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*Attorneys for Plaintiff Freezer Longline Coalition*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,  
Plaintiff,

v.

JANE LUBCHENCO, et al.,  
Defendants.

Case No. 3:10-cv-00271-TMB

ALASKA SEAFOOD COOPERATIVE, et al.,  
Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,  
Defendants.

Case No. 3:11-cv-00001-TMB

FREEZER LONGLINE COALITION,  
Plaintiff,

v.

JANE LUBCHENCO et al.,  
Defendants.

Case No.: 11-cv-00004 TMB

**SECOND DECLARATION OF KENNETH G. DOWN**

1. My name is Kenneth G. Down. I make this declaration on the basis of personal knowledge and am competent to testify to the matters stated herein, which are true and correct to the best of my knowledge, information, and belief.

2. I have served my entire adult life in the Maritime and Fishing business, starting out as a deck hand and later becoming a U.S. Coast Guard Licensed Merchant Marine Officer with the rating of Chief Engineer for all Oceans. I have served in the Alaska Longline Fishery for more than 20 years, starting as a Chief Engineer aboard a freezer longliner in 1990 and working as a port engineer for many years. More recently, I was the General Manager for a large Washington State-based longline company operating three modern freezer longliners in the Bering Sea and Aleutian Islands. Before selling my interest in 2008, I was also an owner of Pacific Coast Seafoods, a Washington State corporation with a primary focus of brokering the export from the United States of Longline caught Pacific cod. As such, I have direct expertise in the markets for Aleutian Island Pacific cod that continue to be damaged by the Interim Final Rule that is at issue in this lawsuit.

3. I currently serve as the Executive Director of the Freezer Longline Coalition (“FLC”), a position I have held since April of 2008. The FLC is a Section 501(c)(3) non-profit corporation that represents the owners and operators of the vessels that participate in the freezer longline, or catcher processor hook-and-line sector of the Pacific cod fishery in the federal waters of the Bering Sea (“BS”), Aleutian Islands (“AI”), and the Gulf of Alaska (“GOA”) (referred to in this Declaration as the “longline fishery”). The FLC’s mission is to promote public policy that facilitates the intelligent and orderly harvest of Pacific cod and other

groundfish species in the BS, AI and GOA, to encourage the reduction of waste and improvement of resource utilization in the longline fishery, to encourage the reduction of incidental catch of non-target species in the longline fisheries, to support research and public education about the longline fisheries, and to represent longline fishery interests in matters concerning the management and regulation of the longline fishery with respect to target species and protected resources.

4. The longline fishery is based and serviced in the States of Alaska and Washington, with freezer longline-caught Pacific cod marketed and sold in the Pacific Northwest. Freezer longline-caught cod provides approximately \$150-200 million in annual export revenues to the Nation. The longline fishery creates more than 1,200 full-time positions, has more than 30 modern vessels with fish processing and freezing capabilities on board, and community businesses that repair vessels and sell supplies rely on the fishery to sustain jobs.

5. The FLC and its members are committed to the protection of the environment of the BS, AI and GOA, and to ensuring that the living marine resources of the BS, AI and GOA are managed and conserved to enhance the health and productivity of the ecosystem. This commitment is exemplified by the fact that the longline fishery was the first cod fishery in the world to obtain certification by the Marine Stewardship Council as a sustainable, eco-friendly, and well-managed fishery. Additionally, the Monterey Bay Aquarium's "Seafood Watch" guide – a product endorsed by Oceana, a defendant-intervenor in this action – has for many years given longline-caught Pacific cod the highest and best rating. *See, e.g.,* <http://na.oceana.org/en/living-blue/seafood-guide>.

6. Pacific cod (*Gadus macrocephalus*) is distributed widely in the North Pacific and is neither overfished nor approaching an overfished condition. Pacific cod is targeted by a

variety of fisheries that use multiple gear types, including trawl, longline, pot, and jig. The longline fishery is managed under a federal license limitation program. Participants in the longline fishery hold federal license limitation program permits with federal Pacific cod endorsements issued by the National Marine Fisheries Service (“NMFS”) allowing their vessels to participate in the longline fishery.

7. The Pacific cod longline fisheries previously targeted the larger, older cod that are found in the western Aleutian Islands but can no longer do so under the Interim Final Rule. Several vessels in the FLC fleet had fished in Areas 541, 542, and 543 extensively in the past and up through 2010 (i.e., prior to implementation of the Interim Final Rule). Fishing grounds in Areas 541, 542, and 543 have produced large, high-quality Pacific cod, which obtains relatively high prices in the market and which is of substantially better quality for the export markets in Europe due to its larger size, compared to Pacific cod caught in other areas of the Bering Sea and the Gulf of Alaska. Fishing in these now-closed areas was a key component of the business model for several of the FLC vessels. Long-term relationships with markets for the larger cod in Europe continue to be damaged without adequate product to offer as a result of the restrictions imposed by the Interim Final Rule. We are unsure of how the new EIS process mitigates the ongoing harm suffered by our vessels, who continue to operate under a regulatory framework that was implemented in violation of NEPA. Certainly, the new EIS process will have to be meaningful and not simply “rubber-stamp” a process that was conducted in violation of the law.

8. Recently, Mr. Steve MacLean, Protected Resources Coordinator with the North Pacific Fisheries Management Council (“Council”), presented a list of new studies regarding Steller sea lion recovery as part of the Council’s Protected Species Report. This list is presented

in the attached Exhibit A. This list alone showcases the need for a meaningful EIS process that considers all new scientific information.

9. Pacific cod is managed as a complex in the Bering Sea and Aleutian Islands and therefore is managed under a single allocation. The freezer longliners previously targeted the larger, older cod found in areas now closed by the Interim Final Rule. It is well-established that Pacific cod predate on Atka mackerel. As NMFS's own studies have shown, the increased presence of Pacific cod (due to lack of fishing effort) will decrease the presence of Atka mackerel, one of the primary food sources for Steller sea lions in the western Aleutian Islands. These impacts were not fully analyzed in the regulatory process leading up to the Interim Final Rule, but must be fully analyzed in the new process ordered by the Court.

10. The Interim Final Rule, and associated "reasonable and prudent alternative," issued by NMFS and challenged in this litigation continue to severely and significantly impact the FLC and its members. The Interim Final Rule closes vast areas of fishing grounds in Areas 541, 542, and 543 (as those areas are identified in the Interim Final Rule) to the Pacific cod longline fishery that were available to the longline fishery before the Interim Final Rule was issued. The FLC's members have been and will continue to be forced to attempt to direct their effort in other areas or to simply reduce or eliminate effort. The FLC members simply cannot practically, economically, or legally redirect their effort in other areas while also achieving the same level of productivity that they achieved prior to implementation of the Interim Final Rule. The losses to the FLC's members as a result of implementation of the Interim Final Rule will, as NMFS has recognized in its Environmental Assessment, amount to many millions of dollars.

11. The longline fishery's catch of Pacific cod in the Aleutian Islands has always been proportionately very small and spatially and temporally dispersed compared to trawl fleets

that target Pacific cod. Longline vessels fish by using individually baited hooks that are spaced apart on a long continuous line. The pace of longline fishing is slow and spaced over large geographical regions. The longline fishery is economically viable because of the relatively higher prices paid for longline-caught cod.

12. Longline vessels are able to target larger fish that have higher value because the low catch level by the longline catcher processors is offset by the high value of the cod. Cod buyers are willing to pay high prices for longline fish primarily because: (i) the fish are caught one-at-a-time on single hooks and are alive when brought onboard with little or no bruising; (ii) the fish are bled immediately upon landing; (iii) the fish are processed and flash frozen on board, and (iv) the fishery targets the high proportion of large fish that exist in Aleutian Islands fishing grounds. This all leads to obtaining strong prices on the international market for exceptionally high-quality Alaska longline cod, and particularly the larger Aleutian Islands cod, including cod caught in Areas 541, 542, and 543. This set of circumstances is unique and replacement for the larger Aleutian Islands fish simply does not exist in other areas available to the longline fishery. Consequently, the loss of fishing in the Aleutian Islands caused by implementation of the Interim Final Rule cannot be, and has not been, effectively mitigated or supplemented by moving the longline fishery to other areas.

13. FLC's members are geographically, legally, logistically, and practically constrained from expanding effort in locations outside of the Aleutian Islands to fish for Pacific cod. Restrictions on expanding effort in current fisheries and participating in fisheries outside the BS, AI and GOA cod fisheries limit the ability of the longline fleet to mitigate losses suffered under the Interim Final Rule. This was typified in January 2012 as the ice flow in the Bering Sea compressed the entire fishery into a very small area. Without the areas in the Aleutian Islands

available to our fleet, the vessels were forced to operate in a very small area while waiting for the ice to retreat. But for the measures imposed by the Interim Final Rule, some of the FLC member vessels could have mitigated these circumstances by fishing in areas that are closed by the Interim Final Rule.

14. The Interim Final Rule continues to place the future of the jobs of freezer longline fishermen, and of those of the many Alaskans and Washingtonians employed in fishery-dependent businesses, in doubt. The freezer longline Pacific cod fishery operates in a highly dynamic and litigious regulatory environment and participants in the longline fishery are aware of this fact. Accordingly, not only do the vast closures implemented by the Interim Final Rule place jobs and businesses in jeopardy, they make captains and vessel owners understandably hesitant to make substantial investments in the longline fishery. This, in turn, adversely impacts the future potential and sustainability of the entire longline Pacific cod fishery. There is no indication that these tenuous circumstances will change for the better so long as the Interim Final Rule remains in effect.

15. As a result of the Interim Final Rule, which was implemented in violation of NEPA, the FLC members have suffered an irreparable injury. On behalf of FLC, I respectfully submit that the balance of hardships in this case warrants a remedy in equity, and that reestablishing the fishing opportunities and United States export markets that have been lost due to an unlawful regulatory process is squarely in the public's interest.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

EXECUTED in Seattle, Washington this 7<sup>th</sup> day of February 2012.

A handwritten signature in blue ink, appearing to read "Ken Down", is written on a light blue rectangular background.

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Kenneth G. Down



**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2012, I filed a copy of foregoing document a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No's. 3:10-cv-00271-TMB; 3:11-cv-00001-TMB; and 3:11-cv-00004-TMB who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Murray Feldman  
Murray Feldman