

STATEMENT OF JAMES P. WALSH
ON BEHALF OF THE PACIFIC SEAFOOD GROUP
BEFORE THE PACIFIC FISHERY MANAGEMENT COUNCIL
ON THE PROPOSED LIMITED ACCESS SYSTEM
FOR THE PACIFIC GROUND FISH FISHERIES

June 14, 2007

Foster City, California

Mr. Chairman and Members of the Council:

Introduction

My name is James P. Walsh and I am a partner in the San Francisco, California office of the law firm of Davis Wright Tremaine LLP. Prior to entering the full-time practice of law, I served, from 1972 to 1977, as Staff Counsel and General Counsel of the U.S. Senate Committee on Commerce, Science and Transportation under Senator Warren G. Magnuson (D.-Wash.) as Chairman. In that position, I was responsible for handling maritime, oceans and environmental legislation for the Committee and also served as staff to the Senate's original National Ocean Policy Study. One of my particular responsibilities was to help draft what is now referred to as the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act"). In 1978, I was appointed by President Jimmy Carter to serve as the Deputy Administrator of the National Oceanic and Atmospheric Administration ("NOAA"), and served as Acting Administrator of NOAA beginning in January 1981, until July 1981. During my tenure in office, I was responsible not only for overseeing NOAA's fishery management programs and budgets, but also for reviewing all fishery management plans adopted by Regional Fishery Management Councils under the Magnuson-Stevens Act.

Today I am representing the Pacific Seafood Group, and I have been asked by that company to present a legal perspective on decisions that are pending before this Council to establish a "limited access system" for the West Coast groundfish fisheries from Washington in the north to California in the south, within the U.S. Exclusive Economic Zone. In particular, I

will address the legal obligations of the Council to give fair and equitable consideration to including initial allocations of harvest quota shares to processing companies that have made substantial and continuing economic and market contributions to these fisheries in recent years.

Before providing specific comments, I first want to provide a summary of the recent statutory changes to the Magnuson-Stevens Act that guide the Council's decision-making process and to note the Council's response to these new statutory changes in considering rationalization for the Pacific groundfish and whiting fisheries.

The Limited Access System Directives of the Reauthorized Magnuson-Stevens Act

Everyone is aware that, with enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act,¹ Congress added new statutory authority and directives with respect to limited entry systems that become part of fishery management plans. A "limited access system" is defined to mean a system that limits participation in a fishery to those persons satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation. Within this system, a "limited access privilege" is established that provides a person with a quantity of fish equating to a portion of the total annual allowable catch of that species of fish that may be received or held for the exclusive use of that person, and includes a individual fishing quota ("IFQ") but does not include any community development quota ("CDQ"). This privilege will be in form of a revocable permit issued for a period of not more than 10 years.

In addition to the general provisions on limited access systems, the Reauthorized Magnuson-Stevens Act contained a specific directive addressed to this Fishery Management Council with respect to an "appropriate rationalization program for Pacific trawl groundfish and whiting fisheries under its jurisdiction."² This directive (1) established timetables for your consideration of a limited access system for these fisheries, (2) changed the general requirements that would have otherwise been applicable generally, and (3) stated additional analysis to be considered by the Council. I will now summarize very generally some of the key provisions relevant to your discussions at this meeting.

A. The New Directive

The first element of this specific limited access system provision reads as a mandatory directive for the Council to develop a proposed limited entry program:

(f) PACIFIC FISHERY MANAGEMENT COUNCIL.—

(1) IN GENERAL.—The Pacific Fishery Management Council shall develop a proposal for the appropriate rationalization program for the Pacific groundfish and whiting fisheries, including the shore-based sector of the Pacific

¹ H.R. 5946, enacted as Public Law 109-479 on January 12, 2007.

² Section 301(f) of H.R. 5946.

whiting fishery under its jurisdiction. The proposal may include only the Pacific whiting fishery, including the shore-based sector, if the Pacific Council determines that a rationalization plan for the fishery as a whole cannot be achieved before the report is required under paragraph (3).

In reviewing the Council's recently published "Trawl Rationalization Alternatives (REV 05/23/07)," it appears the Council is well on its way to satisfying this directive by considering an Individual fishing quota ("IFQ") or Cooperative program that includes both the Pacific groundfish and whiting fisheries.

B. Special Factors That Must Be Considered

In addition to the general requirements for all limited access systems, which I will discuss briefly later, Congress included unique language addressed only to this Council:

(2) REQUIRED ANALYSIS.—In developing the proposal to rationalize the fishery, the Pacific Council shall fully analyze alternative program designs, including the allocation of limited access privileges to harvest fish to fishermen and processors working together in regional fishery associations or some other cooperative manner to harvest and process the fish, as well as the effects of these program designs and allocations on competition and conservation. The analysis shall include an assessment of the impact of the proposal on conservation and participating in the trawl groundfish fisheries, including the shore-based sector of the Pacific whiting fishery.

What marks this provision as unique is the reference to allocating limited access privileges at the outset to two different segments of the fishing industry, entities that harvest the fish and entities that process the fish. However, this language is consistent with the recommendations of the National Research Council in its 1999 Report entitled "Sharing the Fish: Towards a National Policy on Individual Fishing Quotas." In that Report, the authors concluded that there was no "compelling reason to recommend the inclusion or exclusion of processors from eligibility to receive initial quota shares."³ By the reference above and in other provisions, Congress has decided to include processors as eligible for allocations of initial quota shares. Significantly, Congress specially directed this Council to consider allocations to both the harvesting and processing sectors of the Pacific groundfish and whiting fisheries.

In response to this directive, the Council's Trawl IFQ Alternative includes a discussion of options for the initial allocation of IFQ, which are (1) allocate 100 percent of quota share to vessel permit owners, or (2), for non-whiting groundfish, allocate 75 percent to vessel permit owners and 25 percent to processors, or for whiting, allocate 50 percent to vessel permit owners and 50 percent to processors. This allocation issue is now squarely before this Council, as Congress directed.

³ National Research Council Report, at 205.

C. Report to Congress

Upon completion of the Council's work on its rationalization program, the "proposal and related analysis" must be submitted to the Senate and House Committees with jurisdiction over the Magnuson-Stevens Act no later than January 2009. This provision, however, does not change the requirement that any such proposal must go through the normal approval process for amendments to fishery management plans under the Act. Congress merely gets a report on what is going on. This reporting requirement, no doubt, influenced the timetable being followed by the Council with respect to these particular fisheries.

D. An Overview of the General Limited Access System Statutory Provisions

The 2006 Reauthorization of the Magnuson-Stevens Act expanded considerably the Congressional guidance on the use of limited access systems in the nation's fishery management program. Creation of such a system remains a discretionary matter with each Council. However, the new guidance includes expanded definitions, statements as to the purpose of such systems, considerations that must be taken into account in developing a system, and mandated requirements for approval of a limited access privilege program. Also created were new categories of entities that would qualify to receive limited access privileges, in addition to qualifying individuals or business entities that own fishing vessels and fish processing plants or hold permits. These categories include fishing communities and regional fishery associations, each with its own particular qualification criteria. Neither of these new categories is involved in the rationalization program this Council is considering for the Pacific groundfish and whiting fisheries.

Some of the highlights of these general provisions as they apply here, are the following:

1. By operation of the transition rules, the Pacific groundfish and whiting fishery program is not necessarily required to assist in the rebuilding of the fishery. Presumably this is because these fisheries are already very tightly regulated and that reduced harvesting opportunities because of ongoing rebuilding requirements, and a buy-out program, have already significantly reduced the number of vessels participating in these fisheries. Thus, considerable excess harvesting capacity has left the fishery, estimated at more than 50 percent, in recent years.
2. By the same transition rules, the program is not required to be for a fishery that has been determined by the Secretary of Commerce or the Council to have over-capacity, for the same reasons as just indicated. Overcapacity has been presumed for this fishery but it has been addressed previously through other programs.
3. As a result, the primary requirement under the Reauthorized Magnuson-Stevens Act that this Council must consider is the mandate that its adopted program shall "promote (i) fishing safety; (ii) fishery conservation and management; and (iii) social and economic benefits." All the other applicable general requirements relate to considerations other than the primary reasons behind the limited access system, such as, for example, the procedural requirement of specifying the goals of the program in writing.

E. Allocation

The subject I want to address in more detail is the section of the new legislation that deals with the issue of allocation, particularly initial allocations. The primary requirement here directs the Council to adopt procedures “to ensure fair and equitable initial allocation, including consideration of (i) current and historical harvests; (ii) investments in, and dependence upon, the fishery; and (iii) the current and historical participation of fishing communities” and to distribute the limited access privilege to “persons who substantially participate in the fishery, including in a specific sector of such fishery.” These statutory statements frame your legal obligations in determining the substance of the allocations under the program.

General Observations on Initial Allocations to Processing Companies

A. Congress Expressed Its Clear Intent That the Processing Sector of the Pacific Groundfish and Whiting Fisheries Be Eligible to Receive an Initial Allocation of Limited Access Privileges

From the express language of the Reauthorized Magnuson-Stevens Act, there can be no doubt but that Congress decided to make the processing sector of the Pacific groundfish and whiting fisheries eligible to receive an initial allocation of limited access privileges. The universe of eligible recipients is not limited to vessel owner and employees, permit holders, communities, and regional fishery associations, but all of them, including processors. Prior law did not contain sufficient legislative language and history to make such a strong legal statement, notwithstanding the onshore/offshore allocations made in the pollock fishery in Alaska and the statutory “two-pie” system in the Alaska Crab Rationalization Act.

With the changes made on January 2007, there can be no doubt that harvest privileges may be given to any qualifying processing company that satisfies the general goals of the program and the other requirements of the Reauthorized Magnuson-Stevens Act. The Council’s obligation to promote “social and economic benefits” applies equally to the harvesting and processing sectors because Congress did not make any distinction between the two sectors in the provisions governing limited access allocations. If an entity is judged by the Council to have substantially participated in the fishery, then it can be argued that that entity should be given quota share, unless there is convincing rationale that another entity is more deserving or would better serve the objectives of the limited access program.

B. Eligible Processing Companies Must Demonstrate A Commitment to the Pacific Groundfish and Whiting Fisheries Through Investment and Active Participation in the Fisheries

A limited access privilege system often changes the timing, focus, and location of harvest activity after rationalization. Eliminating the open entry style of fishing, or even a limited entry system, with harvest quota allocations will force changes, both geographical and temporal, in harvesting and marketing patterns, and could impact current processing and transportation patterns. Congress recognized this fact when it adopted the new limited access system

legislation. As a consequence, investments in existing fixed processing plants may be at risk in a rationalization system. One way to guard against processing disruption is to allocate a portion of the harvest quota to processing companies.

But Congress also required, it is clear, that any processing entity that seeks limited access harvesting privileges must have made demonstrated commitments to the fishery, in terms of active participation and investment in the recent past. A case can also be made that each sector (and each member of each sector) must be subjected to a comparative analysis as to its recent commitment to the fishery in order to avoid economic injury and to ensure continuing social and economic benefits from the fishery, as well as fairness. In summary: those who have made substantial commitments to the fishery, whether harvesters or processors, should not be ignored in the initial allocation. For example, permit holders who have not used their permits in recent years may lack that substantial commitment.

In this regard, it must be recognized that, as a matter of law, anyone holding a federally issued fishing permit lacks a property right to that permit. Recent cases in the United States Court of Federal Claims have decided that such permit holders are unlikely, if their permits are revoked, to succeed in claiming an unconstitutional taking of private property under the Fifth Amendment of the U.S. Constitution. See *Arctic King Fisheries, Inc. v. United States*, 59 Fed.Cl. 360 (2004) (fishing vessel owner does not have a property interest in permits and licenses which can be the subject of a taking claim). Thus, even if someone holds a permit in the Pacific groundfish and whiting fishery, that permit may be extinguished for public use, such as in the creation of a properly devised new limited entry program with proper fishing management objectives.

Thus, the important consideration here is whether an entity seeking an initial allocation of a limited access privilege has demonstrated a meaningful active commitment to the fishery, such as by making an investment, and will likely do so in the future. In fact, it can be argued that the Council cannot simply ignore any such entity in developing its program. This is true whether considering allocations to vessel owners, permit holders, or processing entities.

C. Allocations Must Be Fair and Equitable

The touchstone standard for allocations is fairness and equity. Making the decision about how best to meet this standard may be the most difficult task before you. However, each entity that has demonstrated a strong commitment in terms of investment and active participation in the relevant fisheries deserves, and even requires, consideration. Excluding any such entity from the initial allocation could run afoul of the Reauthorized Magnuson-Stevens Act and the Due Process Clause of the U.S. Constitution. Under the Due Process Clause, government regulation of economic activity, which is what a limited access system does, must meet the "rational basis" test. While not a stringent standard to meet, nonetheless the "rational basis" test requires that any classification created by statute or rule must bear a rational relationship to a legitimate public purpose. The Supreme Court has stated that any classification is unlawful whose relationship to the stated goal (such as stated in the Reauthorized Magnuson-Stevens Act limited access provisions) is so attenuated as to make it arbitrary or irrational. *City of Cleburne, Tex. v.*

Cleburne Living Center, 473 U.S. 432, 447 (1985). The Court also said that the objective of harming a politically unpopular group is not a legitimate state interest.

Conclusion

Congress has made clear that those processing entities that make significant commitments to a particular fishery, and are important to the economic activity of the fishery in the future, are eligible to receive an initial allocation of limited access privileges. Determining what is fair and equitable will depend on the facts of each fishery and will require a clear articulation as to why the allocations made by the Council are rationally related to the objectives of the Reauthorized Magnuson-Stevens Act and the fishery management plan at issue.

Thank you for the opportunity to appear before you today. I would be happy to answer any questions you may have.

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