

# ISSUES SURROUNDING THE GULF OF MEXICO RED SNAPPER FISHERY AND THE IMPACT OF THE MAGNUSON ACT REAUTHORIZATION

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## I. INTRODUCTION

As fisheries crises attract attention from National Geographic and other popular media,<sup>1</sup> public awareness of declining fish stocks steadily grows and along with it a nagging fear that the ocean's bounty may not be endless. Although the United States ranks as one of the top eleven fishing countries in the world,<sup>2</sup> the National Marine Fisheries Service (NMFS) estimates that over half of the nation's commercially targeted fish species are overfished.<sup>3</sup> Fishing is big business in the coastal states, and powerful lobbyists rise to defend the industry's right to continue to fish and overfish. It is in this setting that the United States Congress attempts to reauthorize the Magnuson Fisheries Conservation and Management Act (Magnuson Act).<sup>4</sup>

Two Magnuson Act reauthorization issues which directly impact the Gulf of Mexico fishery region are bycatch and limited access systems. First, bycatch, the incidental take of species associated with targeted species,<sup>5</sup> significantly decreases fish stocks in the Gulf. For example, every pound of shrimp caught in the Gulf of Mexico results in four

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1. Michael Profit & Robb Kendrick, *Diminishing Returns: Exploiting the Ocean's Bounty*, NAT'L GEOGRAPHIC, Nov. 1995, at 2; see also Roger DiSilvestro, *Are We Headed Toward a Fishless Ocean?*, DEFENDERS, Spring 1995, at 26; Carl Safina, *The World's Imperiled Fish*, SCI. AM., Nov. 1996, at 46; Wilton Woods, *Rescaling the Fishing Industry*, FORTUNE, Sept. 18, 1995, at 28; Deborah Cramer, *Troubled Waters*, ATLANTIC MONTHLY, June 1995, at 22.

2. DiSilvestro, *supra* note 1, at 26.

3. *Id.* at 28.

4. 16 U.S.C. §§ 1801-1882 (1988).

5. KENNETH J. ROBERTS, LOUISIANA SEA GRANT COLLEGE PROGRAM, *DEFINING FISHERIES: A USER'S GLOSSARY* 3 (1991, rev. 1995).

pounds of fish discarded as bycatch waste.<sup>6</sup> The reauthorization incorporates a definition for bycatch and requires reductions in bycatch to avoid waste. Second, limited access systems promise to reduce fishing pressure on strained stocks and improve the economic efficiency in U.S. fisheries. Traditionally, the development and implementation of limited access systems was left to the regional councils; however, the reauthorization may preempt council action on Individual Transferable Quota systems (ITQs).<sup>7</sup> Specifically, the imposition of federal guidelines for ITQs threatens the implementation of the red snapper ITQs in the Gulf region.

Although the Gulf Council manages hundreds of fish through its fishery management plans, the red snapper fishery presents some of the most complex management problems and will be significantly affected by the Magnuson Act reauthorization. Red snapper management problems arise from different user groups, commercial and recreational, competing in the same fishery for fewer and fewer fish. The red snapper decline is attributed, in large part, to the millions of young red snappers killed annually by shrimp trawl bycatch,<sup>8</sup> bycatch which cannot be reduced through the red snapper fishery management plan (FMP) because the Gulf Council advocates maintaining or increasing annual catches for the red snapper fishery.<sup>9</sup>

In 1990, the Gulf Council considered closing the directed fishery because the entire Allowable Biological Catch (ABC)<sup>10</sup> was being harvested as bycatch of the shrimp trawl fishery.<sup>11</sup> In the absence of viable alternatives for reducing trawl bycatch, the Gulf Council added

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6. GULF OF MEXICO FISHERY MANAGEMENT COUNCIL, DRAFT AMENDMENT NUMBER 9 TO FISHERY MANAGEMENT PLAN FOR THE SHRIMP FISHERY OF THE GULF OF MEXICO, U.S. WATERS 4 (1995) [hereinafter SHRIMP AMENDMENT 9].

7. After the Magnuson Act (FCMA) passed in 1976, emphasis was placed on improving the economic efficiency of U.S. fisheries through limited access. Access can be limited either by capping the number of licenses or by giving fishery participants individual quotas. Under the ITQ system, individual quotas may be transferred, leased or sold.

8. SHRIMP AMENDMENT 9, *supra* note 6, at 4.

9. C. PHILLIP GOODYEAR, SOUTHEAST FISHERIES SCIENCE CENTER, RED SNAPPER IN U.S. WATERS OF THE GULF OF MEXICO 48 (1995).

10. The regulations define ABC as "a preliminary description of the acceptable harvest (or range of harvests) for a given stock or stock complex." 50 C.F.R. § 602.11(e) (1995).

11. AMENDMENT 11 TO THE REEF FISH FISHERY MANAGEMENT PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO 3 (1995) [hereinafter REEF FISH AMENDMENT 11]. *See also* NATIONAL MARINE FISHERIES SERVICE, U.S. DEPARTMENT OF COMMERCE, COOPERATIVE RESEARCH PROGRAM ADDRESSING FINFISH BYCATCH IN THE GULF OF MEXICO AND SOUTH ATLANTIC SHRIMP FISHERIES (1995) [hereinafter NMFS REPORT].

flexibility to its annual framework procedure to allow the continuation of red snapper fishing through the use of quotas.<sup>12</sup> However, commercial catch quotas were filled so quickly in 1991 and 1992 that closure of the fishery was required during those years.<sup>13</sup> The 1992 closure created such socioeconomic hardship for commercial fishermen that an emergency rule<sup>14</sup> reopened the fishery for an additional month. After this incident, a moratorium on the issuance of new reef fish permits was implemented. Still struggling with declining stock, the Council extended the target year for population recovery<sup>15</sup> and implemented a new endorsement system.<sup>16</sup> Subsequently, the Gulf Council proposed a plan to reduce red snapper bycatch by fifty percent in 1994 through the mandatory use of finfish

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12. The Gulf Council changed the procedure for specifying TAC by allowing the target date for rebuilding an overfished stock to be changed depending on scientific advice, except that the rebuilding period could not exceed 1.5 times the generation time of the species. The Council revised the FMP's primary objective, changed definitions of optimum yield and overfishing and replaced the twenty percent SSBR target with twenty percent SPR and established a new red snapper target year of 2007 for achieving the SPR goal. GULF OF MEXICO FISHERY MANAGEMENT COUNCIL, AMENDMENT 8 AND ENVIRONMENTAL ASSESSMENT (EFFORT MANAGEMENT AMENDMENT) TO THE REEF FISH FISHERY MANAGEMENT PLAN FOR THE REEF FISH RESOURCES OF THE GULF OF MEXICO 3 (1995) [hereinafter REEF FISH AMENDMENT 8].

13. The 1991 commercial limit was filled by August closing the commercial fishery for the remainder of the year. In 1992, extremely heavy commercial harvest rates resulted in the quota being filled by February, just 53 days into the fishing year. REEF FISH AMENDMENT 11, *supra* note 11, at 4.

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(1) If the Secretary finds that an emergency exists involving any fishery, he may promulgate emergency regulations necessary to address the emergency, without regard to whether a fishery management plan exists for such fishery.

(2) If a Council finds that an emergency exists involving any fishery within its jurisdiction, whether or not a fishery management plan exists for such fishery—

(A) the Secretary shall promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by unanimous vote of the members who are voting members, requests the taking of such action; and

(B) the Secretary may promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by less than a unanimous vote, requests the taking of such action.

16 U.S.C. § 1855(e).

15. A 1992 regulatory amendment changed the target year to achieve a twenty percent SPR from 2007 to 2009, based on the plan provision that the rebuilding period may be for a time span not exceeding 1.5 times the potential generation time of the stock and an estimated red snapper generation time of thirteen years. REEF FISH AMENDMENT 11, *supra* note 11, at 5.

16. Permittees with red snapper endorsements are allowed a 2,000 pound possession limit while permittees without the endorsement are only allowed 200 pounds. REEF FISH AMENDMENT 8, *supra* note 12, at 4.

excluder devices (FEDs) on shrimp trawls, reductions in fishing effort, area or seasonal closures of the shrimp fishery, or a combination of these actions.

Despite these efforts, the Gulf Council has been unable to reduce shrimp trawl bycatch significantly, and red snapper continues to decline. In response to failed attempts at red snapper recovery, the Gulf Council developed a limited access program based on ITQs. Under the program, quotas are initially allocated to eligible individuals and may subsequently be transferred to other persons or corporations. House Bill 39 and Senate Bill 39 prohibit or significantly restrict the transferability of quota shares and may preclude implementation of the program.

## II. BYCATCH REDUCTION

Shrimp trawl bycatch kills millions of juvenile red snapper annually.<sup>17</sup> In 1993 alone, the estimated number of red snapper caught as shrimp trawl bycatch was thirty-four million.<sup>18</sup> Because the juvenile red snapper are too small to retain,<sup>19</sup> they are thrown back in the water where ninety percent die,<sup>20</sup> significantly reducing the stock's ability to rebuild.<sup>21</sup> The Gulf Council's attempts to reduce bycatch<sup>22</sup> remain ineffective due to a Congressional moratorium and research program which effectively halts Council action for four years.<sup>23</sup> The Magnuson Act reauthorization may remove this moratorium and require immediate implementation of programs to reduce bycatch.

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17. Since 1972, the estimated number of red snapper discarded as bycatch has never fallen below fifteen million. Moreover, since 1990, the number has not fallen below thirty million. GOODYEAR, *supra* note 9, at 34.

18. SHRIMP AMENDMENT 9, *supra* note 6, at 4.

19. NMFS REPORT, *supra* note 11, at 7. See also REEF FISH AMENDMENT 8, *supra* note 12. The Reef Fish FMP in 1990 imposed a thirteen-inch total length size limit for red snapper. *Id.* at 2. A 1994 amendment (Amendment 5) to the Reef Fish FMP increased the size limit to fourteen inches and proposed an increase to sixteen inches over a period of five years. *Id.* at 4.

20. GOODYEAR, *supra* note 9, at 36.

21. NMFS REPORT, *supra* note 11, at 7.

22. Amendment 9 to the Shrimp FMP proposes to reduce red snapper bycatch mortality by fifty percent. SHRIMP AMENDMENT 9, *supra* note 6, at 4. A 1991 Regulatory Amendment to the Reef Fish FMP (governing red snapper) adopted a proposal to reduce red snapper bycatch by fifty percent through FEDs, reduction in effort or seasonal closures. *Id.* at 7.

23. The incidental harvest provision of the Magnuson Act states that "the Secretary may not implement any measures under this chapter to reduce incidental mortality of nontarget fishery resources in the course of shrimp trawl fishing which would restrict the period during which shrimp are harvested or would require the use of any technological device or other change in fishing technology." 16 U.S.C. § 1854(g)(6)(A). See also NMFS REPORT, *supra* note 11.

The House Bill addresses bycatch in several areas. It modifies the Magnuson Act policy and national standards,<sup>24</sup> adds a new definition for bycatch,<sup>25</sup> requires completion of incidental harvest research,<sup>26</sup> requires a study on contribution of bycatch to charitable organizations,<sup>27</sup> and specifically targets the Gulf of Mexico for fishery assessments and monitoring including a study on red snapper management.<sup>28</sup> The Gulf Council welcomes Congress's emphasis on bycatch reduction with the reservation that each Council retain the ability to manage regional problems.<sup>29</sup> The final compromise between the House Bill and the Senate Bill will determine future actions of the Gulf Council in reducing red snapper bycatch.

When the Magnuson Act was first enacted, Congress focused its attention on developing a domestic fishing fleet rather than reducing bycatch.<sup>30</sup> As fishery resources dwindled and the domestic fleet size increased, bycatch emerged as a controversial issue. The term "bycatch" is commonly used to describe "[t]he harvest of fish or shellfish other than the species for which the fishing gear was set."<sup>31</sup> House Bill 39 restricts the definition of bycatch to fish "not sold or kept for personal use."<sup>32</sup> The House Bill definition accurately addresses waste; however, it creates a loophole for bycatch. Fish caught incidental to targeted species no longer constitute bycatch if the incidental catch is sold on the market. The Gulf Council plans to address bycatch in the shrimp fishery and reduce the trawl bycatch mortality rate of juvenile snappers by fifty percent, which may be circumvented under this new catch by definition.<sup>33</sup> Simply put,

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24. The Magnuson Act policy is amended to "minimize bycatch." H.R. 39, 104th Cong., 1st Sess. § 3(c) (1995). The national standards contain new language so that "[c]onservation and management measures shall, to the maximum extent practicable, minimize bycatch." H.R. 39 at § 7.

25. H.R. 39 at § 4(b).

26. H.R. 39 at § 10(d).

27. H.R. 39 at § 23.

28. H.R. 39 at § 22.

29. Testimony of Julius Collins, Chairman of the Gulf of Mexico Fishery Management Council, before the Subcommittee on Oceans and Fisheries of the Senate Committee on Commerce, Science and Transportation (May 13, 1995) [*hereinafter* Testimony of Julius Collins].

30. One of the purposes of the Magnuson Act is "to promote *domestic* commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(3) (emphasis added).

31. ROBERTS, *supra* note 5, at 3.

32. The House Bill defines bycatch as "(34) The term 'bycatch' means fish which are harvested by a fishing vessel, but which are not sold or kept for personal use, including economic discards and regulatory discards." H.R. 39 § 6.

33. SHRIMP AMENDMENT 9, *supra* note 6.

shrimp fishermen may sell their incidental take of red snapper and not be subject to Gulf Council bycatch reduction measures.

The House Bill addresses bycatch research for the Gulf region, making permanent the program to assess shrimp trawl bycatch impact and mandating the completion of the incidental harvest research program.<sup>34</sup> The Gulf Council supports the continuation of research, specifically the incidental harvest research program.<sup>35</sup> The Council credits the program with providing the information and gear technology necessary to amend the Shrimp FMP aimed at reducing bycatch.<sup>36</sup> However, under Representative Goss's amendment, research alone is no longer sufficient to address the bycatch problems in the shrimp industry.<sup>37</sup> The Goss Amendment strikes the bycatch reduction exemption granted to shrimpers during the last research period.<sup>38</sup> Without the exemption, shrimp fishermen may be required by the Department of Commerce to install bycatch reduction devices (BRDs) or finfish excluder devices (FEDs) in their trawl nets shortly after passage of the reauthorization.

BRDs and FEDs exclude fish either by having two different size mesh nets separate the fish from the shrimp or by creating a hole in the net to allow fish to swim free. In most cases, shrimp are swept to the back end of the net by the current and are kept away from the excluder device. Although shrimp catch losses would result in less than ten percent loss,<sup>39</sup> shrimpers barely turning a profit are adamantly opposed to any bycatch reduction device. The shrimpers claim that installation of turtle excluder devices (TEDs) decreased the shrimp catch by allowing shrimp to escape through the turtle escape hatch in the upper part of the

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34. H.R. 39 § 10. The House Bill mandates a "systematic program for the assessment and annual reporting to the public of the status of Gulf of Mexico fisheries; development of a plan for the Gulf of Mexico region to collect, assess, and report statistics concerning the fisheries; . . . and an independent analysis regarding Gulf of Mexico red snapper." H.R. 39 § 22.

35. Testimony of Julius Collins, *supra* note 29.

36. *Id.*

37. Representative Porter Goss (R-Fla.) introduced an amendment to the House Bill which strikes the provision preventing the Commerce Department from requiring shrimp fishermen to use incidental harvest reduction devices. 141 Cong. Rec. H 10242. The amendment passed by a vote of 294 to 129 on October 18, 1995. *Id.*

38. 16 U.S.C. § 1854(g)(6)(A).

39. Depending on the placement of the "fisheye," retention of shrimp can range from 90% to 97% and release of red snapper over Age 1 ranges from 40% to 60%. SHRIMP AMENDMENT 9, *supra* note 6, at 11.

trawl net. Shrimpers view the requirement of BRDs or FEDs as another form of federal intervention which will harm the shrimping industry.<sup>40</sup>

The House Bill requires any shrimp bycatch measure implemented to apply throughout the range of the fishery resource concerned.<sup>41</sup> Thus, a BRD required to reduce shrimp trawl bycatch of red snapper may be required in all shrimp trawl nets, even those nets used in areas where red snapper are not prevalent. The Gulf Council supports the emphasis on bycatch in HR 39 “with the caveat that the Gulf Council retain the authority to address its own regional problems relating to bycatch.”<sup>42</sup> The Gulf Council would like to reduce bycatch in problem areas, but not unilaterally.

The reauthorization contains provisions to alleviate the burden on small, local fishermen. The Miller Amendment requires regional councils to take into account the historic participation of local community-based fishing fleets in the fishery and provide for sustained participation of those fleets and communities when creating fishery management plans.<sup>43</sup> The Gulf Council supports the Miller Amendment since many of the region’s smaller communities are largely or wholly dependent on fishing activities<sup>44</sup> and the increased cost of BRDs may prove economically disastrous for some local fishermen.<sup>45</sup> Whether the Miller Amendment will extend to defraying costs required by bycatch reduction measures remains to be seen.

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40. Shrimp fishermen believe that TEDs have a negative impact upon their fishing operations and further bycatch regulations will force many fishermen out of business. J. STEPHEN THOMAS ET AL., UNIVERSITY OF SOUTH ALABAMA, SHRIMP FISHERMEN ON THE EVE OF BYCATCH REGULATIONS: A REPORT TO THE GULF OF MEXICO FISHERY MANAGEMENT COUNCIL 11 (1995).

41. The House Bill states: “(7) Any measure implemented under this Act to reduce the incidental mortality of nontargeted fishery resources in the course of shrimp trawl fishing shall apply to such fishing throughout the range of the nontargeted fishery resource concerned.” H.R. 39 at § 10(d).

42. Letter from Julius Collins, Chairman Gulf of Mexico Fishery Management Council 1 to David Whaley (May 18, 1995) (on file with authors).

43. Representative Miller introduced an amendment which required regional councils to take into account the historic participation of local community-based fishing fleets when developing fishery management plans and to provide for sustained participation of those fleets and communities. 141 Cong. Rec. H 10223. The Miller Amendment passed the House on October 18, 1995. *Id.*

44. Testimony of Julius Collins, *supra* note 29.

45. Over one half of the shrimp fishermen interviewed in a sociological study believed they would continue in the fishery after bycatch regulations were in place for two to three years. THOMAS, *supra* note 40, at 11-12.

### III. INDIVIDUAL TRANSFERABLE QUOTAS

#### A. *Gulf Council Plan*

In 1992, the Gulf Council initiated studies<sup>46</sup> regarding the development of a limited entry system for the red snapper fishery management plan.<sup>47</sup> As part of the studies, three series of workshops were completed to evaluate red snapper effort management<sup>48</sup> in the South Atlantic and Gulf regions. In January 1993, the Gulf Council voted eleven to six to move ahead with a limited entry system for the red snapper which implements an individual transferable quota system (ITQ) to fairly and equitably distribute quotas among commercial and recreational fishermen in the Gulf of Mexico red snapper fishery.<sup>49</sup> The Council selected ITQs as the preferred management option principally because ITQs alleviate the problems of a derby fishery<sup>50</sup> and should result in the largest increase in net economic benefits while achieving

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46. Dr. Michael Orbach, a social anthropologist, held workshops in locations from Port Isabel, Texas to Madeira Beach, Florida from June 1992 through December 1992 to discuss with fishermen the problems and issues in the red snapper fishery, evaluate fishermen's perceptions of limited access alternatives and develop options for red snapper effort management for the Council's consideration.

47. The Magnuson Act authorizes any Council to establish a limited entry system, including ITQs, with the following language:

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary with respect to any fishery, may—

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations.

16 U.S.C. § 1853(b)(6).

48. REEF FISH AMENDMENT 8, *supra* note 12, at 6. Effort is generally defined as the amount of time and fishing power used to harvest fish. ROBERTS, *supra* note 5, at 6.

49. After years of management proposal review and public hearings held between January 1993 and May 1995, the Council drafted Amendment 8 to the Reef Fish Fishery Management Plan and selected the ITQ system as the preferred alternative to the red snapper effort management. REEF FISH AMENDMENT 8, *supra* note 12, at 5-7.

50. The 1993, 1994, and 1995 red snapper seasons, when bag limits and pound quotas were reached within 95, 77, and 50 days, respectively, resulted in depressed red snapper prices at market and forced fishermen to fish in dangerous weather conditions. REEF FISH AMENDMENT 8, *supra* note 12, at 5.

optimum yield (OY).<sup>51</sup> In June of 1995, the Secretary approved the Gulf Council's ITQ program which was scheduled to take effect on April 1, 1996.<sup>52</sup>

The red snapper ITQ system restricts the allocation of red snapper share certificates among fishery participants. Initially, the share certificates will be distributed to persons qualifying as owners or operators of currently permitted reef fish vessels and historical captains.<sup>53</sup> Limited transferability controls the further allocation of quota shares as follows: within the first six months of the initial distribution, shares are nontransferable;<sup>54</sup> for the following eighteen months, shares may only be transferred "among those who were eligible to receive a red snapper ITQ allocation at the start of the ITQ program;"<sup>55</sup> and, after the initial two years of implementation, all eligibility requirements for the transfer of shares are removed with the exception that transfers be limited to "natural persons."<sup>56</sup> Moreover, the equitable allocation of quota shares remains protected against monopolizing corporations or persons by the four-year

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51. The current version of the Magnuson Act provides for the "preparation and implementation . . . of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery." The Act defines optimum yield as:

The amount of fish—

- (A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and
- (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.

16 U.S.C. § 1802(18).

52. 50 C.F.R. Part 641 (1995); *see also* REEF FISH AMENDMENT 8, *supra* note 12.

53. The preferred alternative for eligibility for initial allocation of ITQ shares authorizes the Council to "[i]ssue ITQ shares to all eligible applicants who, based on the historical catch records of vessels they owned or operated, had red snapper landings between 1990 and 1992, and who had the requisite eligibility status on: . . . c. Date of publication of proposed rule for this amendment." REEF FISH AMENDMENT 8, *supra* note 12, at 38.

54. Transfers were limited to 6 months after the beginning of the program to allow NMFS time to prepare for the administrative burden of transfers while providing for the efficient operation of the system. REEF FISH AMENDMENT 8, *supra* note 12, at 45.

55. In order to remain consistent with section 303(b)(6) of the Magnuson Act, the Council gave preferential treatment to existing reef fish fishermen and the historical participants in the fishery. *Id.*

56. After the 2-year mark, the program shall "provide no eligibility requirements on the transfer of ITQ shares, except as those provided under ownership restrictions or rule violations. Transfer of ITQ shares is limited to natural persons who are U.S. citizens or permanent resident aliens." *Id.*

limited duration of the system.<sup>57</sup> After the initial four years of implementation, the Council shall evaluate the system for its effectiveness, cost of enforcement and the accumulation of an excessive ratio of shares by any participant.<sup>58</sup> Based on that evaluation, the system may be extended, modified, or terminated.<sup>59</sup> Given the restricted transferability of shares and the limited duration, the red snapper ITQ promotes the fair and equitable allocation of quota shares among fishery participants.

Red snapper fishery participants raise questions regarding whether NMFS and the Gulf Council can enforce the red snapper ITQ system.<sup>60</sup> Their concern is grounded in the skepticism that fishery participants will limit their take of red snapper to their share allocation. Given the large number of red snapper landings in the Gulf of Mexico,<sup>61</sup> the concern may be legitimate because monitoring the take of every fishing vessel and person in the fishery will prove to be an impossible task. Moreover, fear that reporting a fellow fisherman for excessive landings may result in retaliation prevents community enforcement.<sup>62</sup>

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57. According to NMFS' National Standard Guidelines for Fishery Management Plans, an allocation of fishing privileges must be designed to avoid creating conditions that foster the acquisition by any person of an inordinate share of fishing privileges or control by buyers and sellers that would not otherwise exist. 50 C.F.R. § 602.14(c)(3)(iii) (1995). Although the National Standard Guidelines do not specifically define an "excessive share," they imply conditions of monopoly or oligopoly. The Council does not believe that a monopoly will occur under its ITQ system and expects that owners/operators will remain the dominant entities in the fishery. Therefore, the Council recommended no limit on ownership of ITQ shares, and it is anticipated that this will not lead to overall market control of the red snapper fishery. 60 Fed. Reg. 61,200, 61,202 (1995).

58. The Council chose as the preferred alternative to "confer on an ITQ share certificate holder the privilege to harvest the specified amount for four years after inception of the program after which the program may be extended." The Council selected the preferred alternative to resolve concerns that the system may not produce the expected benefits for fishermen and "because the four-year period would keep windfall profit and speculation to a minimum." REEF FISH AMENDMENT 8, *supra* note 12, at 30-31.

59. *Id.* at 31.

60. Public Testimony, The Gulf of Mexico Fishery Management Council Reef Fish Management Committee meeting (Nov. 14, 1995) (on file with authors) [*hereinafter* Public Testimony].

61. In 1994, approximately 3.5 thousands of tons of red snapper were harvested from the Gulf of Mexico. Subsequent to meaningful conservation action imposed in 1990 through the Magnuson Act, both the commercial and recreational landings have been increasing. GOODYEAR, *supra* note 9, at 35.

62. Public testimony given at the Gulf Council meeting on Reef Fish Management addressed the possibility that fishery participants who contact authorities regarding the illegal conduct of other participants "may find their boats burned the next day." Public Testimony, *supra* note 60.

NMFS and the Gulf Council assure participants that the program is enforceable.<sup>63</sup> The slower-paced fishery that is anticipated under the ITQ program will be easier for NMFS to monitor, particularly with fewer fishermen operating over a longer season. Participants in the program are expected to assist in reporting illegal activities in order to maintain the benefits of safer and more relaxed fishing periods, higher market prices and the profitability of share transfers. The participants are further expected to assist enforcement to maintain their vested interest in an exclusive "right to fish."<sup>64</sup> ITQ shareholders will also report to enforcement officials any illegal or unreported landings because these landings will eventually result in adverse effects on the stock condition which may result in quota reductions. Further, public support for the program is expected to increase as the benefits of the system emerge, and thus more participants will report violators who frustrate the system's purpose.<sup>65</sup>

*B. The Impacts of the Magnuson Amendments on ITQs*

Controversy surrounds the implementation of ITQs because the system, by itself, neither safeguards against the inequitable distribution of stock nor prevents corporations or persons from gaining an inequitable number of quota shares. Both the House and Senate versions of the Magnuson Amendments address these concerns with provisions for ITQs which protect against the inequitable allocation of quota shares by restricting transferability. These provisions threaten the implementation of the red snapper ITQ system which relies on transferability as an essential element of the management scheme.

House Bill 39, which passed on October 18, 1995, by a vote of 388 to 37 in the House of Representatives, authorizes the establishment of ITQs but prohibits their transferability. Section 16 of the House Bill amends section 303(b)(6) of the Magnuson Act, authorizing the Council or the Secretary to prepare ITQ systems to achieve optimum yields for a specified fishery and, when establishing ITQs, to take into account "the

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63. Reef Fish Fishery of the Gulf of Mexico; *see also* REEF FISH AMENDMENT 8, *supra* note 12; 60 Fed. Reg. 61,200, 61,203 (1995).

64. The red snapper ITQ system confers a vested interest upon participants by allowing them to exclusively fish a portion of the quota. Transferable quotas create economic interests which may be exploited by persons or corporations monopolizing inequitably large proportions of quota shares.

65. REEF FISH AMENDMENT 8, *supra* note 12, 60 Fed. Reg. 61,200, 61,203 (1995).

need to promote conservation.”<sup>66</sup> However, House Bill 39 eliminates the transferability of individual quotas, decreasing the value of quota shares considerably and resulting in the inefficient allocation of quota shares among fishery participants.<sup>67</sup> Nontransferable quota shares hold little or no market value for recipients who fail to reach their quota. The Senate version also obstructs the implementation of a transferable quota system in the near future. Although not yet finalized, Senate Bill 39 requires the Secretary to develop guidelines for ITQs after consultation with the Councils and public notice.<sup>68</sup> Without expressly prohibiting transferability, Senate Bill 39 places a moratorium on the implementation of the red snapper ITQ by requiring the Secretary to publish in the federal register a five year “strategic plan” regarding fisheries research, for submission to Congress, and provide recommendations on the guidelines developed by the Secretary.<sup>69</sup> Although cooperation among the Secretary and Councils for research and development of ITQ guidelines seems pragmatic, the interim moratorium renders the Council’s power to develop limited entry systems under section 303(b)(6) a nullity.<sup>70</sup>

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66. H.R. 39, 104th Cong., 1st Sess. at § 16(A)(I) (1995).

67. Special provisions for individual quota systems require that “any individual quota system established for a fishery after the date of enactment of the Fishery Conservation and Management Amendments of 1995—(A) shall not allow individual quota shares under the system to be sold, transferred, or leased.” H.R. 39 at § 16(G) (6).

68. S. 39 strikes section 303(c) of the current Magnuson Act and inserts the following language:

- (f) Individual Transferable Quotas
  - ...
  - (2) The Secretary shall promulgate, after consultation with the Councils and public notice and comment, mandatory guidelines for the establishment of any individual transferable quota system;
  - ...
  - (4) ... The Secretary shall establish an advisory panel on individual transferable quotas ... [to] provide recommendations on the guidelines required under paragraph (2) ...”

S. 39, 104th Cong., 1st Sess. at § 111(f) (1995).

69. The current version of S. 39 requires, “[w]ithin one year after the date of enactment of the Sustainable Fisheries Act, and at least every 3 years thereafter, the Secretary to develop and publish in the Federal Register a strategic plan for fisheries research for the five years immediately following such publication.” S. 39 at § 205(b).

70. In testimony given before the Senate Subcommittee on Oceans and Fisheries, Julius Collins, Chairman of the Gulf of Mexico Fishery Management Council, expressed the Council’s opposition to the interim moratorium on the implementation of ITQs while NMFS developed guidelines for limited entry systems after three years of development and approval by the Council of the red snapper ITQ system. Testimony of Julius Collins, *supra* note 29.

Furthermore, the controversy surrounding the transferability of ITQs led Congress to eliminate all funding for the red snapper ITQ program and block its implementation. By letter dated December 22, 1995, the House and Senate Committees on Appropriations requested that “no further work should be done to implement [the red snapper] ITQ program or to develop other new ITQ programs at this time.”<sup>71</sup> The absence of congressional funding places the red snapper ITQ system, and that of any other species in the Gulf, on hold indefinitely.

Both the House and Senate proposals direct the Secretary to assess administrative fees on ITQ share holders. The fee should cover the cost of processing and issuing quotas as well as other costs incurred when implementing an ITQ program. House Bill 39 requires the Secretary to collect an allocation fee from the initial recipient of an individual quota<sup>72</sup> and an annual fee, “not to exceed 4 percent of the value of fish authorized to be harvested each year under an individual quota,” from the holder of an individual quota.<sup>73</sup> The provisions for fee assessment found in Senate Bill 39 parallel those in House Bill 39.<sup>74</sup> Senate Bill 39 empowers the

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71. Letter from Bob Livingston, Chairman, House Committee on Appropriations, and Ted Stevens, Member, Senate Committee on Appropriations to Rolland Schmitt, Assistant Administrator, NMFS (Dec. 22, 1995) (on file with authors).

72. H.R. 39 imposes the following administrative fee requirements:

(A) [t]he Secretary shall collect from a person that holds an individual quota issued under a limited access system established under section 303(b)(6)

....

(B)(i) an initial allocation fee in an amount, determined by the Secretary, equal to 1 percent of the value of fish authorized to be harvested in one year under an individual quota, which shall be collected from the person to whom the individual quota is first issued.

H.R. 39 at § 16(G)(10)(c)(2).

73. H.R. 39 further requires the assessment of

(B)(ii) an annual fee in an amount, determined by the Secretary, not to exceed 4 percent of the value of fish authorized to be harvested each year under an individual quota share, which shall be collected from the holder of the individual quota share.

74. The Senate’s current reauthorization proposal requires that:

(2)(A) Fees assessed . . . shall be sufficient to recover the cost of managing the fishery . . . , up to—

(i) four percent annually of the value of fish harvested or processed in that year under the individual transferable quota; and

(ii) an additional 1 percent of the value of fish authorized to be harvested or processed for that year under the individual transferable quota to be assessed on a person receiving an initial quota or transferring a quota.

S. 39 at § 112(f).

Secretary to establish fees “not [to] exceed the administrative costs incurred in issuing the permits.”<sup>75</sup> The administrative costs of implementing an ITQ system include: “the cost of managing the fishery to which the quota applies, including reasonable costs for salaries, training, data analysis and other costs directly related to fishery management and enforcement.”<sup>76</sup> Given the potential increase in fishery management costs associated with the implementation of the ITQ system,<sup>77</sup> the most beneficial use of the monies received will be their reinvestment into the program.<sup>78</sup> Arguably, Congress is acting in the best interest of the regions when setting the amount of administrative fees. However, members of the Councils, not the Secretary, possess the knowledge to most accurately assess the administrative costs of implementation and the fees required to cover such costs.

Furthermore, a program based on transferable quota shares creates a vested interest<sup>79</sup> in participants’ right to fish. The red snapper ITQ creates this interest and is enforceable because fishery participants will protect their right to fish for their portion of the quota and will report violators who fish beyond their quota share. House Bill 39 eliminates this built-in enforcement provision by prohibiting the transferability of quota shares.<sup>80</sup> There is no vested interest in nontransferable shares because nonparticipant shareholders will merely let their shares expire unused. This creates waste because one interested in using the quota shares will not be able to obtain the shares from a nonparticipant shareholder. Similarly, Senate Bill 39 expressly provides that “[a]n

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75. *Id.* at § 112(f)(1).

76. *Id.* at § 112(f)(2)(A).

77. The Council estimates that Amendment 8 will increase annual administration and enforcement costs on a continuing basis between \$659,000 and \$1,749,000, depending on the level of law enforcement efforts. However, the annual benefits include increased revenues of \$2.5 to \$4.1 million and a decrease in the total cost of harvesting. REEF FISH AMENDMENT 8, *supra* note 12, 60 Fed. Reg. 61,200, 61,204 (1995).

78. The Council “support[s] the collection of fees from participants in any limited entry system up to four percent annually of the ex-vessel value provided that the fees are dedicated to that region’s fishery management program and the Councils set the level of the fees.” Letter from Julius Collins to Dave Whaley and Jean Flemma (May 18, 1995) (on file with authors).

79. A vested interest is defined as “[a] present right or title to a thing which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future, as distinguished from a future right, which may never materialize or ripen into title, and it matters not how long or for what length of time the future possession or right of enjoyment may be postponed, if the present right exists to alienate and pass title.” BLACK’S LAW DICTIONARY at 1563 (citation omitted).

80. H.R. 39 at § 16(G)(6)(9).

individual transferable quota does not constitute a property right.”<sup>81</sup> The Secretary may terminate or limit an ITQ at any time without compensation to the shareholder.<sup>82</sup> Thus, the value of the shares significantly decreases.

#### IV. CONCLUSION

Hopes are high that the House and the Senate will reach a compromise on the Magnuson Reauthorization as soon into 1996 as possible. As stated in House Bill 39 and the 1995 Senate version, Congress strongly advocates the preservation of United States fisheries and emphasizes bycatch reduction for the Gulf region red snapper fishery. However, questions linger regarding whether regional and local officials in the Gulf of Mexico can develop fishery management plans to eliminate overfishing and environmental destruction of the red snapper fishery under the proposed guidelines which heavily restrict ITQs and require extended periods of time for research and development.

House Bill 39 and the 1995 version of Senate Bill 39 emphasis on bycatch reduction illustrates the national awareness of rapidly depleting fishery stocks such as the Gulf of Mexico red snapper. However, the federal government must allow the Gulf Council to actively participate in the fight against collapsing fisheries by lifting the moratorium on bycatch reduction programs created by mandatory research programs. By requiring research programs prior to implementation of programs mandating bycatch reduction devices and finfish excluder devices, Congress precludes the Gulf Council from exercising its expertise and wastes precious time which could be used for decreasing the numbers of juvenile red snapper killed as bycatch.

With reauthorization falling a few months prior to the scheduled implementation date for the red snapper ITQ program, the Gulf Council finds itself embroiled in the battle over transferable quotas. The Council is forced to stop, look, and listen for federal approval of programs developed with Council expertise and knowledge over the span of several years. Congress may significantly restrict or preclude programs implementing transferable quotas as a result of pressure from political constituents, thereby undermining the Gulf Council members' autonomy in managing the red snapper fishery.

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81. S. 39 at § 111(f)(5).

82. *Id.*

The concern that the red snapper ITQ program will not survive reauthorization is legitimate because of the strong animosity toward transferable quotas. Therefore, the Gulf Council will be required to suspend implementation of the ITQ program and develop a new management program for the red snapper fishery in conjunction with congressional guidelines. Unfortunately, time is running out for the red snapper fishery stock which is currently being pushed to the verge of collapse. In the meantime, regional and local officials in the Gulf of Mexico can merely sit back and wait for the congressional compromise and wonder if the red snapper can wait for the implementation of programs that will prevent their extinction.