater size. This is impossible for the ALASKA OCEAN because there are no harvesting vessels of equal or greater size in the U.S. fleet.

Accordingly, S. 1221 would have horrendous effects on the Partnership, rendering it the owner of nothing more than a frozen asset. First, the Partnership could never sell the ALASKA OCEAN because the sale would trigger a loss of fisheries privileges. Thus the Partnership could never recoup its $60 million+ investment; the ability to sell and recoup is the fundamental expectation of any investor. Furthermore, if the Partnership keeps the vessel, its only alternative, it would then have to comply with Section 102 (b) of the bill. That Section would require that entities owning fishing industry vessels be 75%-owned by U.S. citizens. As noted above, the Partnership complies with the citizenship requirements of existing law; it is 51%-owned by U.S. citizens. If the Partnership complies with Section 102 by increasing its American ownership to 75%, it will arguably have undergone a change of control under Section 201, and once again, the ALASKA OCEAN will lose its fisheries privileges and, for all intents and purposes, its entire value. Thus the "American Fisheries Act" would have the anomalous effect of legislating out of the fishing industry some of the very people who have

contributed to the Americanization of the fisheries.

Such a result is blatantly unfair. The bill would penalize the Partnership for not complying with provisions of law *that did not even exist during the only period of time during which the Partnership could have complied.*

In addition, our lawyers have advised us that such a result may have fiscal consequences to the Government as well. As we understand it, the result would be treated as a Section 1231[5] ordinary loss for tax purposes, allowing us a 35% deduction which may be carried back 5 years and forward 3 years to recover taxes already paid or to offset taxes which may become due in the future. They have also told us that, absent just compensation, S. 1221, if enacted, may well be an impermissible taking under the Fifth Amendment of the Constitution. They have told us that, while the Government can regulate property to a certain extent, "if regulation goes too far it will be recognized as a taking."[6] For example, in the case of *Lucas v. South Carolina Coastal Council*,[7] the Supreme Court stated: "when the owner of . . . property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[8]

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[5] 26 U.S.C. § 1231.

[6] 260 U.S. 393, 416 (1922).

[7] 505 U.S. 1003 (1992).

[8] *Id.* at 1019. In any event, we do not see that any common good will be achieved here. Removing the ALASKA OCEAN from the fishery will not mean that less fish are harvested; it will simply mean that more fish are

This is precisely the result that the Partnership would suffer under S. 1221. Further, the federal courts have recognized that the Government is restricted in its ability to interfere with investment-backed expectations.[9] Of particular interest in this regard is a case now being considered by the courts, *Maritrans v. U.S.*[10] In that case, Maritrans is seeking compensation from the Government because a 1990 law requires Maritrans either to equip its vessels with double hulls by a certain date, or remove them from service. Maritrans argues that the statute interfered with its reasonable, investment-backed expectations. On October 29, 1997, the court agreed, finding that Maritrans could not reasonably have foreseen the new requirement. There can be no question that the Partnership could not possibly have foreseen that, long after it placed the ALASKA OCEAN in service, it would be faced with a requirement that *it cannot possibly meet.* This is a clear - and totally unwarranted - interference with the Partnership's investment-backed expectations.

OUR OBSERVATIONS ON THE SUPPOSED JUSTIFICATIONS FOR S. 1221

The preamble to S. 1221 and other materials circulated in the press and elsewhere suggest that this bill was introduced for a number of reasons. None of these reasons can withstand scrutiny.

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harvested by our competitors.

[9] *See*, e.g., *Ruckleshaus v. Monsanto*, 467 U.S. 986 (1984).

[10] Docket No. 96-483-C, Court of Federal Claims (filed Aug. 7, 1996).

A. *The Coast Guard Allegedly Goofed.*

Proponents of S. 1221 suggest that the Coast Guard erred in at least two respects in its administration of the Rebuilding Grandfather and that vessels that entered the fisheries on the basis of those errors should now be ousted. It is patently unfair to penalize investors who relied in good faith on the determinations of the Agency to which Congress entrusted administration of the provision. Moreover the arguments with respect to the Coast Guard are without merit.

The proponents argue first that the Coast Guard should not have issued fishery endorsements in cases where changes of ownership or control had occurred during the Grandfather qualifying period. It is very difficult for us to understand how the Coast Guard's interpretation can be wrong, when it comports with the plain language of the statute itself. The Rebuilding Grandfather, on its face, applies to vessels, not to owners or to controlling parties of owners. Neither the words nor even the concepts of ownership or control appear anywhere in the language. In addition, the Coast Guard's interpretation is nothing new. Shortly after the Anti-Reflagging Act's enactment, the Coast Guard began issuing written, publicly available rulings in which it articulated its view that the Rebuilding Grandfather "runs with the vessel,"[11] and it promulgated regulations to that effect.[12] Surely, if Congress

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[11] *See, e.g.,* Letter from U.S. Coast Guard to Michael D. Walker dated March 16, 1988. The Partnership itself received several such rulings.

[12] *See* 46 C.F.R. § 67.45 (b). Furthermore, the Coast Guard also issued regulations implementing another grandfather clause in the Anti-Reflagging Act which actually dealt with vessel ownership. *See id.* §

felt that the Coast Guard was misinterpreting the Rebuilding Grandfather, it could and should have acted *at that point* to correct the problem.

The proponents argue secondly that the Coast Guard should not have allowed into the fisheries rebuilt vessels that are larger than the original vessels from which they were rebuilt. But there is nothing wrong with this. The Rebuilding Grandfather contains absolutely no limitations on the size of the resultant vessel. In addition, Congress knew, or should have known, that the Coast Guard's rebuilding regulations could have precisely that result. It could certainly have imposed size limitations in the Rebuilding Grandfather had it chosen to do so.

B. *There Allegedly Is Something Inherently Offensive about Vessels Rebuilt Overseas.*

As detailed above, the ALASKA OCEAN was rebuilt in Norway in full compliance with the Rebuilding Grandfather. Its rebuilding was perfectly legal and by its enactment of the Rebuilding Grandfather, Congress signaled its intent to allow such projects.

Moreover, in the case of the ALASKA OCEAN, it is important to note that our overseas rebuilding project was far from an attempt to bypass American law; it was purely the

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67.45 (a). The Coast Guard found that this grandfather attached to the vessel as well, a finding that was explicitly and unanimously affirmed by the United States Court of Appeals, which stated: "Vessels, not owners, are either eligible or ineligible for documentation under federal maritime law. Endorsements are issued to vessels. . . . If a fishing vessel were to be exempted from [a requirement], one would expect the exemption also to be framed in terms of the vessel." *Southeast Shipyard Ass'n v. U.S.*, 979 F.2d 2541 (D.C. Cir. 1992).

result of the fact that we were unable to locate a capable, cost-effective shipyard in the United States to undertake our project.

The ALASKA OCEAN is the result of a long-term business plan which originally focused on construction of a new vessel in a United States shipyard. Specifically, in June, 1985, we entered into a memorandum of understanding in which we set forth our intent to construct a surimi trawler in a U.S. yard. On June 19, 1987, after many months of discussion, negotiation, and design, we entered into a memorandum of agreement formalizing our plans to build the vessel and, on that same day, we engaged Guido Perla and Associates (GPA) as our design consultant to "prepare a United States style bid package to invite bids from United States yards." Thereafter, and for the next 15 months, we and GPA sought to locate a capable and cost-effective shipyard to construct the vessel. We contacted a total of 15 yards; many did not respond at all. Of those that did, only two actually submitted bids to us and neither bid was acceptable.

At that point, we were seriously considering abandoning the project. However, we then learned of the availability of a U.S.-built vessel under a conversion contract with the Ulstein shipyard in Norway. The contract was for rebuilding the vessel STATE EXPRESS to a surimi factory trawler. The owner of that vessel was having trouble obtaining long-term financing. We negotiated to and, on November 28, 1988, ultimately agreed to purchase the stock of the vessel's owner. By the stock purchase, we acquired the vessel and the owner's rights under the rebuilding contract. It was under that contract that the ALASKA OCEAN

was rebuilt to a factory trawler.

In other words, the ALASKA OCEAN rebuilding project was undertaken legally and for the soundest of business reasons.

Interestingly, the proponents of initiatives like S. 1221 apparently are not offended by other foreign "taints" in the fisheries. Some examples:

- The 635-foot vessel OCEAN PHOENIX is the largest vessel in the United States fishing fleet. Formerly a container ship, the vessel was converted to a processor in Norway at costs reported to have exceeded $50 million. The conversion was accomplished *after* the Anti-Reflagging Act cut-off date. This vessel would be unaffected by Section 201 of S. 1221.

- The 353-foot vessel EXCELLENCE is a processor that was built in Japan. It entered the United States fisheries two years after enactment of the Anti-Reflagging Act, by reason of a change in the law that benefitted only that vessel. The EXCELLENCE would not be affected by Section 201 of S. 1221.

- The 364-foot vessel NORTHERN VICTOR is a processor that entered the United States fisheries by reason of special legislation; the language of the legislation suggests that the vessel underwent an overseas rebuilding. The NORTHERN VICTOR would be unaffected by Section 201 of S. 1221.

- The 230-foot vessel TEMPEST was built in the Netherlands. The vessel engages in processing and coastwise trade, and is able to do so by reason of special legislation. The TEMPEST would not be affected by Section 201 of S. 1221.

- Vessels that were fully built in the United States nonetheless represent substantial investments in foreign-manufactured fishing, fish processing, and propulsion equipment. S. 1221 does not target these vessels.

- All shoreside processing facilities have and continue to rely significantly on foreign processing equipment and technology. S. 1221 does not target these facilities.

C. *Congress Allegedly Was Misled as to the Nature and Extent of Some Rebuilding Projects Such as the ALASKA OCEAN.*

There have been suggestions that our vessel qualified under the Rebuilding Grandfather only because of alleged misrepresentations about the vessel during the pendency of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987. The principals of the Alaska Ocean Partnership categorically and unequivocally deny any participation in or knowledge of any misrepresentation.

As we understand these suggestions, during the pendency of the Act, the owner of the vessel STATE EXPRESS, which is the vessel we converted to the ALASKA OCEAN, represented to some Congressional staff members at the time that the owner intended to convert the vessel to a fish tender vessel. The owner of the vessel at that time was Sunmar Alaska, Inc; it was that company's stock which we ultimately purchased. We have no other affiliation or relationship with the Sunmar organization and never have. The representations in question must have been made before January 11, 1988, the date on which the Anti-Reflagging Act was enacted. We did not even begin negotiations to purchase the STATE EXPRESS project until September 1988 and did not consummate the purchase until December 6, 1988. Therefore there is no way that we could have participated in any of Sunmar's activities before Congress in 1987.

Furthermore, while we have no knowledge of the tender vessel representation, we are familiar with the contents of the documents that Sunmar furnished to us at closing and with documents that the Coast Guard has made available through the Freedom of Information Act. Those documents reflect the following:

- **On July 12, 1987, Sunmar requested a ruling request from the Coast Guard concerning Sunmar's plans to convert the vessel overseas. The ruling request specifically states that the vessel was to be converted to *either* a fish tender *or* a factory trawler.**
- **On July 8, 1987, Sunmar entered into a contract to purchase the vessel from the United States of America. The contract recites, *inter alia*, that the vessel will be used as *either* a fish tender *or* a fishing vessel *or* a fish processing vessel.**
- **On June 20, 1988, Sunmar entered into a conversion contract with Ulstein Shipyard to convert the vessel to a factory trawler.**
- **On October 31, 1988, Sunmar sought a ruling from the Coast Guard that our acquisition of the Sunmar Alaska stock, and thereby the vessel and the conversion contract, was permissible under the Anti-Reflagging Act. The request specifically states that the vessel is to be converted to a factory trawler.**

The contents of these documents do not suggest intentional misrepresentation to us. Rather, they indicate a company that started out with two possible options for the vessel, was unable to obtain financing for the tender vessel option and thus was ultimately forced to choose the factory-trawler option in order to preserve the value of its project investments to date.

We are also at a loss to understand what possible difference the tender vessel representation made. The Rebuilding Grandfather did not grandfather vessels by vessel type;

it simply grandfathered vessels that were intended to be used in the fisheries. The Reflagging Act itself defined fisheries as encompassing not only catchers but also tenders and processors.[13] Thus, regardless of whether Sunmar at the time intended to use the vessel as a catcher, a tender, or a processor, the STATE EXPRESS would still have been grandfathered.

The implication that the alleged misrepresentation would have made a difference in the vessel's qualification suggests that the Rebuilding Grandfather was enacted only because Sunmar asked for it. To the contrary, the ALASKA OCEAN shares the fishing grounds with at least 15 other vessels that we know to have been rebuilt overseas under the Grandfather; Sunmar was certainly not the only intended beneficiary of the provision. The reality is that the Rebuilding Grandfather was enacted to accommodate existing contracts which would otherwise have been made in detrimental reliance on existing law. Congressman Bob Davis, who sponsored the rebuilding prohibition and the Rebuilding Grandfather, made this clear when he introduced the provisions: "As a matter of equity, however, the amendment grandfathers those vessels unfairly caught by the change in the law that this amendment makes."

D. ***Pollock Stocks Allegedly Are in Decline So Some Vessels Have to be Removed from the Fishery.*** **While it is true that the pollock fishery is overcapitalized, this is not**

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[13] Prior to the Anti-Reflagging Act, tenders and processors were not considered fisheries vessels at all and would have been unaffected by the Act's overseas rebuilding prohibition.

synonymous with the fishery being overfished. Indeed, data recently published by the North Pacific Fishery Management Council certainly suggests the opposite. "The stability of the eastern Bering Sea pollock stock is remarkable in light of trends in most Asian pollock stocks and North Atlantic gadoid stocks which have collapsed or undergone strong fluctuations in catches and abundance. It appears that eastern Bering Sea pollock catches in the range of recent years are sustainable, and within the productive capacity of the stock and stock fluctuations observed over the history of the fishery."[14] Further, "[b]eyond 1998 the exploitable biomass and yields are expected to increase with the recruitment (as age 3-year olds) of above average year-classes."[15]

E. ***Big Boats are Appropriate Candidates for Removal Because They Allegedly Are Bad for Conservation.***

In testimony with respect to S. 1221, the National Marine Service provided to the Senate Commerce Committee some informative and helpful comments on this argument:

- **Fishing in general does have impacts on U.S. fisheries, but they are not necessarily linked to the size of vessels deployed in a particular fishery.**
- **The size of a vessel does not necessarily reflect its fishing capacity.**

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[14] Stock Assessment and Fishery Evaluation Report for the Groundfish Resources of the Bering Sea/Aleutian Islands Regions, *prepared by the Plan Team for the Groundfish Fisheries of the Bering Sea and the Aleutian Islands* (Nov. 1997) (introduction).

[15] *Id.* § 1.5.6 (emphasis added). While it is true that the biomass has shown some decrease since 1993, "[a]n increase in abundance is expected in future years as apparently above average 1995 and 1996 year-classes recruit to the exploitable population." *Id.* § 1.5.3.

- **It is our understanding that vessel size is not necessarily a key factor in explaining why boats overfish the resources, nor are large boats disproportionately responsible for bycatch problems.**

- **The menhaden fishing industry, for example, typically uses large vessels ranging from 140 feet to 180 feet; studies indicate that it is a relatively clean fishery with little bycatch.**

- **Redistribution of fishing effort to predominately smaller vessels that may rely on more bottom trawl gear could make observer coverage more difficult and would increase concern with bycatch.[16]**

Nonetheless, our competitors who operate catcher vessels that deliver to shoreside processors, and other proponents of S. 1221, argue that larger size, of necessity, means greater fishing capacity. The argument is incorrect and completely misapprehends the reasons for the vessel's size. The fact is that the ALASKA OCEAN has slightly *less* fishing capacity than two small shoreside catcher vessels. The number of the deck crew that actually engage in fishing is four - exactly the same as on our competitors' shoreside catcher vessels. The ALASKA OCEAN's fishing function represents less than 10% of its rebuilding cost. The size of the ALASKA OCEAN has nothing to do with fishing capacity; it is the result of the fact that the ALASKA OCEAN is a *processing* vessel.[17]

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[16] National Marine Fisheries Service responses to supplemental questions from the Senate Commerce Subcommittee on the Ocean and Fisheries with respect to S. 1221 at pages 1, 5, 10, 11.

[17] Two of the main proponents of S. 1221 are the owner of the vessel OCEAN PHOENIX and the owner of the vessel NORTHERN VICTOR. These vessels, which are discussed *infra* in text, are the two largest vessels in the American fishing industry. As they only process and do not harvest fish, their owners are fully aware of the real reasons for the ALASKA OCEAN's size.

The principal advantage (and indeed the very purpose) of a factory trawler is to remain at sea for long periods and process fresh fish as soon as possible after they are caught. However, that ability requires a factory trawler to be self-sufficient and, accordingly, large.[18] In addition to its fishing equipment and space, the ALASKA OCEAN embodies the following:

PROCESSING

The ALASKA OCEAN has the daily capacity to process 500 metric tons (mt) of Alaska pollock into 90 mt of surimi, 15 mt of fishmeal, and 4 mt of fish oil.[19] The surimi processing area occupies about 14,000 square feet, and the fishmeal plant requires two deck levels of about 3,000 square feet. In addition, the vessel contains cargo holds for the finished products that can hold 2,400 mt of surimi, 450 mt of fishmeal, and 100 mt of fish oil.

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[18] In this regard, a vessel which processes at sea may be analogized to an offshore drilling rig which must dedicate large amounts of space to functions other than drilling for oil.

[19] *surimi* is minced, washed, and frozen pollock meat. It is sold to secondary processors who use it to make imitation crab meat and other products traditional in Japan and Korea. Approximately 80% of the product is sold in Asian markets and the remaining 20% in the United States.

fishmeal is very high quality steam-dried white meal that is marketed in Japan and China for aquaculture feed.

fish oil is a refined by-product of the fishmeal plant. It currently is being test-marketed in the United States and Japan but is mainly used as fuel for the ALASKA OCEAN's steam boilers.

ENGINE ROOM

This spaces houses not only the main engine[20] but also

> **Three generators that develop 4,500 kilowatts, primarily for refrigeration, hydraulics, and lighting**
>
> **Water maker - Surimi production requires vast amounts of fresh water for the washing process. 20% of the ALASKA OCEAN's engine space is devoted to the water maker, which daily produces 400 mt of fresh water from sea water. The crew consumes 10 to 15 mt daily.[21]**
>
> **Steam - Another 20% of the engine room contains the vessel's steam boilers and exhaust boilers. Steam is used for the fish meal plant, water maker, and accommodations heating.**
>
> **Fuel - Fuel determines the amount of time the vessel can remain at sea, which in the case of the ALASKA OCEAN is about 45 days. This requires a fuel tank capacity of 450,000 gallons.**

HOTEL AND RESTAURANT

The ALASKA OCEAN carries a crew of 100 to 140 persons, all of whom must be housed and fed aboard the vessel. Most of the sleeping accommodations are two-person staterooms with

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[20] The ALASKA OCEAN's 6,250-horsepower main engine is necessary to overcome the vessel's 10,000 ton displacement weight in moderate seas, while towing a trawl net that is not much larger than that of a small catcher vessel of 500 tons displacement. The size of the main engine is also dictated by our safety and reliability requirements which demand a slow-revolutions-per-minute and low combustion pressure engine.

This can be placed in perspective by comparing the ALASKA OCEAN with a typical small catcher vessel which has 1125 horsepower and 500 tons displacement. Thus, while the ALASKA OCEAN has 5.5 times more horsepower, it is *twenty times* heavier.

[21] The ALASKA OCEAN's daily consumption of electricity and water is equivalent to that in 500 homes.

private baths. The galley/mess is set up buffet style with seating for about 70 people. The second deck contains an exercise room and crew lounge. Heating, ventilation, and air conditioning are provided by a complex dual duct HVAC system which provides positive air pressure, exchange, and temperature control in each stateroom and public area.

These particulars with respect to the ALASKA OCEAN need to be compared with a small catcher vessel, which typically remains at sea for 3 days at a time and which has no processing spaces. The small vessel does not need a large capacity fuel tank, has no need for large hold spaces for storing provisions, has no need to produce steam, has no need to make fresh water, and has no storage capacity beyond sea water holding tanks for its catch. Moreover, the small vessel need provide only short-term accommodations for 4 to 6 people.

It is obvious then, that when one attempts to compare a factory trawler such as the ALASKA OCEAN with a small shoreside catcher vessel, big is not bad; big is just different. The vast majority of the ALASKA OCEAN's size is dedicated to and necessitated by activities that do not involve the harvesting of fish. Rather, the vast majority of the ALASKA OCEAN's size is the result of the fact that the ALASKA OCEAN *processes* the fish it harvests.[22]

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[22] The ALASKA OCEAN's daily processing capacity is about one-third that of a typical shorebased processing facility. Such a shorebased facility must employ over 15 small catcher vessels. This is partly the result of the facility's large processing capacity but is also the result of the fact that only one-third of a catcher vessel's operating time is used in fishing; the remaining two-thirds is used for traveling to and from the fishing grounds

We are therefore quite puzzled as to what the real objection is to our vessel. Is there some dissatisfaction with the technological advances that make our vessel capable of processing our catch at sea, thus enabling us to market some of the freshest fish products in the world; or is it the fact that we are competing, in what is supposedly a free market, with catcher vessels and shoreside processors?[23]

CONCLUSION

The principals of the Alaska Ocean Partnership represent a long history in the North Pacific and Bering Sea fisheries and have made significant contributions toward the Americanization of those fisheries. We have no objection to further Americanization. We do, however, object strenuously to efforts to legislate us out of the fisheries.

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and off loading catch in port.

[23] The fallacious argument that larger vessels are bad for conservation also conveniently overlooks the fact that larger vessels generally bring other advantages to the fisheries, such as safer construction; better crew accommodations; economies of scale; and far greater regulatory scrutiny from myriad agencies including the Coast Guard, OSHA, the State of Alaska, and the North Pacific Fishery Management Council.