

**PROPERTY RIGHTS, CONSERVATION, AND
INSTITUTIONAL AUTHORITY: IMPLICATIONS OF
MAGNUSON ACT REAUTHORIZATION FOR THE
MID-ATLANTIC REGION**

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I. INTRODUCTION

Final versions of bills to reauthorize The Magnuson Fishery Conservation and Management Act of 1976¹ (the Act or FCMA) were not decided as of early February, 1996. However, it is clear that the

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1. 16 U.S.C. 1801-1882 (1988 & Supp. 1995).

mood of Congress is to make significant changes in the management of the nation's fisheries in the extended economic zone (EEZ).² These changes will favor conservation over social or economic goals and specify more clearly Congress's views on social equity in fishery management decisions, including the special status of fishery-dependent communities. The proposed legislation will also change the structure of decision making, giving Congress a greater role in determining what policy is and how it is implemented. It appears to be Congress's intent to direct the Secretary of Commerce, the agency currently holding the fisheries mandate,³ to be much more proactive in preventing overfishing. Thus Congress is choosing to shift power from the regions to the federal government and change the structure of the regional fishery management council system which the Magnuson Act instituted. Finally, Congress is especially concerned about a relatively new tool in fisheries management, ITQs, or individual transferable quotas, and appears inclined to impose restrictions on their use.

II. THE MAGNUSON ACT

When Congress passed the Magnuson Fishery Conservation and Management Act in 1976, it extended the boundaries of U.S. fisheries jurisdiction to 200 miles and established eight fishery management councils to develop fishery management plans for managing fisheries in their geographical jurisdiction. Responsibility for approving and implementing the fishery management plans was given to the Department of Commerce. Two committees, the House Resources Committee⁴ and the Senate Committee on Commerce, Science and Transportation (Commerce Committee), are responsible for re-authorization of the Act. The House Resources Committee completed work on a reauthorization bill, which then went to the House floor. The House approved H.R. 39, the "Fishery Conservation and Management Amendments of 1995," on October 18, 1995. The Senate companion bill is S. 39, the "Sustainable Fisheries Act." It is still in committee and is being revised as of early February.

2. The EEZ extends from 3-200 nautical miles from shoreward baselines.

3. At this time, Congress is considering dissolving the Commerce Department and re-assigning marine fishery management.

4. The 104th Congress dissolved the House Merchant Marine and Fisheries Committee and assigned marine fisheries issues to the House Resources Committee.

Whatever the outcome of reauthorization, the Mid-Atlantic and other regions will be strongly affected by North Pacific fishery issues. This is partly due to the position of Alaskans in Congress. The new Republican majority has put Alaskans in key positions to influence the reauthorization of the Magnuson Act, with Congressman Young sitting as chairman of the House Resources Committee and Senator Stevens as chairman of the Senate Commerce Committee's Subcommittee on Oceans and Fisheries. In addition, Senator Stevens is a member of the Senate Appropriations Committee and many believe he will be its new chairman. Because of their positions on these key committees, the fate of fishery management is going to be strongly influenced by North Pacific fishery issues. In addition, conservation advocates have become powerful voices in the reauthorization process, as is reflected in the House and Senate bills.

Two very controversial issues in the North Pacific are the implementation of an ITQ system for the halibut-sablefish fishery and the potential that ITQs⁵ might also be implemented for the groundfish fishery. ITQs are also being debated in other regions, especially in New England and the Gulf of Mexico. As one Senate staff person put it, ITQs have "become the linchpin" of the process to reauthorize Magnuson. Not only are ITQs the most contentious issue Congress is addressing, but the ITQ debate is part of a larger debate over the fate of coastal communities at a time when fisheries on all coasts are considered to be overfished.

ITQs are management tools that allocate privileges or rights to harvest specified amounts of a quota to individuals or enterprises. ITQs appeal to fishery managers seeking to prevent the twin problems of overfishing and overcapitalization. Public debates about ITQs largely focus on the following issues: whether a public resource should be

5. In an open access regime for the exploitation of a common pool resource, fishers own nothing of the resource, except perhaps the right not be excluded, until they actually capture it. Limiting entry creates value in the rights of access and narrows the boundary of the group with access rights, but does not eliminate the incentives to race to capture more fish before others can. In an ITQ system, participants own shares in rights to capture a resource, although the fish or other marine resources remain in the public domain until they are captured. Depending on how the system is designed, participants can buy, sell, lease, trade, and inherit shares as they would any other property. This is very close to what is thought of as private property. However, unlike the example of a farming system based on private property rights to harvest, in a marine fisheries case the government retains the right to determine an overall quota and other aspects of the fishery that affect sustainable use of the fish stocks. To that extent ITQs may be defined as quasi-private property. They represent property in rights of access to and withdrawal from common pool and public resources, not in the resources themselves.

allocated to private interests; whether the costs and benefits of an ITQ management program are distributed in a way that is politically acceptable and socially equitable; and, whether privatization helps or hinders the task of sustainably managing wild fisheries. There is also academic debate about the extent to which ITQs fulfill the objectives of promoting more economic and administrative efficiency and relatively new debate about the organizational structure of ITQ fisheries governance.

III. BRIEF DESCRIPTION OF THE BILLS AND THE STATE OF THE CONGRESS

A. *H.R. 39, The Fishery Conservation and Management Act of 1995 Conservation Provisions*

H.R. 39 contains a number of provisions to prevent overfishing, minimize bycatch, and protect fishery habitat.

The bill changes the definition of optimum yield (OY) for a fishery management plan. Councils are required under current law to manage fisheries for OY, which is defined as maximum sustainable yield⁶ (MSY), *modified* by any relevant social, economic, or ecological factors. The House voted to change the definition to “as *reduced* by any relevant social, economic, or ecological factor,” to ensure that councils could not increase the allowable catches above MSY. The fate of fishing communities has also been tied to OY by requiring that OY be designed to provide “employment opportunities and economic benefits through the sustained participation of local community-based fleets and the coastal communities which those fleets support.”⁷

The Secretary is also required to intervene to prevent overfishing and develop a fish rebuilding program, should a Council fail to do so. In addition, the Secretary must report annually to the Councils and the Congress on the status of fisheries in danger of being overfished. The bill also requires the Councils to describe essential fishery habitat for each of their fishery management plans, based on Secretarial guidelines. In addition, federal agencies will have to notify the Secretary of any

6. Peter A. Larkin, 1979. An epitaph for the concept of maximum sustained yield. *Trans. of the Amer. Fisheries Society* 106(1): 1-11.

7. H.R. 39, 104th Cong., 1st Sess. § 3.

proposed actions the agencies might take that would damage or modify essential fishery habitat.⁸

Two sections of the bill deal with regional issues that are relevant to the Mid-Atlantic region. The State of North Carolina would become a member of the Mid-Atlantic Fishery Management Council. The bill also creates an optional “fishing capacity reduction program,” to buy out excess fishing capacity user fees collected from license holders in a limited access fishery. This program was designed for the New England groundfish fishery, which includes some Mid-Atlantic vessels and some Mid-Atlantic ports.

H.R. 39 contains a number of provisions pertaining to limited access individual quota systems.⁹ These include provisions: (1) that individual quotas are not property rights and can be rescinded or reallocated without compensation; (2) that add to the criteria for awarding individual quotas; (3) that ITQs sunset seven years after implementation; (4) that establish a schedule for user fees for individual quota holders; (5) that establish a central individual quota lien registry system;¹⁰ and (6) that create a moratorium on new limited access systems until the Secretary has written guidelines for individual quota systems. In addition, an amendment introduced and passed on the House floor does not allow individual quotas to be transferred, bought or sold (eliminating the ‘T’ in ITQs). It specifies that only participants in the individual quota fishery may hold individual quotas, and requires that unused individual quotas revert to the government for reallocation, with preference given to non-ITQ holders who are participants in that fishery. The bill exempts existing ITQ systems,¹¹ except that current systems would have a central lien registry system and the current ITQ holders would have to begin paying the user fees five years after the Act is reauthorized.

B. S. 39, the Fishery Conservation and Management Amendments of 1995

S. 39 is the Senate’s companion bill to H.R. 39. As discussed, the staff for the Ocean and Fisheries Subcommittee of the Senate Committee

8. H.R. 39, § 304.

9. H.R. 39, § 303(b)(6) (16 U.S.C. 1853(b)(6)).

10. This system makes it possible to use individual quotas as collateral, even though they are not a property right. It would therefore help small operators to buy individual quotas.

11. There are three current ITQ fisheries, the Atlantic surf clam and ocean quahog fishery, the Atlantic wreckfish fishery, and the North Pacific halibut and sablefish fishery.

on Commerce, Science, and Technology is currently redrafting S. 39. The earlier version of the bill addresses the same conservation issues that H.R. 39 addresses, so it is likely that provisions similar to those in H.R. 39 will be in the final reauthorization.¹² ITQ provisions will almost certainly be included in S. 39, although the final form of the ITQ provisions is still being debated. Senator Stevens has decided to put his weight behind a five-year moratorium on ITQs and appoint a panel to study the issues and report back to Congress. A moratorium would be a compromise between ITQ opponents and proponents because it prohibits new ITQ systems, but it does not ban them forever. In addition, a moratorium would ratify a *de facto* moratorium on new ITQs, which Senator Stevens and Congressman Livingston (Chairman of the House Committee on Appropriations) announced in a letter to National Oceanic and Atmospheric Administration (NOAA) Assistant Administrator Roland Schmitten. The moratorium prohibits work on the development or implementation of any new ITQ systems, including an ITQ system the Secretary recently approved for Gulf of Mexico red snapper, until Congress has decided what to do about ITQs.¹³ However, senators from other regions, particularly those from the Mid-Atlantic region, question the wisdom of letting regional problems shape national policy. Some of these legislators are discussing alternatives, such as establishing a moratorium for the North Pacific and possibly the Gulf of Mexico and leaving the ITQ option for the other councils. It appears unlikely that anyone is going to take up the cause of ITQs, given the Alaska Senator's strong views and constituents' mixed views on ITQs. Although the outcome is not certain, a five year moratorium is most likely. In addition, the Oceans and Fisheries Subcommittee staff indicate that current ITQ systems would be exempt, except for the lien registry and user fees after five years.

We now turn to a discussion of the impacts of proposed changes in conservation strategies and the management process for the Mid-Atlantic region.

12. An alternate version of S.39 is also being circulated, which has far fewer micromanagement provisions than either S. 39 or H.R. 39. The substitute appears to have limited support, however.

13. Letter from Senator Ted Stevens and Congressman Robert Livingston to Assistant Administrator of NOAA/NMFS, Roland Schmitten (Dec. 22, 1995).

IV. THE MID-ATLANTIC FISHERY MANAGEMENT COUNCIL

There are three federal fishery management councils responsible for managing Atlantic EEZ fisheries: the New England Fishery Management Council (NEFMC), the Mid-Atlantic Fishery Management Council (MAFMC), and the South Atlantic Fishery Management Council (SAFMC). In addition, the Atlantic States Marine Fisheries Commission (ASMFC) is responsible for management of interstate fisheries. The MAFMC has full or shared responsibility for the preparation of Fishery Management Plans for tilefish, scup, black sea bass, summer flounder, dogfish, Atlantic mackerel, Loligo squid, Illex squid, butterfish, weakfish, bluefish, angler (monkfish), surf clams, and ocean quahogs. The range of these fisheries varies, depending upon the range of the stocks, but they can extend from the United States-Canadian border in the north to the Caribbean in the south.¹⁴

At present, six states have voting memberships on the MAFMC: New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia. Each state has one obligatory membership and there are six at-large members.¹⁵ Each of the states' fisheries directors and the National Marine Fisheries Service (NMFS) regional director are also voting members. Nonvoting members include representatives of the ASMFC, the U.S. Fish and Wildlife Service, the U.S. Coast Guard, the U.S. Department of State, NOAA General Counsel, the Northeast Fisheries Center of the NMFS, a NEFMC liaison, and a SAFMC liaison.

A. *The Structure and Fate of the Mid-Atlantic Fishery Management Council*

The provision to make the State of North Carolina a member of MAFMC has been supported by the Council and by North Carolina. The addition of North Carolina is seen as appropriate because North Carolina fishermen are involved in MAFMC managed fisheries. North Carolina also will keep its membership on the SAFMC.

A proposal that appeared in the Senate but not the House was to eliminate the MAFMC, relegating its functions to the South Atlantic and

14. The MAFMC has liaisons on the SAFMC and the NEFMC. The NEFMC is the lead council for the Atlantic groundfish fishery and the Atlantic scallop fishery. Both are important fisheries for the Mid-Atlantic region.

15. As of 9/25/95 New York, Delaware, Maryland, and Virginia have one at-large member each, New Jersey has three, and Pennsylvania has none (MAFMC 1995, mimeo).

New England councils. The stated rationale for the proposal is to cut the costs of fishery management.¹⁶ This would seem an error to us, given the large and growing tasks faced by each of the councils and, even more, the relative effectiveness of the MAFMC. Over the past two decades, the MAFMC has been able to deal intelligently with very sticky issues in both domestic and foreign fisheries. It has dealt with complex joint venture issues for squid, mackerel, and other species. The Council also has taken a leadership role in bringing issues concerning habitat to the fore in federal fisheries management. The Council has often been on the cutting edge of fishery management strategy. It was among the first to institute a “framework” fishery management plan when it implemented a quota framework plan for the Atlantic surf clam and ocean quahog fishery in 1981. A “framework plan” sets the outer limits of a fishery management measure, such as the highest and lowest total allowable catch (TAC or fishery quota). The plan identifies and analyzes the social, ecological, and economic impacts of the two extremes the framework allows. The Council is then able to pick options within the range of the framework without having to develop an entirely new fishery management plan, saving considerable money and time. The Council was also the first fishery management council to develop a limited entry system, and was the first to develop an ITQ system.

B. The Effect of Proposed Conservation Provisions in Magnuson Act Reauthorization on the Mid-Atlantic Region

The conservation provisions in H.R. 39 will have mixed effects on the operations of the Mid-Atlantic Council. The Council has never allowed a fishery it is managing to exceed MSY, so the Council will not have problems with any of the provisions to eliminate overfishing. On the other hand, the provisions to protect habitat and to reduce bycatch could prove to be counterproductive. This is because satisfying these provisions could hold up action (for as much as two years, according to council staff’s estimates) on fisheries that are already stressed by overfishing or in danger of overfishing. This would be an ironic and unfortunate outcome, given Congress’s clear desire to protect and restore stressed stocks. Furthermore, satisfying these provisions will also delay work on other parts of plan development because the staff is unlikely to

16. Another proposal suggested would be to dissolve the MAFMC in order to form a single council that would manage large pelagic fisheries in the Atlantic region.

be expanded, given a predicted operating budget cut of at least 25%. From the perspective of the MAFMC staff, preventing overfishing is the prime directive, to which everything else must take a back seat. Thus, while the conservation provisions are commendable, the implications for the effect on preventing overfishing may not have been fully examined by conservation advocates.¹⁷ These effects will have a direct impact on the Mid-Atlantic fisheries for which the MAFMC is responsible.

The Council is seeing problems in squid and other once healthy fisheries because fishermen are turning to these fisheries when the fishermen are displaced by management measures designed to stop overfishing and restore stocks in other fisheries, especially the New England groundfish fishery.¹⁸ This “domino effect” puts stress on fisheries, creating the need for more stringent management. The only tool the Council has to stop the domino effect is a moratorium on licenses that is implemented before the stocks are overfished. For example, the Council thought it had been very conservative in managing *Illex* squid, but found that there were signs of stress in this so-called “underutilized” fishery. The Council, in cooperation with the NMFS, the NEFMC, and the SAFMC, has developed a moratorium on commercial fishing permits for *Illex* and Lolligo squid and butterfish, and has established guidelines for considering a moratorium on commercial permits for Atlantic mackerel when landings reach 50% of the allowable biological catch (ABC).¹⁹ The limited entry plan has been sent to the Secretary for review and approval. Not surprisingly, fishermen displaced from the groundfish fisheries of New England because of regulations designed to help restore those highly stressed stocks are lobbying very actively in Washington for the Secretary to reject the *Illex* squid limited entry amendment.²⁰

17. David Kiefer, Executive Director of the MAFMC, personal communication 2/5/96.

18. *Id.*

19. Amendment #5 to the Fishery Management Plan for the Atlantic Mackerel, Squid, and Butterfish Fisheries, Aug. 1995 (MAFMC).

20. The Council is also developing commercial vessel moratoria management plans for black sea bass (Fishery Management Plan and Draft Environmental Impact Statement for the Black Sea Bass Fishery, March 1995 (MAFMC, in cooperation with ASMFC, NMFS, NEFMC, SAFMC)) and scup (Amendment 8 to the Summer Flounder Fishery Management Plan: Fishery Management Plan and Final Environmental Impact Statement for the Scup Fishery, January 1996 (MAFMC, with ASMFC, NMFS, NEFMC, SAFMC)). These plans, as drafted, also require dealer permits, logbook reports, and permits to sell the fish managed by the Plan, as well as other measures to prevent overfishing.

C. *The ITQ Provisions*

A moratorium on new ITQ systems will eliminate a fishery management tool that has been used effectively in the Atlantic to reduce or prevent overcapitalization. The first federal ITQ system was the Atlantic surf clam and ocean quahog fishery, which the MAFMC developed and which was implemented in 1990 in order to let the fleet consolidate and eliminate overcapitalization.²¹ In a different fishery, for wreckfish, the SAFMC found ITQs very effective in preventing overcapitalization before it had occurred.²² The MAFMC is not considering any new ITQ systems at this time, but there are people in the Mid-Atlantic who are involved in the scallop and the groundfish fisheries who would support ITQs for those fisheries.

D. *Effect of ITQ Provisions in Magnuson Act Reauthorization on the Atlantic Surf Clam and Ocean Quahog Fishery*

As discussed, current ITQ programs, including the surf clam and ocean quahog system, would be exempted from ITQ provisions being considered by Congress. Exceptions are participation in a central ITQ lien-registry and payment of user fees, after five years. The industry is in favor of the lien-registry system; it asked Congress for the lien registry in order to make it easier for smaller operators to purchase ITQs. The majority of ITQ holders have reluctantly agreed to user fees, provided they are collected for the sole purpose of managing the fishery. The five-year delay in imposition of user fees is intended to allow those who purchased ITQs to pay off their loans before they are required to pay a fee that they did not expect when they incurred the debts.

Several studies examine the economic, social, and legal implications of ITQs in the Atlantic surf clam and ocean quahog fishery.²³ It is often viewed as a telling instance of how rapidly the distribution of ownership and wealth can change once fishing rights are

21. This was also the first federal fishery to have a limited entry system, beginning in 1977.

22. John R. Gauvin, *The South Atlantic Wreckfish Fishery: A Preliminary Evaluation of the Conservation Effects of a Working ITQ System*, in *LIMITING ACCESS TO MARINE FISHERIES: KEEPING THE FOCUS ON CONSERVATION* 169-83 (Karyn L. Gimbel, ed., 1994).

23. Bonnie J. McCay, *ITQ Case Study: Atlantic Surf Clam and Ocean Quahog Fishery*, in *LIMITING ACCESS TO MARINE FISHERIES: KEEPING THE FOCUS ON CONSERVATION* 75-97 (Karyn L. Gimbel, ed., 1994).

privatized.²⁴ Decline in the number of vessels and people in the industry was pronounced after 1990.²⁵ However, this fishery had a very high degree of asymmetry and concentration of ownership and wealth prior to the onset of ITQs in the 1990s;²⁶ consequently, there has been very little change in that regard, although there have been other structural changes that have affected bargaining relationships between buyers and sellers of clams and quotas.²⁷ Moreover, the main purpose of the ITQ systems was to promote an industry-funded buyout of excess fishing capacity of a fleet that was prevented from consolidating under the prior management regime.²⁸ Antitrust issues have been raised, but one court decided that the NOAA behaved rationally in its design of the Atlantic surf clam and ocean quahog system and that market power was not impermissibly abused.²⁹ The Atlantic surf clam and ocean quahog ITQ case may also fit the prediction that individualized quota systems are more likely than competitive quota systems to enable the development of effective and

24. See, e.g., Greer, Jed. 1995, *The Big Business Takeover of US Fisheries: Privatizing the Oceans Through Individual Transferable Quotas (ITQs)*. Washington, DC: Greenpeace, US; Amsterdam, Greenpeace International, pp. 3-6-6 et seq. Environmental groups have a wide range of perspectives on ITQs; the Environmental Defense Fund is among those which are hopeful that ITQs are tools for conservation as well as economic efficiency (Environmental Defense Fund 1994. *ACHIEVING SUSTAINABLE FISHERIES IN AMERICA WITH INCENTIVE-BASED LIMITED ACCESS POLICIES*. New York, draft dated January, 1994). See also Lee G. Anderson, 1996, *Access Control in Fisheries: The Views of Environmental Groups*. OCEAN AND SHORELINE MANAGEMENT, in press.

25. Stanley Wang, *The Surf Clam ITQ Management: An Evaluation*, in *MARINE RESOURCE ECONOMICS* 10, 93-98. Also see Thomas B. Hoff, 1993, *The Surf Clam (*Spisula solidissima*) and Ocean Quahog (*Arctica islandica*) Fishery—The First U.S. ITQ System*. Paper presented to the Annual Meeting of the American Fisheries Society, Portland, Oregon, August 1993.

26. Carolyn F. Creed, 1991, *Cutting Up the Pie: Private Moves and Public Debates in the Social Construction of a Fishery*. Unpublished Ph.D. Dissertation. New Brunswick: Rutgers University.; McCay, Bonnie J. and Carolyn F. Creed, *Social structure and debates on fisheries management in the Mid-Atlantic surf clam fishery*, in *OCEAN & SHORELINE MANAGEMENT* 13, 199-229 (1990). McCay, Bonnie J. and Carolyn F. Creed, *Dividing up the commons: management of the U.S. surf clam fishery*, in *PROCEEDINGS OF MARINE RESOURCE UTILIZATION: A CONFERENCE ON SOCIAL SCIENCE ISSUES*, Mobile, Alabama, University of South Alabama, May 4-6, 1988.

27. Bonnie J. McCay, Richard Apostle, Carolyn F. Creed, Alan C. Finlayson, & Knut Mikalsen, *Individual Transferable Quotas (ITQs) in Canadian and U.S. Fisheries*, in *OCEAN AND SHORELINE MANAGEMENT*, in press (1996).

28. AMENDMENT #8 TO THE FISHERY MANAGEMENT PLAN FOR THE ATLANTIC SURF CLAM AND OCEAN QUAHOG FISHERY, July 1988 (MAFMC, 1989).

29. *Sea Watch Int'l v. Mosbacher*, 762 F. Supp. 370, 376, 378, 380-81 (D.D.C. 1991). See also William J. Milliken, *Individual Transferable Quotas and Antitrust Law*, in *OCEAN AND COASTAL LAW JOURNAL* vol. 1 (no.1), 35-37 (1994), who argues in his review of this and other cases that although antitrust concerns were legitimate, ITQ systems can be designed to make violations of antitrust laws unlikely.

responsible participation in fisheries management by members of the industry.³⁰

V. THE OTHER ISSUE—THE STRUCTURE OF DECISION-MAKING

Connected with the ITQ issue in reauthorization is the issue of whether the federal government or the region should make decisions about implementing national fisheries management policy. The Magnuson Act was designed to promote regional and participatory decision making, with national review and approval by the Secretary of Commerce. The regional fishery management councils established by the Act were empowered to create fishery management plans and amendments to those plans. The effect of constraints on ITQs and other features of the current reauthorization bills is to take power back to the federal level of government, reducing the decision making power and flexibility of the regional fishery management councils. This is ironic, given the more general trend in the nation to reduce the presence of federal institutions in favor of local institutions. Whether this is wise is an important question. The Mid-Atlantic region has been the site of important innovations in fisheries management. It is possible that the capacity and incentives for innovativeness will be reduced by the 104th Congress, and this may be unfortunate given the lack of clear consensus in the scientific and management community about policies that will help curb overfishing and promote sustainable development.

30. McCay et al., *op.cit.* Cf. Anthony Scott, *Obstacles to Fishery Self-Government*, in *MARINE RESOURCE ECONOMICS* 8, 187-199 (1993).