

# Ocean and Coastal Law Memo

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## Magnuson Fishery Conservation and Management Act: Congress Debates Amendments As Deadlines Approach for 1994 Reauthorization

### I. Introduction

The Ocean and Coastal Law Center at the University of Oregon School of Law is in the process of completely revising its *Federal Fisheries Management* guidebook to the Magnuson Fishery Conservation and Management Act (MFCMA). Currently, Congress is considering significant changes to the MFCMA, and it is our intention to *not* publish the new edition until the reauthorization process is complete and the new amendments can be incorporated. The following update is intended to inform readers on the reauthorization process primarily by highlighting the key amendments to the Magnuson Act under consideration by Congress as of August 19, 1994. Although congressional staffers and fishery administrators remain optimistic that the reauthorization of the MFCMA will be completed before Congress's October adjournment, it is not clear that this goal will be

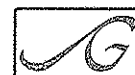
achieved. Therefore, it is not possible at this time to state a specific publication date for the new guidebook.

The new guidebook is being designed to serve as a guide to the MFCMA for all interest groups and their legal counsel. It will not be limited to an analysis of the MFCMA. Other changes in international and national law increasingly are affecting the domestic commercial fishing industry and its managers. The new guidebook will therefore briefly discuss the relationship of these laws to the MFCMA. These laws include (1) recent amendments to the Marine Mammal Protection Act (MMPA) and other laws; (2) the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which the Clinton Administration is submitting to the Senate for advice and consent to ratification; (3) the General Agreement on Tariffs and Trade (GATT); and (4) recent MFCMA-related court decisions. Because of dra-

matic changes in fisheries management in the United States 200-mile exclusive economic zone (EEZ), the new guidebook will shift its emphasis away from foreign fishing and joint ventures. The book will include more information on emerging fishery management tools, especially the increased use of various forms of limited entry, such as individual transferable quotas (ITQs).

Our intention is to provide a comprehensive review of the MFCMA and other laws that affect commercial fishing in waters within United States jurisdiction, especially in the EEZ. We apologize for the delay in producing a new guidebook, but in the interest of publishing an up-to-date and useful guide it is the view of the editor that it would be best to await the results of the current reauthorization process.

Since the Magnuson Act is currently being reauthorized,



a reasonable place to begin this memo is by defining reauthorization and its role in congressional oversight of federal fisheries law.

## II. Reauthorization

### A. *What Does It Mean?*

When a law comes up for "reauthorization" it means Congress must review a schedule of future funding for previously approved and already functioning government programs. Therefore, reauthorization does not affect all laws. Instead it is a tool Congress uses to keep tabs on *ongoing programs*. For example, the Magnuson Act created eight regional councils that draft and implement federally approved fishery management plans (FMPs). It also requires the National Marine Fisheries Service (NMFS) to conduct research and provide scientific data on the status of various stocks. These activities cost money, and reauthorization allows Congress to set funding guidelines for a period of years into the future. For example, Congress is currently planning on reauthorizing the MFCMA through 1999. This gives the President and the administration guidance as they prepare budgets to present to Congress each year. Of course, the administration and Congress itself can later choose not to fund programs at the reauthorized level set by Congress. In any case, when the authorized period of years set by Congress lapses, the bill comes up for "reauthorization." This provides an opportunity for Congress to review the successes or

failures of programs. Based on the review, Congress can cancel a program or redirect future funding. Often substantive new programs or provisions are added to the law.

It is important to note that the dollar amounts set during reauthorization are not the same as an appropriation in the annual budget. Exactly how much money actually will be appropriated is decided *each year* when every ongoing government program gets an appropriation in the annual budget. It is during this appropriating or annual budgeting process that the actual dollars are doled out for federal programs. This is when fishery management competes with national defense, health care, highway construction, and countless other federal programs for funding. Reauthorization, on the other hand, is a part of the *authorizing* (as opposed to the *appropriating*) legislation that creates the law itself. It serves as an opportunity for Congress to fine tune or otherwise adjust a law and also for Congress to set new funding levels it believes necessary to carry out those changes.

### B. *What If a Law Is Not Reauthorized Before the Previous Authorization Expires?*

Since Congress must also pass a separate appropriations bill each year anyway, a law such as the MFCMA does not expire if reauthorization is not completed before the prescribed period lapses.

The fact is that most fed-

eral environmental laws do not evaporate merely because their authorizations have expired. Absent express "sunset" language, a federal statute's substantive provisions usually remain in effect despite the expiration of its authorizations. In such a situation, the only essential question is whether the government continues to possess adequate "budget authority" to spend federal funds on behalf of the expired program. Conveniently, annual appropriations acts are deemed adequate for providing this requisite "budget authority." Thus, as long as funds are appropriated, an environmental statute remains in business.<sup>1</sup>

In short, a failure to reauthorize does not mean a whole lot as long as Congress appropriates money in the annual budget to keep a program going. Annual appropriations are approved in the interim as a sort of stopgap measure until Congress later picks up the debate on proposed amendments and completes the reauthorization process during a subsequent session.

### C. *The Status of the Current Reauthorization of the MFCMA*

The Magnuson Act's authorization lapsed on September 30, 1993. Congress failed to reauthorize the law before it adjourned last

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<sup>1</sup> Donald J. Barry, *Amending the Endangered Species Act, the Ransom of Red Chief, and Other Related Topics*, 21 ENV'T L.L. 587, 596 (1991).

October. It instead appropriated money to fund the various activities authorized by the MFCMA for one more year. The issue now is whether Congress will reauthorize the Act before it adjourns this October, or whether it will once again keep the current law in effect for another year as it continues to debate proposed amendments.

At this time it is unclear if Congress will complete the reauthorization process before its scheduled October adjournment. The House fisheries subcommittee approved a proposed bill in early August that is now before the full Merchant Marine and Fisheries Committee. The subcommittee, however, avoided debate on some key issues, including ITQs, preferring instead to let the full committee debate such topics. The bill now awaits markup by the House Merchant Marine and Fisheries Committee, where staffers expect it will undergo significant modification. The Senate National Ocean Policy Study released a draft bill for consideration by the Senate's Commerce, Science, and Transportation Committee in early August. It would amend both the MFCMA and the Merchant Marine Act. Markup by the committee is not expected before early September.

The debates on crime and health care initiatives are delaying action on and threatening to prevent reauthorization of the MFCMA this year. Originally staffers hoped to have a draft bill through both the House and

Senate committees prior to Congress's scheduled August 12 recess. Upon return from recess, both houses would then have had a bill ready for floor debate, improving chances for passage of a reauthorized bill by the October adjournment. This has not happened, as both bills have yet to be moved out of committee. Furthermore, Congress has not taken its recess, and it is unclear if or when it will do so. Finally, at this time the House and Senate versions differ significantly. This means that, even upon approval of a bill by both houses, some time must be allowed for a joint conference committee to draft a compromise bill that must then be approved by both houses before it is presented to the President for his signature. Staffers and other interested parties agree that time is running short but remain optimistic that a reauthorized bill can be approved this year.

The remainder of this memo discusses many, but not all, of the proposed amendments to the MFCMA. The draft bills discussed are those made public as of August 19. Readers are cautioned that both the Senate and House versions have yet to be marked up and approved by the appropriate committees. Congressional staffers expect significant changes to be made at the committee level.

### **III. The End of Foreign Fishing: A Magnuson Act Success Story**

Congress enacted the

MFCMA and created the 200-mile fishery conservation zone (now called the exclusive economic zone or EEZ) in direct response to a dramatic rise in foreign fishing off the coasts of the United States in the early 1970s. One undisputed success of the MFCMA has been the virtual elimination of foreign fishing within the EEZ. Likewise, the interim use of joint ventures between American fishers and foreign processors declined and was phased out as American processors invested in shore facilities and offshore processing vessels to accommodate many previously underutilized species. Originally, Congress did not intend to eliminate foreign fishing in the EEZ. Subsequent amendments to the Magnuson Act, however, did establish a hierarchy giving first preference to American fishing and processing interests, second preference to joint ventures, and third preference to foreign fishing.

The transformation from having 70 percent of the fish off the United States coasts caught by foreigners in 1973 reduced to about 1 percent in 1989 is a remarkable achievement. Most experts agree that foreign fishing and joint ventures are now relegated to history and that they are unlikely to play a significant role in the future of American EEZ fisheries. In May of 1994, one NMFS official said that some Atlantic mackerel was made available for a joint venture in 1994, but foreign fishing fleets expressed little interest because the venture did not also include any direct foreign fishing. He concluded, "I doubt we'll ever

have a TALFF again.<sup>2</sup> Some commercial fishers on the East Coast have complained that they have been unable to establish markets for some fish because buyers are reluctant to contract for fish that might be bought cheaper if the resource is allocated to foreigners. The House and Senate draft reauthorization bills would place a moratorium on offering foreign fishing for certain Atlantic mackerel and herring fisheries. Joint ventures would, however, be allowed. The House and Senate versions also add provisions requiring foreign-flag vessels to obtain "transshipment permits" before transferring United States fish within the EEZ.

The mechanisms for allowing foreign participation in United States EEZ fisheries remain a part of the MFCMA. This means foreign fishing or joint ventures remain an option if American fishing or processing interests are unable to catch or process allocations of EEZ fish. The overcapitalized state of the domestic fishing industry, however, renders this possibility remote. States also retain the option of requesting permits allowing foreign participation in state-managed fisheries, but for similar reasons such requests have become a rarity. The bottom line is that foreign fishing and joint ventures briefly played a major

role in EEZ fish management, but, as intended by Congress, they were only stepping stones to full domestic utilization.

It is worth noting that some critics point out that just because factory trawlers fly American flags and modern shoreplants have been constructed on American soil does not mean foreign interests have been shut out of United States fisheries. They point to Alaska, where the factory trawler fleet has been heavily financed by a Norwegian bank and where many new shoreplants were financed and are, in part, owned by Japanese companies. The prospect that some of these foreign interests might acquire permanent quota rights to United States EEZ fish resources may prove to be a hurdle for expanding the use of limited entry and ITQs. Indeed, how to prevent foreign investors from getting control over ITQs has been a part of the congressional debate on ITQs (discussed further below) during the reauthorization process.

#### IV. New Groups Take an Interest in the Health of United States Fisheries

It is difficult to provide a nationwide overview of fish stocks because there are so many species ranging over the 200-mile-wide EEZ off all the coasts of the United States from Maine to the Gulf of Mexico and from the South Pacific to the West Coast and on up to Alaska. Efforts by NMFS, the agency charged

with assessing fishery stocks, to evaluate populations are hampered by the fact that, unlike land-based animals, fish are part of a fluid underwater environment. This makes it difficult to actually count fish populations and forces NMFS to estimate stocks based on the "best scientific evidence available," which in many cases is limited. Nevertheless, NMFS recently published its assessment of United States fish stocks.<sup>3</sup> It is impossible to provide an adequate summary of the status of all fish stocks here, but in its report NMFS notes that some of the nation's most historically important fisheries are in serious decline, including several key species of Northeast groundfish, Atlantic bluefin tuna, many Pacific coast salmon runs, and Gulf of Mexico shrimp.<sup>4</sup> Of the fish stocks where status is known, 40 percent are overutilized, and more than 65 species are overfished.<sup>5</sup>

A variety of fishing industry and environmental publications, as well as major newspapers, have documented the decline in certain fish stocks and the resulting economic devastation of many coastal communities. In 1991, the Center for Marine Conservation (CMC) published a comprehensive analysis of federal fishery management that concludes

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<sup>2</sup> Telephone interview with David Creston, Deputy Director of Fishery Conservation and Management at NMFS (May 20, 1994). TALFF means total allowable level of foreign fishing.

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<sup>3</sup> NATIONAL MARINE FISHERIES SERVICE, *OUR LIVING OCEANS: REPORT ON THE STATUS OF U.S. LIVING MARINE RESOURCES* (1993).

<sup>4</sup> *Id.* at 18.

<sup>5</sup> *Id.*

that the MFCMA succeeded in getting rid of foreign overfishing only to replace it with domestic overfishing.<sup>6</sup> In 1993, the CMC published *Fish for the Future: A Citizens' Guide to Federal Marine Fisheries Management* that further warns of stock declines as it encourages the public to become more involved in the management process.<sup>7</sup> The CMC also has played an important role in founding the Marine Fish Conservation Network (MFCN), an umbrella group representing a broad range of environmental, conservation, commercial and sport fishing, coastal community, and other interest groups. Most recently, a popular liberal and environmental magazine published a series of stories on the politics and health of commercial fish populations.<sup>8</sup> One article noted that the United Nations has reported that up to 60 percent of the world's fish populations it monitors are fully exploited or depleted.<sup>9</sup>

Bill Mott, a spokesman for the MFCN, recently said that it is because of serious declines

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<sup>6</sup> JOHN WISE, FEDERAL CONSERVATION AND MANAGEMENT OF MARINE FISHERIES IN THE UNITED STATES 7 (Center for Marine Conservation 1991).

<sup>7</sup> SUZANNE FOWLE, FISH FOR THE FUTURE: A CITIZENS' GUIDE TO FEDERAL MARINE FISHERIES MANAGEMENT (Center for Marine Conservation 1993).

<sup>8</sup> *Special Report: A Farewell to Fish?*, MOTHER JONES, July-Aug. 1994, at 30.

<sup>9</sup> Peter Steinhart, *The Cry of the Ocean*, MOTHER JONES, July-Aug. 1994, at 30, 31.

in many fish populations that reauthorization is needed this year to prevent further devastation and to bolster the MFCMA's provisions regarding conservation, management, and protection of fish stocks. The management regimes being proposed by groups like the MFCN are partly responsible for prolonging debate on reauthorization of the Magnuson Act. As new interest groups, especially environmental and conservation organizations, take an interest in fishery management, it becomes increasingly difficult for Congress to agree on a law that is satisfactory to all.

Historically the management process at the regional council level has been dominated by the various commercial fishing interests themselves. Council debate focused largely on how much of a quota would be allocated to various user groups. Today this is no longer true. Environmentalists, coastal communities, sport and recreational fishing interests, and others are demanding a larger role, including seeking more nominations to the regional councils. The MFCN and other conservation interests are keeping a constant vigil over the reauthorization process and have found bipartisan support in Congress to promote their interests. Several of the network's proposals have been incorporated into the House draft bill.

## V. Proposed Amendments to the Magnuson Act

The most significant

amendments under consideration aim to rebuild, conserve, and better manage EEZ fish resources. As one conservationist told Congress, "we have lost the 'C' in the FCMA."<sup>10</sup> Whether it is the effectiveness of the conservation lobby or the cry from constituencies devastated by the collapse of key fisheries is unclear, but Congress seems to be heeding the call for increased conservation. The primary proposed amendments include those that would (a) address conflicts of interest; (b) define "overfishing" and "bycatch" and mandate specific actions to eliminate or reduce their negative effects on stocks; (c) institute fees for ITQ shares; (d) place a three-year moratorium on new ITQ programs; (e) protect and enhance fish habitats; (f) bolster fishery research and monitoring of fisheries; and (g) implement a National Vessel Registration Program, provide disaster relief, and refinance debt. In addition, the Senate draft has several detailed provisions for managing fisheries off Alaska's coasts and a program for the management of United States high seas fishing vessels in order to comply with international commitments. Again, it should be noted that these are only draft proposals, and they are subject to significant changes.

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<sup>10</sup> Testimony of Suzanne Iudicello on behalf of the Center for Marine Conservation before the House Subcommittee on Fisheries of the House Merchant Marine and Fisheries Committee (Apr. 21, 1993) (on file with author).

They are likely to be amended by the appropriate committees, the full House and Senate memberships, and a joint conference committee.

#### A. *Conflict of Interests*

Because of the increased involvement of new interest groups, the domination of many regional fishery management councils by the commercial fishing industry may be coming to an end. Critics of the historical makeup of the regional councils suggest that fishing industry representatives have controlled policy, been short-sighted, and often lined their own pockets after being appointed to the regional councils and various advisory committees. Commonly, critics make an analogy to allowing the "fox in the hen house," with those who want to harvest the fish deciding who gets the rights to fish and how much they will take. In support of this position, they argue that while the MFCMA succeeded in eliminating foreign fishing, the government's own statistics show a continued decline in many vital fish stocks. On the other hand, one former North Pacific Fishery Management Council (NPFMC) member believes that these claims are not always warranted. He says that the NPFMC, which manages Alaska's vast fish resources, is a good example of a council that has approved measures that consider a broad range of interests and conserve fish despite being dominated by various fishing

industry interests.<sup>11</sup>

The House and Senate draft bills both propose to tighten the conflict of interest provisions of the MFCMA by requiring council members to recuse themselves from voting on issues in which they have a direct financial stake. The MFCMA currently requires voting members to disclose when they, their family members, or groups they belong to have a financial interest in a fishery, but it does not require them to abstain from voting on decisions where those interests are directly affected. The House version directs the Secretary of Commerce to establish rules for recusal. The General Counsel of the National Oceanic and Atmospheric Administration (NOAA) or a designee would determine whether a conflict exists. Any voting council member could request NOAA to make a conflict of interest determination. The standard is whether a voting member would be "significantly affected." The Senate version would have the Secretary designate an official to make such determinations based on a test of whether council members might "significantly enhance" their economic positions. Under both drafts, a finding of a conflict prevents voting, but the council mem-

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<sup>11</sup> This individual preferred not to be named, but it should be noted that statistics add credence to his view. The NPFMC in recent years has been a leader in setting conservative quotas, and Alaska's fisheries are, for the most part, among the healthiest in the nation.

ber could continue to participate in the debate on the issue. The Senate version also directs the Secretary to formulate regulations for recusals and to review the decisions of the designated official.

Proposals to limit the number of seats held by industry interests or to guarantee conservationists seats are not contained in the draft bills. But some strengthening of the Act's language requiring input from a broad spectrum of interests and ensuring opportunities for public participation in the council process has been included in the House draft. Both the House and Senate versions would require the placement of a Native American representative on the Pacific Fishery Management Council.

Others suggest that meddling with the appointment provisions is unnecessary. They propose better oversight of the regional councils' FMPs by the Secretary of Commerce. At least one court has agreed that the required approval of FMPs by the Secretary need not be a mere rubber stamp and that the MFCMA allows the Secretary to unilaterally make changes to plans under review.<sup>12</sup> Still others propose oversight of the councils by creating a central fishery commission appointed by the President with approval from Congress. Such proposals have not gotten strong support, probably because the apparent intent of Congress in

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<sup>12</sup> *Parravano v. Babbitt*, 837 F. Supp. 1034 (N.D. Cal. 1993).

creating regional councils was to decentralize fishery management by giving regional councils (and the states that appoint the members) the primary role in designing FMPs. Barring a fundamental philosophical shift by Congress, it is unlikely that a grant of power to a central decision-making body will occur during reauthorization.

### *B. Defining Terms: Bycatch and Overfishing*

In an effort to prevent further declines in fish stocks, proposed amendments in both houses define or redefine certain terms, including "overfishing," "bycatch," and "essential fishery habitat." Councils would be required to institute actions and amend FMPs to restore overfished stocks, prevent overfishing and bycatch, and protect and restore fishery habitats. Both drafts require councils to institute recovery programs for overfished or depleted stocks, providing a timetable for full recovery has been included. Increasing the emphasis on biological and ecological factors, despite adverse economic effects on the fishing industry, is also being proposed. In short, conservation of fish stocks at sustainable levels, *not* the fishing industry's economic woes, would be the prevailing factor when a council sets a total allowable catch (TAC).

Perhaps one of the more controversial areas is the bycatch of nontargeted, prohibited, juvenile, and undersized fish. It has been estimated that up to one-third of all the fish harvested by commercial fishing vessels is returned to

the sea, most often dead or dying. This waste of valuable food resources is being widely publicized by conservationists. On August 30, 1994, the Associated Press reported on a recent study commissioned by the Alaska Department of Fish and Game that concluded that in 1993 more than 740 million pounds of edible fish were dumped overboard in the North Pacific. The majority of the fish was harvested by the trawl fleet operating in the Bering Sea and Aleutian Islands regions.<sup>13</sup>

At this time, the Senate bycatch provisions, proposed by Senator Ted Stevens (R-Alaska), would affect *only* the NPFMC. Critics have pointed out that bycatch occurs in every region, and in response staffers say some nationwide restrictions on bycatch may be added to the Senate bill. The Senate version defines bycatch as "fish . . . for which conservation and management measures have been established, but which are not a target of the fishery in which a fishing vessel is operating; or marine mammals, birds or prohibited fish." "Prohibited fish" are defined as those fish caught in a commercial fishery that fishers "are prohibited by regulation from retaining, or are required by regulation to retain but not sell." These definitions do not include all nontarget fish. Instead, another term, "economic discards," is defined as "fish which are not retained by the fishing vessel harvesting

those fish or which are not processed by United States fish processors because they are the wrong size or sex, of poor quality, or for other economic reasons."

Senator Stevens's proposal would require the NPFMC to include fees or incentives to reduce bycatch, waste, and discards in all its FMPs by January 1996. By 1997 a system to measure each fishing vessel's total catch with separately enumerated tonnage for target, bycatch, and prohibited species must be implemented. Based on these data, future allocations of fish by the council will give preference to catchers and processors with the least bycatch and discards. Stevens's bill also aims to achieve full utilization of all fish landed, except prohibited species, by the year 2000. All fish, and all of each fish caught, must be utilized. Those parts not used for food would probably be made into fish oil and meal, requiring some investment in new equipment for some processors.

Critics of the Stevens proposal say it is an "after-the-fact" plan, meaning it does little to actually prevent fishers from catching and landing unwanted or prohibited fish. They point out that the majority of fish cannot be returned to the sea alive, and therefore the goal should be to minimize the catching of all but the target species.

The House draft defines bycatch as fish that are caught, taken, or harvested by a fishing vessel that are not the target of the fishery, that

<sup>13</sup> *Report: Millions of Edible Fish Dumped Overboard by Trawlers*, REGISTER-GUARD (Eugene, Or.), Aug. 30, 1994, at 4C.

are discarded in the course of fishing, or the retention of which is prohibited. Its bycatch provisions would apply nationwide and create an eighth national standard, requiring that FMPs, "to the maximum extent practicable, minimize bycatch." It also authorizes councils to use incentives and allocation preferences within a gear group to promote avoidance of bycatch. Neither draft mandates that cleaner fishing techniques or gear be developed; however, fishers might be encouraged to alter catch methods to avoid the proposed council-imposed sanctions. Conservationists say such a mandate would strike closer to the heart of the problem of actually reducing bycatch.

Better management and conservation of fish resources is the ultimate goal of the bycatch proposals, but even when regional councils have acted, results have been slow. For example, in the Gulf of Mexico shrimp fishery it is estimated that 10 pounds of finfish, including many young recruits for other commercial fisheries, are wasted for every pound of shrimp caught. A three-year study was authorized to find solutions, but just last year the industry proposed another three-year extension for "further study." The Senate draft bill does require the Secretary of Commerce to complete this research within nine months after the bill is enacted, but it does not provide a time frame for implementing changes to reduce finfish bycatch. Instead it calls for more data demonstrating a relationship

between incidental harvests of fish by shrimp trawlers. Conservationists argue that this relationship is already evident and that delaying changes to shrimp fishing gear will result in continued devastation from which some species might never recover.

It is worthwhile noting that even if tougher bycatch measures are not added to the MFCMA, the Secretary and the regional councils can approve provisions to regulate and reduce bycatch. Some councils have already done so by requiring modifications to fishing gear (such as requiring turtle excluder devices in the Gulf of Mexico) to allow escapement of undersized or prohibited species. Critics say that until councils are no longer dominated by the commercial fishing industry, such changes are too slow in developing, and that Congress itself should amend the Act now to mandate reductions in bycatch.

Both draft bills also define overfishing and require regional councils to define overfishing in every FMP and take action to rebuild overfished species to sustainable levels. The House draft allows the Secretary, upon a finding of overfishing, to request a council to halt the overfishing and develop a plan to rebuild the stocks. If a council fails to do so, the Secretary may unilaterally implement an FMP to prevent overfishing and rebuild stocks. The House version has specific provisions for restoring certain runs of Pacific salmon. Although the drafts differ somewhat, they both aim to

prevent and stop overfishing and rebuild overfished stocks by requiring councils to address those issues in their FMPs. Another key term, "essential fishery habitat," is discussed below.

### C. Fees

United States commercial fishing interests harvest a public resource that, in theory at least, belongs to all of the citizens of the United States. They sell that resource for profit in both domestic and foreign markets. With the exception of some minor licensing charges and fees, members of the fishing industry do not pay the federal government for the fish they harvest or for the federal research and management programs that aim to protect those fish stocks.<sup>14</sup> This has led many to ask why the American public and United States government should give away fish resources while spending millions to ensure that fish continue to be available to the commercial fishing industry. Often an analogy to other federal resources is made. For example, lumber companies must bid and pay for the harvest of trees in national forests, and oil companies must bid to drill on federal lands and pay royalties for every barrel they pump. The fishing industry counters that it provides jobs, helps balance international trade, and cannot afford to

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<sup>14</sup>For example, Congress authorized more than \$100 million of public funds to be spent to carry out the provisions of the MFCMA in fiscal year 1993.



pay fees. However, in an era of huge national deficits, it is becoming difficult for the industry to justify its position.

At this point, fees will likely only be paid by fishers when a limited entry or ITQ system has been put in place for a fishery. In other words, if fishing interests get a private, exclusive right to harvest fish, they will pay a fee, probably a percentage of the value of their ITQ take. An earlier House draft set fee levels at either 4, 3, or 1 percent, and revenues would remain in the region where they are generated. The fees must be used for conservation and management in that region. However, the subcommittee dropped all language on ITQs in its most recent version. Staffers say this does not mean ITQs and fees are a dead issue in the House. On the contrary, the subcommittee apparently decided it would be better to delete the language and allow the full committee to take up this debate anew. The Senate draft also calls for fees based on the value of one's ITQ share. Supporters urge that such fees be in addition to current levels of federal support, not as a substitute. They point out that federal funding of marine fish research falls far short of that needed to adequately assess and manage stocks. Some proposals would create a centralized national fund or trust with the fees. Others propose leaving fee setting to the regional councils.

Despite the strong rationale behind setting fees for ITQs, approval is not certain. One would certainly expect the commercial fishing indus-

try to oppose them. The industry is most likely to point out the severe economic plight facing so many catchers and processors, as evidenced by President Clinton's recent decision to provide economic relief for the industry in New England and the Pacific Northwest. Since fees are only being discussed in relation to ITQs, it is significant that the current Senate draft bill and an earlier House version would put a moratorium on the creation of more ITQ fisheries.

#### *D. Limiting Entry: ITQs and CDQs*

By far the most significant and controversial trend in federal fishery management is to restrict entry into commercial fisheries. Historically fisheries have been open. People needed only a license, a boat, and fishing gear to fish commercially. Conservationists say the result today is an overcapitalization of the commercial fishing industry, which has led to increased pressure to raise or maintain quotas and declines in stocks. In short, too many boats are chasing too few fish. However, efforts to change the open-entry system have met with widespread opposition and litigation.<sup>15</sup> The MFCMA already allows (and in fact

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<sup>15</sup> See, e.g., *Northern Eagle Partners v. Franklin*, No. C92-1915 (W.D. Wash. Aug. 24, 1993). The court upheld the power of the Pacific Fishery Management Council to set a cutoff date for determining who would and would not get entry permits for the Pacific whiting fishery.

encourages) regional councils to limit entry into commercial fisheries as a legitimate management tool. But it has only been recently that the councils have been willing to approve the use of quota shares.

In any limited entry scheme there will be winners and losers. If the goal is to limit fishing effort, some individuals will not make the cut. Opponents of limited entry also argue that the government cannot or should not "privatize" a public resource. But clearly this has been done with other resources such as federally owned oil, lumber, and minerals, and, in fact, the open-entry system for fisheries is in reality an exception, not the rule. One of the most common methods for determining who will get a quota, and the one contained in the Senate draft bill, is to base the allocation on a set of criteria, including present and historical catches and dependence on a fishery.

The Senate draft and an earlier House draft called for a three-year moratorium on new ITQ plans. Under the Senate plan, during the moratorium years the Secretary of Commerce would review and evaluate already approved ITQ plans and promulgate rules to guide post-October 1997 regimes for limiting entry. It has a provision reserving some fish for non-ITQ fishers. The Senate draft is also replete with references to including consideration of the effects of all management plans, including ITQs, on coastal communities. This is probably due to the efforts of Senator Stevens to protect

coastal residents in his state, many of whom are Alaska Natives. The NPFMC has already implemented a community development quota (CDQ) system in Alaska, whereby coastal communities are granted a portion of TACs that they can trade to fishers or processors for cash, jobs, or other benefits.

It is not clear why Congress is discussing a three-year moratorium. One concern is that foreign interests will gain control of United States fish resources by buying up or otherwise acquiring quota shares. Another possibility is that limiting entry can become highly political, as exemplified by the NPFMC's decision to delay an ITQ system for the Bering Sea and Gulf of Alaska pollock fisheries. The Bering Sea fishery is divided between the large at-sea factory trawlers that catch and process and the catcher boats that deliver to shore-based processing plants. It has been suggested that the purchase of Arctic Alaska, one of the North Pacific's largest factory trawler fleets, by the nation's largest chicken-processing company, Tyson Foods, was made primarily because the Arctic fleet's historical catch would grant Tyson a large part of any future ITQ. Others criticize the use of historical catches for setting trawl-fleet ITQs because it rewards those who have in the past not only caught the most fish, but also wasted the most fish or fished illegally. Shore-based processors have also stated that if catcher and catcher/processor boats are to get quotas to catch pollock, then shore-based seafood

plants deserve quotas to process. They argue that their investment is no less important or significant than that of the fishing fleet.

Another concern is that many smaller interests will be swallowed up by larger interests, leading to a concentration of quota shares and a private monopoly of a once public resource. Some economists agree the "big fish will swallow the little fish," but they go on to say this is good for the nation. They point out that larger interests are more efficient and often are more stable, making the likelihood of future government bailouts of the industry less likely. Also, management might also be streamlined if fewer interests have to be accommodated. Of course, many small boat owners from families who have been fishing for generations are likely to take issue with such views. Such a concentration of quota shares is already occurring in the ITQ system created for the Pacific whiting fishery as catcher boats sell their quotas to factory trawlers. Often a comparison to the decline of the family farmer in favor of "agribusiness" is made. The impact of ITQs and concentration of quota shares on small coastal communities where fishing is the primary source of revenue is another area of concern. Factory fleets are often more self-contained and are less dependent on shore-based services than smaller catcher boats.

In Alaska, where the NPFMC allocates about half of all the fish caught in the United States, several innova-

tive measures have been taken to preserve fish stocks and the interests of those who might be disenfranchised by ITQs. First, small boat owners, many of them Native Alaskans, have been protected by creating "small-vessel-only" zones around some coastal communities. Second, the council has indicated it will reward vessels with a "clean" history of little or no bycatch. Third, the NPFMC has also approved CDQs that coastal communities can sell or barter to the mostly Seattle-based high seas fishing and processing interests. Fourth, to prevent overfishing, the NPFMC has also employed buffers in setting quotas whereby TAC is reduced to allow for unforeseen circumstances and to help ensure that fish stocks do not fall below sustainable levels. Finally, the council has divided the Bering Sea pollock harvest between at-sea factory trawlers and shore-based processors.

While some of these practices are controversial, they indicate a willingness to accommodate a variety of interests and at the same time to attempt to prevent the devastation of fish resources that has occurred elsewhere. If nothing else, the NPFMC is a good indication of how the Magnuson Act currently allows for great flexibility in tailoring fishery management and FMPs to the needs of particular regions. Any proposed amendments to the MFCMA that might infringe upon this flexibility are likely to be opposed by many in the fishing industry. Some conservationists want stronger federal oversight of the

actions of regional councils. They use government statistics demonstrating continued declines in vital fish stocks to argue that the regional councils have failed to protect the nation's fisheries. At this time, the draft bills indicate a continued commitment to regional decision making, suggesting that conservationists will need to become more involved at the regional as well as the national level.

#### *E. The Protection of Marine Fish Habitat*

Most interest groups agree that fish habitat needs to be better protected. Perhaps this is most significant in the management of anadromous species, which rely on coastal estuaries and streams for reproduction. The collapse of the commercial salmon industry in the Pacific Northwest, as evidenced by the August 18 relisting by NMFS of Snake River chinook salmon from threatened to endangered under the Endangered Species Act, is a vivid example of this dilemma. Unfortunately, management of nearshore or onshore fisheries is complicated by the complexity and number of federal and state laws governing coastal regions. Also, when commercial fisheries are located near coastlines and large population centers, the fish habitat is altered by various types of pollution associated with industrial, commercial, and residential development. Fisheries are impacted by other factors, such as power-generating dams, logging, farming, grazing, and pollution from urban runoff and sewer systems.

Anadromous species are not the only marine life impacted by coastal development and pollution. Most fish and shellfish species at some point in their lives are dependent on the rich resources of the continental shelf, often for critical activities such as reproduction and feeding. With the possible exception of some highly migratory pelagic species, this means that the marine habitat within 12 miles of shore is critical for the continued health of a majority of species.

Proposed House amendments define "essential fishery habitat" as areas necessary "to fish for spawning, breeding, or growth to maturity." An earlier House draft would have (1) created a national fishery habitat protection program, including the creation of a strategic plan; (2) given NMFS authority to require that all federal actions affecting the EEZ be consistent with objectives of FMPs; (3) mandated that NMFS implement policies to protect and restore critical habitat and work with the regional councils and other federal agencies; (4) improved research on fish habitat; and (5) provided funding to carry out these objectives. Much of this language has been deleted from the most recent House draft. The House draft now more closely follows the Senate bill, which stops short of requiring full consistency with FMPs by other federal agencies. The most recent House draft requires the Secretary of Commerce to identify essential fishery habitat for each fishery that has an FMP. The Senate version calls for increased research on the

impact of pollution and deterioration of wetlands and estuaries.

The widespread support of the commercial and sport fishing industries and conservationists for habitat protection suggests that some language to address habitat protection will be approved by Congress. However, habitat protection is also the object of several other federal laws, and concerns regarding overlap and duplication could pose obstacles to approval.

#### *F. Bolstering Data, Research, and Monitoring of Fisheries*

Both the House and Senate drafts propose increased research and monitoring of fisheries and fish habitats. The House draft, however, does not include significant increases in expenditures to achieve this end. In light of the proposed moratorium on ITQs, significant new fees to augment research will not be generated until after 1997. The Senate draft bill apparently provides not only the language but also the means to improve fish management. Rather than mere incremental increases, it proposes a boost in the budget to carry out the MFCMA from \$106 million in 1994 to \$143 million in 1995, with additional increases of \$4 million a year through 1999. The Senate draft would also improve data collection by requiring 100 percent observer coverage in Alaska. Observers cost the government nothing because the program is paid for by the industry. Supporters of the observer program note that observers have enhanced the

collection of data that could not otherwise have been readily obtained under today's tighter budgets. Beyond boosting observer coverage, it remains to be seen how much funding, if any, for increased research will be approved. Improving the Act's language to better promote conservation and sustainability will do little without funding to carry out basic research on fish habitat and life cycles. At this time, it is too early to guess how much money will be devoted to improving research and data collection.

**G. National Vessel Registration Program, Disaster Relief, and Refinancing Debt**

The Senate draft calls for the creation of a national vessel registration system. Under the Senate version, all fishing vessels—other than private, noncommercial, recreational fishing vessels—would be required to register. The Senate draft calls for the Secretary of Commerce to submit a national registration plan to Congress by December 1, 1997. The proposal aims to implement the system by December 1, 1999. The goal is to create a single national system for registering vessels under the MFCMA, the MMPA, and other federal fishery-related laws. The registration program is designed to augment the research and data collection provisions discussed earlier.

The Senate draft also includes sections providing for fisheries disaster relief and the refinancing of fishing industry debts, which have already been criticized by

some nonindustry observers. Under the proposals, the Secretary, at the request of a state governor, can declare a "commercial fishery failure," whether it be the result of natural or *other* causes. The disaster relief proposal would make funds available to the affected state or fishery-dependent community at a 75 to 25 federal/state cost-sharing ratio. A determination of a failure also requires the creation of a task force to help develop a recovery plan for the affected area. The recovery plan must be presented to Congress within one year after it is established.

In addition to providing disaster relief to state and local communities, the Senate draft proposes to amend the Merchant Marine Act to help the fishing industry refinance "existing obligations relating to fishing vessels or fishery facilities." Critics say it makes no sense for Congress to acknowledge the overcapitalized state of the nation's fishing fleet and at the same time to also help keep more boats financially afloat. They say the government should simply let the economics of the industry run its course, allowing overcapitalization to diminish through foreclosures on debts. Furthermore, such a measure might actually encourage more investment. Finally, a significant amount of the United States commercial industry is financed by foreign investors. Critics say investing in the volatile fishing industry is risky business and foreign investors should not be granted government assistance because they made poor business decisions. But some industry officials argue

that the government already meddled when it encouraged and aided the industry to take on debt to achieve the "Americanization" of the bottom-fishery in the 1980s. They say that the government encouraged investment, thereby contributing to overcapitalization, and that it would be unfair for the government now to deny assistance. The proposed amendment is complex and includes many exceptions and limitations.

The Senate draft proposes to streamline the FMP process, resulting in a shorter time period for creating management plans. However, in light of the new requirements to amend all present and future FMPs to address overfishing, bycatch, and habitat, it is difficult to understand how the process will be streamlined when so many new and important objectives must be addressed. Finally, some other proposed amendments include those (1) requiring that a Native American seat be created on the Pacific Fishery Management Council; (2) adding a whistle-blower clause to protect council employees against reprisal for disclosing information to Congress or other government agencies; (3) creating plan development teams to manage highly migratory species under the jurisdiction of more than one council; and (4) amending the emergency action provisions.

**VI. Integration of the Magnuson Act with Other Laws**

It is primarily in the area of

habitat protection, especially coastal habitat protection, that the MFCMA increasingly would overlap with other federal and state laws. Among these are the Coastal Zone Management Act (CZMA), which grants states power to control development and regulate certain activities within three miles of their shores and beyond, and the Clean Water Act (CWA). The earlier House proposal to require federal agency consistency is similar to what has proven to be one of the most controversial provisions of the CZMA. Called the "consistency provision," states have used this power and other language in the CZMA to expand their influence over how their coasts are developed. Any federal development affecting the coastal zone must be consistent with a state's coastal zone management plan. Federal agency consistency determinations are sometimes disputed, and some have ended up in court. A similar consistency provision in the MFCMA might create significant overlap, confusion, and increased red tape and paperwork for a variety of EEZ users.

The relevance of other laws has not gone unnoticed by commercial fishers. Members of the fishing industry have testified before Congress requesting tougher enforcement of the CWA to help protect vital marine habitats. Like the Magnuson Act, the CWA is currently being reauthorized. The Clinton Administration has proposed sweeping changes to reduce pollution from farmlands and city sewer systems. As of May 26, 1994,

the reauthorization bill was still in committee.

While the fishing industry seeks tougher CWA enforcement provisions, it has itself enjoyed protection from other environmental laws, principally the MMPA. For years Congress has provided commercial fishers with exemptions from the marine mammal takings prohibitions of the MMPA, allowing fishers, under some circumstances, to take some marine mammals. The recently reauthorized MMPA provides for a phase-out of the exemptions, and fishers will eventually face stricter scrutiny, with the goal of reducing the taking of marine mammals by fishers to a level approaching zero. Under the reauthorized MMPA, fisheries are being prioritized on a three-tiered scale according to the amount of interaction with marine mammals. Fisheries that interact heavily with marine mammals will be ranked first, meaning that the resolution of those conflicts will get a higher priority from NMFS. The Senate's national vessel registration system, discussed earlier, notes that the program should be integrated and coordinated with similar provisions in the reauthorized MMPA.

Many leading commentators on ocean governance have stated that a new national vision of ocean governance is needed—one that integrates all activities and laws that affect oceans and coasts. They argue that a more holistic and ecosystem-wide approach to management is needed, with an emphasis on sustaining renewable

resources, especially marine mammals and commercial and noncommercial fish resources. Of course, pointing out the need for such direction and achieving it are not one and the same. However, as illustrated above, there is evidence of increased interaction and integration of various ocean-related laws.

## VII. International Considerations: Registration of High Seas Vessels

Fish, of course, do not recognize borders. This makes management of some migratory species an international issue. Efforts by one nation to conserve migratory stocks are not helpful if other nations increase their catches. Management of these species rests on treaties and international agreements. One such agreement is the International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted by the Conference of the Food and Agriculture Organization (FAO) of the United Nations on November 23, 1993. The Senate draft includes an administration-sponsored section called the High Seas Fisheries Licensing Act of 1994, which aims to meet the country's obligations under the FAO agreement. If adopted, all United States vessels operating on the high seas (areas outside recognized EEZs) will have to be licensed. The proposed licensing scheme is lengthy and complex, and violators are subject to civil and criminal enforcement provisions. The proposed Act also refer-

ences UNCLOS, which President Clinton just recently agreed to submit to the Senate for its advice and consent to U.S. accession.

Other international issues facing commercial fishers include President Clinton's adoption of the Rio Earth Summit's resource "sustainability" principle, which has already been incorporated into NMFS budget documents. Both draft bills call for sustainable yield management strategies. On August 19, the Associated Press reported that GATT will face opposition in Congress if environmental and labor concerns are not better linked to improvements in trade. The apparent concern of Congress is that other nations will continue to have an edge in trade if they are not bound by rules that ensure the health of the environment and the rights of their workers. Finally, confrontations between United States fishers and Canada have occurred on both the East and West Coasts, indicating the need for bilateral talks with our neighbors to the north. Fundamentally different philosophies regarding fishery management have impeded progress in this area.

### VIII. Conclusion

At this stage it is uncertain whether the MFCMA will be reauthorized this year. It is also too early to determine to what extent Congress will incorporate the various proposed amendments. Staffers

in the House say that the draft approved by the fisheries subcommittee deliberately deleted many controversial provisions; however, they also say that the purpose in doing so was to reserve that debate for the full Merchant Marine and Fisheries Committee. The debate over reauthorization is centered around the issues discussed above. Also, at least two trends are developing:

First, the domination of federal fishery management by commercial fishing interests is probably waning. The Marine Fish Conservation Network and other groups have determined that the nation's fisheries are a vital barometer by which the health of the nation's marine ecosystems are measured. They have pledged continued involvement during the reauthorization process and at the regional council level afterward. While they admit that protecting red snapper and pollock does not have the same popular allure as protecting whales, they aim to promote awareness and increase public participation in the fishery management process.

Second, fishery management will continue to be integrated as part of a larger scheme of international and national ocean and coastal management, along with national security objectives, oil and mineral development, marine mammal protection, commercial navigation, urban growth, and other activities. Although commercial fishing

interests and conservationists are at odds over some aspects of fishery management, it is likely that the movement toward more holistic and ecosystem-wide management of marine resources increasingly will bring them together, because both groups, albeit for different reasons, seek to ensure the long-term health of marine habitats.

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