

**A PACIFIC COAST PERSPECTIVE ON POLICY AND
LEGAL ISSUES RELATED TO REAUTHORIZATION
OF THE MAGNUSON FISHERIES CONSERVATION
AND MANAGEMENT ACT**

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| | | |
|------|---|-----|
| I. | INTRODUCTION..... | 288 |
| II. | THE PACIFIC COAST REGION..... | 288 |
| III. | SIGNIFICANT FISHERIES ISSUES | 288 |
| | <i>A. Adequate Scientific Information</i> | 288 |
| | <i>B. Habitat</i> | 289 |
| | <i>C. Endangered Species</i> | 289 |
| | <i>D. Bycatch</i> | 290 |
| | <i>E. Excess Harvesting Capacity</i> | 291 |
| | <i>F. Public Participation and Conflicts of Interest.....</i> | 291 |
| IV. | THE PROPOSED AMENDMENTS TO THE MAGNUSON ACT..... | 291 |
| | <i>A. Overfishing</i> | 292 |
| | <i>B. Habitat</i> | 292 |
| | <i>C. Bycatch</i> | 293 |
| | <i>D. Conflicts of Interest</i> | 293 |
| | <i>E. Fees</i> | 294 |
| | <i>F. Tribal Membership.....</i> | 294 |
| V. | RELATED DEVELOPMENTS..... | 294 |
| | <i>A. Interstate Conflict.....</i> | 294 |
| | <i>B. International Conflict.....</i> | 296 |
| VI. | WHAT THE FUTURE HOLDS | 297 |
| | <i>A. The Federal Government, States, and Tribes</i> | 297 |
| | <i>B. Industry</i> | 298 |
| | <i>C. Citizens and Nongovernmental Organizations.....</i> | 298 |
| VII. | CONCLUSION | 298 |

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I. INTRODUCTION

This article has three main purposes: (1) to offer an overview of fisheries issues related to the Pacific Coast region in conjunction with proposed amendments to the Magnuson Fisheries Conservation and Management Act (FCMA); (2) to discuss related developments, including recent interstate conflicts and parallel problems in international relations; and, (3) to address what lies ahead, including the extent to which Congress, government agencies, Indian tribes and environmental groups may contribute to the management and conservation of marine resources.

II. THE PACIFIC COAST REGION

The Pacific Coast embraces an enormous area. The perspective provided here focuses primarily on the territory within the jurisdiction of the Pacific Fishery Management Council and the North Pacific Fishery Management Council, as well as the area subject to related international conventions, particularly the Pacific Salmon Treaty.

The Pacific Fishery Management Council includes the states of Washington, Oregon, California, and Idaho. The Council, based in Portland, Oregon, exercises authority over ocean fisheries from south of the Canadian border to Mexico (from 3 to 200 miles offshore).

The North Pacific Fishery Management Council includes the states of Washington, Oregon, and Alaska. The Council, based in Anchorage, Alaska, exerts authority over ocean fisheries off the coast of Alaska (from 3 to 200 miles offshore). This includes the Gulf of Alaska, the Bering Sea, and the Aleutian Islands.

III. SIGNIFICANT FISHERIES ISSUES

A. *Adequate Scientific Information*

The need for adequate scientific information remains one of the foremost concerns throughout the region. Evaluating stocks, estimating abundance and establishing appropriate harvest rates are inherently difficult tasks. For example, one recent study by an independent panel concluded estimates of groundfish are unreliable.¹ While the scientific

1. Lawrence Six, *Ocean Fishery Management Issues In The Pacific Fishery Management Council Area*, PACIFIC FISHERY MANAGEMENT COUNCIL 3 (1996).

expertise exists, lack of personnel and funding continue to thwart effective management and thus, conservation itself. As with other Councils, the question of whether sufficient data will ever exist bedevils the system.²

On the other hand, as part of a precautionary approach to management, all scientific recommendations for the North Pacific Council are subject to peer review.³

B. *Habitat*

The interdependence of fisheries and habitat is symbiotic, but this ecological relationship is not protected by a comprehensive legal framework. The Councils are thus cast in the role of involuntary audience, forced to observe fragmentation in land based approaches that vary from state to state, with an overlay of federal agency actions that often conflict with one another.⁴ For instance, a new study by the National Marine Fisheries Service (NMFS) concluded that logging regulation by the Forest Service, conducted in an adversarial manner without regard to effective cooperation with NMFS staff, has produced predictably detrimental results. The loss of habitat, especially for anadromous species like salmon, continues to obstruct a comprehensive approach to conservation.⁵

C. *Endangered Species*

While the Councils grapple with difficult management decisions, the Endangered Species Act⁶ (ESA) continues to provide one of the most dramatic influences in marine resource conservation. In succeeding where other environmental laws fail, it has forced protection for

2. See Michael Orbach, *The South Atlantic Fishery Management Council: Policy and Management Issues Related to the Potential 1996 Amendments to the Magnuson Fisheries Conservation and Management Act*, 9 TUL. ENVTL. L.J. 257 (1996).

3. For 215 decisions setting the acceptable biological catch (ABC) from 1987 to 1994, the Council's final action deviated from the scientific recommendation only once. NORTH PACIFIC FISHERIES ISSUES 2 (February, 1995).

4. The kaleidoscope of interests provides impetus to the study of chaos theory. JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987).

5. Habitat destruction is the leading cause of extinction and endangerment in North American freshwater fisheries. EDWARD O. WILSON, *THE DIVERSITY OF LIFE*, 254 (1992).

6. 16 U.S.C. §§ 1531-1543 (1994); see also DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTION AND IMPLEMENTATION* (1989); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

threatened and endangered species and reshaped the entire field. Equally important, in extending to habitat⁷ and water quality, the ESA results in new forms of protection. Listings of Snake River Chinook and Sacramento River Chinook, for example, are the most effective means of obtaining beneficial changes in river flows, water allocation and habitat protection.⁸

In any fishery in which a “taking” of a listed species is likely either directly (target species) or indirectly (bycatch), it is subject to the basic restrictions of the ESA. However, notwithstanding these restrictions, fishing activities may continue if approved under Section 7 (consultation and biological opinion) or Section 10 (incidental taking permits), subject to restraints placed on the fishing activity by NMFS.⁹

Litigation under the ESA will continue to dominate the agenda as long as decisive, long-term action fails to come from federal and state agencies. Moreover, while reactive in nature, the ESA is in fact a *rara avis* in environmental law—a statute that achieves its goals.

D. *Bycatch*

Bycatch, especially of salmon and halibut, is a major problem confronting the Councils. Indian tribes, non-Indian fishermen, and the Canadian government are especially concerned about the extent of bycatch.¹⁰ Studies are underway that indicate improved trawl vessel practices as well as excluder devices in shrimp trawls off Oregon may significantly reduce bycatch.

For the Pacific Council, a comprehensive observer program is necessary but the Magnuson Act does not allow assessment of fees for this purpose in regions other than the North Pacific. For the North Pacific Council, an observer program exists that is extensive. However, it does not include many vessels less than 125 feet long or all shore-based processing plants.

7. *Babbitt v. Sweet Home Ch. of Commun. for Great Or.*, 115 S. Ct. 2407 (1995). In a recent example, the U.S. Fish and Wildlife Service announced designating up to 4.5 million acres of “critical habitat” (much of it in national forests) for the murrelet, a seabird listed as threatened in 1992. Brent Walth, *Murrelet Will Receive Added Protection*, OREGONIAN, May 11, 1996, at A1.

8. *See supra* note 1, at 2.

9. 50 C.F.R. Part 420; 50 C.F.R. Part 222. *See also* James Walsh, *Marine Fisheries and the Endangered Species Act: Recent Developments*, National Marine Fishery Law Symposium, University of Washington School of Law, October 5-6, 1995, Seattle, Washington.

10. *See supra* note 1, at 4.

For 1993, it is estimated sixteen percent of the total groundfish catch taken from the Bering Sea, Aleutian Islands, and Gulf of Alaska were discarded.¹¹ With increased international attention, studies are underway but the clamor for action continues to rise.

E. Excess Harvesting Capacity

Even with moratoria on commercial salmon fishing licenses and a federal groundfish license limitation program, substantial excess harvesting capacity exists within the jurisdiction of the Pacific Council.¹² The Council has implemented stricter trip limits, time/area closures, and allocation measures for Chinook and coho salmon, Pacific halibut, sablefish, and Pacific whiting. At this point, however, there is generally a lack of consensus in the industry regarding the efficacy of individual quotas (IFQ).

The North Pacific Council, after years of study and debate, has worked out a program for limiting entry where each fisherman receives a quota based on his or her past history of catches. Even though a similar program has been effective in British Columbia, opposition is strong.

F. Public Participation and Conflicts of Interest

While the Magnuson Act was amended in 1990 to tighten Council membership qualifications, there are widespread concerns about public participation and conflicts of interest. A general perception exists that decisions are made primarily by those who represent the industry and thus have a direct financial interest in the outcome. Similarly, while public participation is allowed, it is difficult to take advantage of the opportunity in a meaningful manner.

IV. THE PROPOSED AMENDMENTS TO THE MAGNUSON ACT

As Congress considers several amendments to the Magnuson Act, it appears generally disposed to pruning and trimming around the edges in contrast to major intervention. The proposed amendments, as

11. NORTH PACIFIC FISHERIES ISSUES, *supra* note 3, at 8.

12. *See supra* note 1, at 4.

discussed here, may tend to improve the Act. At the same time, the larger question remains: is more fundamental change overdue?¹³

A. Overfishing

Even though the first national standard in the Act requires conservation and management measures to prevent overfishing, it is coupled with the counter-balancing phrase “while achieving . . . the optimum yield from each fishery”¹⁴ The problem then, in a nutshell, is:

Since the definition of “optimum yield” admits economic and social factors to the equation, prevention of overfishing has not been considered an absolute edict throughout the history of the Magnuson Act. Measures that would have prevented overfishing but would also have caused economic hardship to fishermen have been rejected by Fishery Management Councils and Secretaries of Commerce alike.¹⁵

Both the House (HR 39) and Senate (S. 39) bills define overfishing by adopting the formulation in the national standard guidelines with some improvement. HR 39 further amends the definition of “optimum” to clarify that economic and social factors cannot modify optimum yield to frustrate a rebuilding program in an overfished area. These changes, while helpful, are really minor.

B. Habitat

Both bills require increased efforts to identify essential habitat, make recommendations to federal agencies and ensure consultation with the Secretary on actions which might adversely affect habitat. The changes reflected in S. 39 were strongly supported by the Pacific

13. See Margaret Hayes, *The Magnuson Act: Legislation and Litigation*, National Marine Fishery Law Symposium, University of Washington School of Law, October 5-6, 1995 Seattle, Washington.

14. 16 U.S.C. § 1851(1) (1988).

15. See *supra* note 13, at 2.

Council,¹⁶ while the North Pacific Council has raised concerns that they are cumbersome.¹⁷

Here again, however, Congress takes the path of least resistance in withholding a grant of increased authority to the Councils and the Secretary. Absent such power, substantial measures in the Pacific Region on behalf of habitat are not likely. A possible exception is the requirement in HR 39 that all fishery management plans include measures to minimize, to the extent practicable, adverse impacts to habitat caused by fishing. This could have a definite impact on the use of gear such as bottom trawls.¹⁸

In assessing the effect of these and other technical refinements, there are divergent opinions. One view is that the provisions will make it more difficult for the Councils and the Secretary to allow overfishing.¹⁹ At the same time, as a knowledgeable source observed, “no one has suggested decoupling the requirement to prevent overfishing with the achievement of optimal yield in national standard one—a revision that would establish the primacy of resource conservation over economic dislocation.”²⁰

C. *Bycatch*

The proposed changes regarding bycatch are helpful, especially adding a national standard that requires conservation and management measures to minimize bycatch to the extent practicable. But do they really do anything about the waste of marine resources through countless actions? Moreover, why are the specific provisions limited to the North Pacific? Is the impact on one Council alone an effective measure? While the proposed changes “re-arrange the furniture,” the house remains the same.

D. *Conflicts of Interest*

The proposed changes regarding conflicts of interest that require members to recuse themselves from voting on certain matters are merely

16. Letter from Robert Fletcher, Chairman of the Pacific Fishery Council, to Senator Ted Stevens (Apr. 24, 1996).

17. Letter from Dr. Clarence Pautzke, Executive Director of the North Pacific Fishery Council, to congressional staff (July 18, 1995).

18. See *supra* note 1, at 6.

19. See *supra* note 1, at 10.

20. See *supra* note 13, at 3.

a restatement of a principal commonly found in governmental decision-making processes that allocate public resources. While phrased in an unnecessarily complex manner, the provisions address the critical need to exclude from participation those who have a financial interest in the outcome of the proceedings. The changes are merely one essential step in the right direction in order to maintain public confidence in the process.

E. Fees

Ocean fisheries are perhaps the only public resource for which fees are not assessed for commercial use by private interests.²¹ In order to support the elaborate management programs that are necessary, President Clinton's administration wisely proposed a system of user fees. The Pacific Council has expressed strong support for authority to establish fees.²² Similarly, the North Pacific Council has recommended fees for limited entry programs.²³ Neither bill offers a genuine opportunity to implement this pressing need.

F. Tribal Membership

From its inception in 1976, the Pacific Council has included participation by the tribes because Washington voluntarily reserved one of its appointments for that purpose. S. 39 now contains a provision that ensures membership by a representative of a tribe with federally recognized fishing rights. This proposed change simply underscores both the necessity of tribal participation as well as intergovernmental cooperation.

V. RELATED DEVELOPMENTS

A. Interstate Conflict

One of the most difficult areas of fishery management in the Pacific Coast Region arises in the context of federal and state regulatory actions regarding salmon. Most recently, Alaska persisted in authorizing fisheries in direct opposition to plans supported by Washington, Oregon, and Indian tribes. This resulted in far-reaching litigation in the case of

21. See *supra* note 13, at 5.

22. See *supra* note 16, at 1.

23. See *supra* note 17, at 3.

*Confederated Tribes v. Baldrige*²⁴ that lead to a federal court injunction barring Alaska from proceeding with approval of specific fisheries last year. The lawsuit was actually brought by the Indian tribes and joined by Oregon and Washington.

In *Confederated Tribes*, the district court determined that Alaska proceeded in bad faith, without legal authority, and in contravention of its own scientific analysis. While an appeal is pending, the extraordinary result has disturbing implications. The case touches the very core of the meaning of federalism in the context of marine resources. Where states are unable to engage in cooperative regulation together due to unilateral actions by one, there is every reason to consider the prospect of an increased federal role.²⁵ Moreover, the litigation signals not only an epic breakdown in constructive interstate relationships but further evidence of competing and fragmented decision-making at the expense of conservation.

At the same time, where states have made a concerted effort to work together on behalf of conservation, the results are not those intended. In 1980, Congress authorized the creation of the Northwest Power Planning Council through the cooperative efforts of Washington, Oregon, Idaho, and Montana.²⁶ The Council was charged with developing a long-range plan for electrical power in the Northwest *and* a program to restore fish and wildlife in the Columbia River Basin. The region, encompassing an area the size of France, is the source of one of the most important salmon fisheries in the world.

However, in a manner not unlike the Fishery Councils, the Power Planning Council was never provided with direct regulatory authority regarding salmon and habitat protection. Forced to act more as a consultant, the Power Planning Council has had to defer to a host of other agencies—especially NMFS, the Fish and Wildlife Service, and the Bonneville Power Administration (BPA)—while salmon runs in the Columbia River are at one to two percent of their historical numbers. With habitat destruction, dams and fractured regulatory authority, rational

24. No. CV-80-342-BJR (W.D. Dist. Wash. 1995).

25. States are free to enter into a variety of agreements or compacts to carry out specific objectives with the consent of Congress pursuant to the Compact Clause of the Constitution. U.S. CONST., art. I, § 10, cl. 3. See Felix Frankfurter & James Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L. J. 685 (1928).

26. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839(h) (1994).

management is rendered virtually impossible.²⁷ While Congress recently directed preparation of a report to consider how to make federal, state, and tribal actions consistent with one another, as well as with the Power Planning Council's conservation plan,²⁸ salmon runs are imperiled.

B. International Conflict

The recent legal dispute between the states in *Confederated Tribes* is mirrored at the international level. The United States and Canada have deadlocked in renegotiation of the Pacific Salmon Treaty²⁹ which lapsed in 1994. The immense difficulties in managing salmon at the international level, like those at the regional level, arise from the essential nature of anadromous fish and the traditional cycle they follow.³⁰

Like other international conventions to protect salmon,³¹ the necessity for accurate scientific information, cooperation and reciprocal action to enhance conservation is their *raison d'être*. The current stalemate becomes even more complex as individual states like Alaska forcefully advocate a distribution that is at great variance from what Canada and informed observers have recommended. The U.S. catch of Canadian salmon is increasing, while the Canadian catch of U.S. salmon is decreasing. From the time the treaty was enacted in 1985, the difference has doubled to 5.3 million salmon.³² While there is no simple answer, implementing a cooperative structure with Canada is, in the end, the only effective way to enhance conservation.

27. In an ironic twist, another interstate agreement provided for in the Columbia River Gorge National Scenic Area Act included significant regulatory authority to protect *land-based* resources in the region. 16 U.S.C. § 544 et seq. See *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir.), *cert. denied*, 113 S. Ct. 184 (1992) (upholding constitutionality of Scenic Area Act). This legislation resulted in formation of the Columbia River Gorge Commission by Washington and Oregon in 1986, a regional agency that deals with *water-based* resources only to a limited extent.

28. The preliminary report makes several recommendations including legislation to require that federal agency actions are consistent with the regional agency's program. *Report on Fish and Wildlife Governance in the Columbia River Basin*, Northwest Power Planning Council, May 15, 1996.

29. 16 U.S.C. §§ 3631-3644 (1994).

30. WILLIAM BURKE, *THE NEW INT'L LAW OF FISHERIES*, 151-98 (1994).

31. For example, the Atlantic Salmon Convention which includes the U.S., Canada, the EC, Norway, Sweden, Finland, Iceland, and Russia. 16 U.S.C. §§ 3601-3608 (1994).

32. This led Canada to cut its Chinook salmon fishing by fifty percent in 1995 with further restrictions coming in 1996.

VI. WHAT THE FUTURE HOLDS

While definitive predictions are not within the scope of this article, there are several potential developments that bear close study regarding the implementation of the Magnuson Act.

A. *The Federal Government, States, and Tribes*

In placing such strong emphasis on economic and social factors, the Act has fallen short of its conservation objectives.³³ The predilection of Congress for avoiding an approach with more definitive authority may simply become the precursor to demands for fundamental change. Any serious discussion of change requires Congress to address: (1) a principle of stewardship in managing marine resources for conservation purposes; (2) explicit recognition of the public trust that ensures decisions regarding the disposition of the trust are made using a precautionary approach to safeguarding resources,³⁴ (3) decision-making processes that require greater public participation as well as access by nongovernmental organizations (NGOs); (4) fees for those who receive benefit from the public trust that include the cost of monitoring and enforcement, as well as scientific research and administration; and (5) increased use of incentives to encourage cooperation by user groups and industry in implementing conservation measures.

Turning from the legislative branch of government to the executive, the implementation of fishery management by the Councils, as well as federal, state, and tribal agencies, requires a new emphasis on cooperation, stream-lined communication, and well-defined processes for coordination. This is a management function of the highest order with a premium on consultation and action.³⁵ Through executive orders and other means, the Administration can make federal agencies adhere to defined management and conservation policies while, at the same time,

33. Richard Hildreth and Jeanne Thompson, *Legal Aspects of Columbia-Snake River Salmon Recovery*, 41 OCEAN & COASTAL LAW MEMO 15, University of Oregon School of Law (1994).

34. "Every generation receives a natural and cultural legacy in trust from its ancestors and holds it in trust for its descendants." Edith Brown Weiss, *In Fairness to Future Generations*, 32 ENV'T 7 (1990).

35. An example of an existing organization is the Pacific States Marine Fisheries Commission. Authorized by Congress in 1947, it includes Alaska, Washington, Oregon, Idaho, and California. Even though it does not have any direct regulatory authority, it provides technical expertise and a forum for building consensus on fishery issues.

exchanging information and forging ahead with a clear strategy. The challenge is the discovery and application of making the law effective.³⁶

From the vantage point of the judicial branch, despite glaring exceptions, remarkable legal decisions have provided the cutting edge in cases where agency foot-dragging, indifference, or outright opposition have threatened marine resources and thwarted the public interest.³⁷ The courts will continue to fulfill this role when the legislative and executive branches are not equal to the tasks at hand. In many circumstances, even this is not enough. But it is still the one playing field where citizens have the opportunity to make agencies comply with environmental laws.

B. Industry

Industry has the opportunity to play a valuable role in developing incentives that reward cooperation and compliance in achieving the objectives of the Act. A dedicated commitment to a program of incentives, in concert with funding research, supporting user fees, and working on ways to streamline the regulatory process, have the potential to significantly influence the future in a positive manner.

C. Citizens and Nongovernmental Organizations

Citizens and NGOs are generally the outsiders. The process does not easily accommodate public participation, even though it is one of the most crucial elements in any area of public policy and government decision-making. The demand will build to find more opportunity to take part and to shape the results in a meaningful manner.

VII. CONCLUSION

After two decades, the Magnuson Act is especially ripe for review. While successful in domesticating what were formerly foreign fisheries, the Act has far to go in achieving its conservation objectives. Congress is clearly sensitive to the need for change, but thus far its efforts are largely tentative. The result is, unfortunately, crystallization of the

36. See WILLIAM RODGERS, ENVTL. L. ix, (1994).

37. See *Washington v. Washington State*, 443 U.S. 658 (1979) (Indian treaty rights to salmon); *Greenpeace v. Evans*, 688 F. Supp. 579 (W.D. Wash. 1987) (federal compliance with Marine Mammal Protection Act required); *Friends of the Earth v. Navy*, 841 F.2d 927 (9th Cir. 1988) (federal compliance with shoreline protection required); *Confederated Tribes v. Baldrige*, D.C. No. CV-80-342-BJR (W.D. Wash. 1995) (injunction against State of Alaska fishing).

status quo and fragmentation as officials tend to react to events rather than to guide them.

The Pacific Region is particularly vulnerable as the Councils grapple with the assignments before them. Effective management requires cooperation, but only Congress can provide a chart that clearly delineates governance for fisheries, including conservation and stewardship, that looks beyond a narrow focus and considers long-term interests that transcend economic concerns.