MAGNUSON FISHERY MANAGEMENT AND CONSERVATION ACT REAUTHORIZATION AND FISHERY MANAGEMENT NEEDS IN THE NORTH PACIFIC REGION*

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I. INTRODUCTION

Reauthorization of the Magnuson Fishery Conservation and Management Act (FCMA or Magnuson Act)[1] is extremely important to the fishing industry, fishery managers, and environmental interests in the North Pacific region. Already, the delay in reauthorization is posing significant problems for the North Pacific region in the development of management measures designed to deal with existing problems of overcapitalization, discards, and the race for fish. The uncertainty surrounding congressional direction and timing also frustrates management planning. Issues of reauthorization in the North Pacific are relatively simple with regard to the commitment to increased standards of conservation, but complex and contentious with respect to the allocative consequences of some measures. Overfishing, in the conventional sense of depletion of fish stocks, *is not* considered a fundamental management problem in the North Pacific region under U.S. jurisdiction. Who gets to catch and process the abundant resources in the Exclusive Economic Zone (EEZ)[2] *is* a fundamental problem. Efforts to deal with other fishery management concerns over bycatch, discards, and prohibited species catch are often distorted by their allocative implications.

Reauthorization of the Magnuson Act presents both an opportunity and a threat to fishery management in the North Pacific. The North Pacific fishing community lacks a consensus about what reforms are needed, but is deeply concerned about the effects of changed national legislation on regional management issues. In this brief review of North Pacific regional concerns, it is necessary to characterize the nature of the regional fisheries and accomplishments of fishery management under the Magnuson Act. Next, it is useful to review regional perspectives on outstanding problems of fishery management. These regional problems then can be analyzed in light of the provisions in the House-passed version of the Magnuson reauthorization to discover if amendments can be seen to help or hinder progress toward improving management in relation to problems identified. Finally, suggestions for Magnuson Act amendments to better address regional problems are made.

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1. 16 U.S.C. §§ 1801-1882 (1994).

2. 50 C.F.R. § 620.1 (1994). The same zone is referenced in the Magnuson Act as the Fishery Conservation Zone. 16 U.S.C. §§ 1811-1812 (1994).

II. NORTH PACIFIC REGIONAL CONTEXT

The North Pacific region consists of the federal waters off Alaska including the Gulf of Alaska, Bering Sea and Arctic Ocean.[3] The major fisheries include salmon, halibut, crab, and groundfish (including cod-like fish, soles, flounders, etc.) and rockfish complexes. This region produces over fifty percent of the finfish and shellfish harvests of the United States by both volume and value with the bulk of production coming from Alaska pollock fisheries in the Bering Sea.[4] Coastal and nearshore habitats are largely in a pristine condition. Some areas where logging, mining and coastal development have taken place present locally serious habitat issues, but these are relatively small in geographic scope in comparison with the total coastline. Probably the biggest impact on the marine ecosystem in the offshore area is from fishing, but even that is not obvious nor confirmed by study.[5]

Under the Magnuson Act, fish species in federal waters are managed by the North Pacific Fishery Management Council (NPFMC or Council).[6] Salmon fisheries are administered by the State of Alaska, as fishing for them is restricted to nearshore waters.[7] Crab and scallop fisheries in federal waters are delegated by the Council to the State of Alaska for management. Halibut fisheries are managed by the Canada-U.S. joint International Pacific Halibut Commission,[8] but bycatch of

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3. The North Pacific under U.S. jurisdiction off Alaska is a relatively small part of the North Pacific. The North Pacific Marine Science Organization (PICES) definition extends to the southern limits of the North Pacific gyre, e.g., off Northern California and across to Japan. *See* NORTH PACIFIC MARINE SCIENCE ORGANIZATION, THE PICES PAPERS (Warren S. Wooster & Megan M. Callahan, eds. 1994). Potentially serious fisheries resource conflicts exist in the U.S./Russia boundary area fisheries for Alaska pollock and snow crab and over salmon and halibut between the U.S. and Canada. The high seas conflict over Alaska pollock in the Bering Sea and the squid driftnet fisheries in the North Central Pacific are outside the discussion in this paper. The Pacific Fishery Management Council manages fisheries in the EEZ off the coasts of Washington, Oregon and California. 16 U.S.C. § 1852(a)(7).

4. *See generally* NATIONAL MARINE FISHERIES SERVICE, OUR LIVING OCEANS: REPORT ON THE STATUS OF U.S. LIVING MARINE RESOURCES (1992). *See also* Marc L. Miller & Charles F. Broches, *North Pacific Fisheries and Reauthorization of the Magnuson Fishery Conservation and Management Act, Marine Mammal Protection Act, and Endangered Species Act,* 9 NORTHWEST ENV'T J. 24 (1993).

5. P.A. Livingston, et al., Eastern Bering Sea Ecosystem Trends (1994) (paper presented at the Large Marine Ecosystems of the Pacific Symposium in Qingdao, China).

6. 16 U.S.C. § 1852.

7. 16 U.S.C. § 1856.

8. Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, March 2, 1953, U.S.-Canada, 5 U.S.T. 5 (Amendments enter into force October 15, 1980).

halibut is a critical factor in domestic management of other fisheries, frequently limiting the harvest of target species. Historically, the salmon, halibut and crab fisheries are prosecuted in Alaskan waters by fishing fleets based in Washington and Oregon. The ancillary industries supporting fish harvesting and processing—financial, insurance, ship building and repair, equipment manufacture, etc., are also based in the states of Washington and Oregon. This specialization within the region derives from the economic comparative advantage of the Pacific Northwest states relative to the high operating costs (due to remote location and lack of infrastructure) in Alaska, and from the seasonal nature of the fisheries.

With maturation of the Alaskan economy, massive changes in the fisheries, and increases in population, some of the activities in the fishing sector have shifted northward, but the comparative advantages of the southern base for the industry continue to provide the economic rationale for location and operation of the fishing industry. With the downturn in oil and gas development and revenues accruing to Alaska, as well as environmental and fiscal questions being raised about mineral and forest industries on federal lands and forests, Alaska has turned more and more to fisheries to generate economic activity, jobs, and revenue. State support of domestic and foreign investment in onshore fish processing, imposition of landing requirements, and exaction of landing taxes has served to alter the traditional north/south organization of the fishing industry. It is no surprise that established Washington-based and Oregon-based interests consider Alaska's gains as losses to themselves. In the Magnuson Act reauthorization, the "north" versus "south" conflict is probably the single most explanatory variable in the North Pacific, although not necessarily the most accurate. As is discussed below in detail, the interest Alaska has in capturing more economic value from fisheries occurring in federal waters is clearly seen in many of the amendments passed by the U.S. House of Representatives. Alaskan support for the House version of the MFCMA reauthorization is seen in passage of a joint resolution by its legislative bodies.[9]

In reality, the issues are far more complex than the interstate rivalries posited above. There is an over-arching philosophical difference that pits various sectors of the fisheries community against each other and divides even those in the same sector. The basic question is over a

9. *Laws for the SEA.* 2:6, February 12, 1996.

preference for maintaining the vestiges of an open-access frontier mentality about fisheries or for fisheries being better managed under limited access systems. In the long-term, continued change in the structure of the fishing industry is dictated by adaptation to trends in the global fisheries economy. Short run efforts to oppose, rather than accommodate, the international market for fish can be expected to founder despite the best of intentions.

With implementation of the FCMA (the "M" tribute to the late Senator Warren G. Magnuson came later) in March 1977, the newly appointed members of the NPFMC [currently 11 members with 6 Alaskans, 3 Washingtonians, 1 Oregonian, and the Regional Director of the National Marine Fishery Service] presided over a groundfish fishery of several million tons almost entirely harvested by Japanese, Soviet, and Korean interests. Under the MFCMA, those fisheries have been transformed from foreign fishing, to joint venture, and now fully domestic fishery.

In the early years, the North Pacific Fishery Management Council was in an enviable position. Without the stresses and strains of internal allocation conflicts that affected other Councils implementing the Magnuson Act, the NPFMC could move quickly to develop a "rational" model for a fishery management process that included harvest quotas based on scientific stock assessments, fees to cover costs of management, an extensive observer program to gather data, and the allocation based on such factors as contribution to scientific research, compliance with regulations, and cooperation in management. The U.S. Department of State made the macropolitical trade-offs on allocations. Under this system of management, fishing nations restricted the number of vessels fishing to the number and configuration that was economically efficient to harvest the assigned quota share.

Given the lack of a U.S. commercial interest in the groundfish fishery in the North Pacific at that time, a management approach strongly biased toward conservation of stocks was developed. By the late-1970s the Council had adopted a cap of two million metric tons on foreign harvest of groundfish in the Bering Sea and Aleutian Islands area. That amount was considered a conservative long-term sustainable yield from the ecosystem, despite it being considerably below the actual catches and scientific assessments. The fact is that the cap served to artificially lower the possible surplus allocated to foreign fishing and to thereby squeeze out their participation in favor of domestic fishing. As the

"Americanization" of the North Pacific fisheries occurred, the Council successfully resisted pressures to expand the harvest cap. The conservative quota-based, scientific fishery management approach remains in place today.[10] Between 1987 and 1996 the Council has only twice out of 281 decisions not followed the advice of its Scientific and Statistical Committee (SSC)[11] on setting Total Allowable Catch (TAC).[12] In both cases it chose to set TAC more conservatively than the Plan Team performing the stock assessment but at a level somewhat more than recommended by the SSC. In each instance the Council TAC was considerably less than the Allowable Biological Catch (ABC)[13] for the stock in question.[14] For 1996, the NPFMC Bering Sea and Aleutian Islands TAC cap of two million metric tons is more than one million metric tons less than the Allowable Biological Catch (ABC) assessed by scientists.[15] It can be argued from a scientific perspective that Council action significantly underharvests the available stocks and this results in large economic losses. Still, there is no overt pressure to change the management approach and caps because the U.S. managers, and fishing and processing industries, prefer to be risk averse. In contemporary fishery management parlance, the strategy employs the precautionary principle. The Council, agency officials, and the fishing industry consider it better to have fish to allocate and risk underharvest than to overfish in the face of competitive pressure and downward spiraling catches.

There are tremendous uncertainties surrounding the science of fishery management.[16] Within conventional standards for evaluating

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10. Marc L. Miller, *Regional Fishery Management Councils and the Display of Scientific Authority,* 15 COASTAL MGMT. J. 309-318 (1987).

11. The Scientific and Statistical Committee, established by each Council, provides expert scientific and technical information intended to assist the Council in fishery management. 50 C.F.R. § 605.23(d) (1994).

12. Total Allowable Catch is defined as the maximum permissible annual harvest for the area set within or below the Allowable Biological Catch (ABC). 50 C.F.R. § 653.2 (1994).

13. ABC is a description of acceptable harvest derived from information on the stock status, environmental conditions, ecological factors, and technological characteristics of the fishery. It is the first step in determining the optimum yield and should not exceed the natural mortality of the exploitable stock. 50 C.F.R. § 602.11 (1994).

14. Clarence Pautzke, North Pacific Fishery Management Council Executive Director's Report, Agenda Item B-1d (January 1996).

15. *Newsletter* (North Pacific Fishery Management Council, Anchorage), December 1995.

16. Donald Ludwig, et al., *Uncertainty, Resource Exploitation, and Conservation: Lessons from History,* 260 SCIENCE 17 (April 2, 1993). *See also* Robert Costanza, et al., *Modeling Complex Ecological Economic Systems,* 43 BIOSCIENCE 545 (September 1993).

success in fishery management, the North Pacific receives fairly high marks for conservation.[17] This does not mean all stocks are in excellent condition. Red King Crab, for example, has not supported a fishing season for two years and Tanner crab stocks are at low levels of abundance. Scientists are unable to assign a cause but seem to regard environmental factors as more significant than fishing related mortality.[18] In contrast, several salmon species are returning at record high levels, yet the salmon fisheries are in financial difficulties because of excess harvesting effort, overcapitalization of the fleet, and low fish prices caused by too many fish for an international market increasingly saturated with farmed Atlantic salmon.[19]

III. REGIONAL FISHERY MANAGEMENT PROBLEMS

Any single statement of management problems for the North Pacific region would find supporters and detractors. One formulation of the fishery management problem is that the Council has not dealt as well with the efficiency of harvest and the limitation of fishing effort as it has with conservation of stocks. In one of the nation's newest and largest fisheries, excess capacity developed extremely rapidly, growing from virtually no domestic groundfish harvesting capacity in the Bering Sea to a fleet two or three times as large as needed to efficiently harvest the resources. Despite the stable harvests and large quantities of fish available, the economic health of the fishing industry is poor. In addition, the costs of management are borne by taxpayers as no fee is charged for the use of public resources.

An alternative formulation of the fishery management problem in the North Pacific is that the Management Council focuses too much on economic issues to the neglect of coastal communities located adjacent to the fishing grounds. In this view, large factory trawlers and catcher vessels from "outside" discard enormous amounts of bycatch, destroy benthic habitat, and take a disproportionate amount of fish. Shoreside investment in fish processing and storage provides jobs and other

17. William Aron, et al., Letter to the Editor, 261 SCIENCE 813 (August 13, 1993).

18. W.S. Wooster, Collapse of the Alaska King Crab Fishery: Case Histories in Fishery Management (1989) (unpublished manuscript, Seattle: School of Marine Affairs).

19. *See In a Rut from Salmon Glut,* SEATTLE TIMES, February 4, 1996, at F1-2; *see also Glut Means Trouble: Fish Processors Discuss Options*, ANCHORAGE DAILY NEWS, February 3, 1996, at C-1, 3.

opportunities for coastal communities. In this view, costs of management should be borne by the public because fisheries belong to all.

The problem statement of the NPFMC for its Comprehensive Rationalization Process (CRP) is used as a starting point in this presentation because it represents a broad consensus of industry and fishery management interests on the nature of the problems in the region as MFMCA reauthorization was looming on the horizon. The NPFMC initiated the CRP in order to deal with the root causes of problems that result in competitive fishing, the race for fish, high bycatch and discard rates, etc. The NPFMC identified a set of fourteen problems that are symptomatic of the distortions caused by overcapitalized fisheries in the North Pacific. The NPFMC list of problems is as follows:

> 1. Harvesting capacity in excess of that required to harvest the available resource.
> 2. Allocation and preemption conflicts between and within industry sectors, such as with inshore and offshore components.
> 3. Preemption conflicts between gear types.
> 4. Gear conflicts within fisheries where there is overcrowding of fishing gear due to excessive participation and surplus fishing effort on limited grounds.
> 5. Dead-loss, such as with ghost fishing by lost or discarded gear.
> 6. Bycatch loss of groundfish, crab, herring, salmon, and other non-target species, including bycatch which is not landed for regulatory reasons.
> 7. Economic loss and waste associated with discard mortality of target species harvested but not retained for economic reasons.
> 8. Concerns regarding vessel and crew safety which are often compromised in the race for fish.
> 9. Economic instability within various sectors of the fishing industry and in fishing communities, caused by short and unpredictable fishing seasons or by preemption which denies access to fisheries resources.
> 10. Inability to provide for a long-term, stable, fisheries-based economy in small, economically disadvantaged, adjacent coastal communities.

> 11. Reduction in ability to provide a quality product to consumers at a competitive price, and thus to maintain the competitiveness of seafood products from the EEZ off Alaska on the world market.
> 12. Possible impacts on marine mammals, seabirds, and marine habitat.
> 13. Inability to achieve long-term sustainable economic benefits to the Nation.
> 14. A complex enforcement regimen for fishermen and management alike which inhibits the achievement of the Council's comprehensive goals.[20]

Obviously, the range of problems stated reflects some of the divergent views in the Council "family." Some of the problems, as stated, are in conflict with others, e.g., maximization of net national benefit may not be feasible if programs are undertaken, instead, to shore up economies of coastal communities. After development of the problem list, the Council spent considerable time and effort evaluating the potential of various management measures to solve them. The alternative management measures included exclusive registration, seasonal allocation, license limitation, gear allocation, inshore-offshore allocation, Community Development Quota (CDQ) allocation, trip limits, Individual Fishing Quotas (IFQ) for Prohibited Species Catch (PSC), nontransferable IFQ, transferable IFQ, and auctions. An informal survey of Council members and industry by Council staff ranked transferable IFQs as the most effective in dealing with twelve of the fourteen problems. No other measures were perceived to address more of the problems. This prompted the Council to move ahead with its CRP process with the target of developing analysis of IFQ type measures for appropriate fisheries.[21]

The significance of the Council's problem statement for Magnuson Act reauthorization is that it demonstrates the NPFMC intent to address the problems facing fisheries in the North Pacific region on a comprehensive basis. The CRP approach of the NPFMC called for a moratorium on new entry into the fisheries to be followed by design of

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20. NORTH PACIFIC FISHERY MANAGEMENT COUNCIL, FINAL ENVIRONMENTAL ASSESSMENT/REGULATORY IMPACT REVIEW FOR THE LICENSE LIMITATION PROGRAM (1994). This list specific to the NPFMC parallels the general problems of fishery management identified elsewhere. *See, e.g.,* Eugene H. Buck, The Magnuson Fishery Conservation and Management Act: Reauthorization Issues, CRS Report 93-88 ENR (January 25, 1993).

21. *Id.*

effort reduction programs, including IFQ programs for appropriate fisheries. The scope of the CRP endeavor was ambitious. Obviously, not all fisheries under NPFMC jurisdiction could be handled at the same time or pace. Analysis of the Pacific halibut and sablefish (blackcod) fisheries IFQ had started before CRP and progress could be made based on the new interests.

The halibut/sablefish program was developed over a several-year period and successfully implemented in 1995. It represents the world's largest such quota program in terms of the number of participants. The halibut/sablefish IFQ program has tended to reduce excess capacity, spread the fishery over an approximate nine month period instead of a couple of day-long derby fisheries, improve quality, increase prices for the harvester, and stabilize market supply of fresh fish. The chief complaint about the program comes from those ineligible for quota share or with low amounts of quota share by virtue of past participation, and from those who want to enter the fishery but lack the financial resources to purchase entry through quota share.[22] They regard the halibut/sablefish program as a massive transfer of public resources to one segment of society—a give away. A side benefit of the halibut/sablefish program is considered to be a decrease in the loss of lives at sea; however, the sinking of four fishing boats in the 1995 season indicates that such programs are not a panacea.

Progress on other IFQ programs has been intermittent, reflecting reticence on the part of some Council members to fully embrace either limited entry *à la* IFQs or total open access fisheries. Concern by some over "windfall profits," the potential for quota share consolidation in the hands of a few, or allocation by rules that favor historic participation rather than proximity to resource overrides the larger resource management gains from limited entry. Partly in response to this concern, the Council developed a Community Development Quota (CDQ) program for villages in the Bering Sea whose residents are predominantly Native Alaskans.[23] The CDQ allocates a portion of the Bering Sea fisheries, essentially a quota share system off the top of the TAC, to be

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22. *See* Francis Caldwell, *Fishing the Sane and Solitary Longline Grounds*, PACIFIC FISHING, October 1995.

23. NORTH PACIFIC FISHERY MANAGEMENT COUNCIL, ENVIRONMENTAL ASSESSMENT AND REGULATORY IMPACT REVIEW FOR REAUTHORIZATION OF AMENDMENT 18/23 TO THE GULF OF ALASKA AND BERING SEA/ALEUTIAN ISLANDS FISHERY MANAGEMENT PLANS (INSHORE-OFFSHORE PROCESSING ALLOCATIONS AND POLLOCK CDQ PROGRAM) (1995).

used by groups of the villages for fisheries development. Because few of the villages have prior involvement in the large-scale Bering Sea fisheries, they must operate in partnership with existing fishing companies, most of which are based in Washington. In this respect, CDQ fisheries are an experiment with IFQ fisheries for groundfish. The results appear extremely positive from the standpoint of the villages, the State of Alaska, and the CDQ partners.[24] Fishing interests not involved in the benefits of the CDQ program view it as an unfair allocation of fish to a particular restricted group with no historic participation in the large scale fisheries. Even the critics are impressed, however, with the performance of the fisheries in terms of better utilization of fish, decrease in bycatch rates, and safer, more deliberate fishing. They point to CDQ fisheries as the best evidence in favor of extending IFQs to the rest of the fishery.

Following the initial commitment of the Council to IFQ development, the Council majority retreated from the emphasis on IFQs and instead adopted a license limitation approach for other fisheries. This was proposed as an interim step in the CRP and had the result of halting the analysis for IFQ for other species. Analysis of an Individual Transferable Quota (ITQ) program for Alaska pollock was later reinstated, and at its January 1996 meeting the Council voted to initiate consideration of a crab ITQ program analysis. This fickle behavior of the Council illustrates the very difficult climate under which improvements in regional fisheries management must be tested. The strength of the regional council process for management is in its ability to craft programs suited to the interests in the region. Those who adhere to the "go-slow" school of fisheries rationalization evidence concern for maintaining regional council prerogatives, as do promoters of more rapid development of IFQs.

From a Council perspective, a variety of other problems could be suggested that could be resolved through congressional action. The Council did not officially develop a set of recommendations to Congress but several can be gleaned from Council discussions and documents. Over the last few years, one source of controversy surrounding the Council has been the question of council member conflict of interest. Presently, the Magnuson Act only requires that members disclose financial and management interests in the fishing industry.[25] A Council

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24. Hal Bernton, *And the Sea Provides: Villagers Find Bounty Beyond Rivers*, ANCHORAGE DAILY NEWS, September 10, 1995.

25. 50 C.F.R. § 601.37 (1994).

member is not required to recuse him/herself on votes where he/she stands to gain.[26] A person who is employed by or lobbies on behalf of financial interests is also not required to recuse him/herself unless there are financial investments. The standards for conflict of interest are less stringent in regional fisheries management than in other contexts governed by the Federal Advisory Committee Act.[27] The Magnuson Act deliberately places those directly involved in the fishing industry in charge of managing the fisheries.[28] The issue of conflict of interest whether real or perceived is one on which Congress could provide guidance.

A second issue relates to the difficulty of managing fisheries in federal waters when there is no Fishery Management Plan (FMP) in place. In the absence of an FMP, federal waters are considered open to fishing by U.S. citizens. In the North Pacific, this did not surface as a major problem until the loophole was exploited by a scallop fisher who fished the legal 1995 season under State of Alaska license, then turned in the license and continued to fish in federal waters. The Council was forced to resort to an Emergency Closure. During the time it took to make the determination and complete necessary paperwork, the scalloper was allowed to continue to fish to the detriment of the stock and to the dismay of others in the fishery. The Council has initiated development of a Scallop FMP but the formal process of analysis, public comment, Council adoption, and Secretarial approval is longer than the Emergency Closure (180 days with a one-time extension of 90 days). In the meantime, the federal waters reopen under the loophole. None of the legitimately licensed scallopers can fish in federal waters until the plan is in place.

A third set of issues concerns the operation of the observer program. The North Pacific program is very likely the largest, most comprehensive, and best observer program in world fisheries. The Council's desire for high quality scientific data and its continual refinements to fishery management produce increased need to monitor more aspects, threaten to overburden the system, and cost too much. Efforts to implement the North Pacific Research Plan established under

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26. As long as the member's financial interest in harvesting, processing, or marketing activities is disclosed, the member may continue to participate in decisions affecting those activities. 50 C.F.R. § 601.35(b)(8) (1994).

27. 5 U.S.C. App. 2 §§ 1-15 (1994).

28. 16 U.S.C. § 1852(2)(A).

previous Magnuson Act reauthorization melted down in December 1995 over the problems of cost and distribution of cost. Currently, a new approach is being developed that will be based on a scientifically designed sampling program instead of a Council imposed 100% standard for many of the large-scale fisheries. Payments for observer "services" are borne by each vessel but the operational costs of the program remain publicly funded. Perhaps the thorniest part of the observer program equation is the lack of definition of the observer's status on board the fishing vessel. Is the observer a member of the crew, a federal employee, or an independent contractor?[29] In the recent past, one of the contractors supplying observers to the program had financial difficulties and ended up not paying observer salaries. These and other problems have tended to demoralize observers. Some of the experienced observers have left the program in frustration.

The listing of management problems above is largely based on how the Council and the fishing industry perceive themselves. The media image of the North Pacific is somewhat different. In recent years, full-page ads have been run in prominent newspapers decrying the waste of as much as three quarters of a million pounds of fish in the North Pacific trawl and longline fisheries. In addition, the overfishing of pollock in the international waters of the central Bering Sea (so-called Doughnut-hole fishery) has come to characterize failure of management even though this fishery is on the high seas and outside the jurisdiction of the Council.[30] Finally, some criticize the Council focus on commercial species to the purported neglect of marine mammals, seabirds, and other components of the marine ecosystem.

In general, the Council and the fishing industry would acknowledge the issues of discarded catch and overfishing by foreign fleets in the Doughnut-hole fishery and the need for better understanding of the marine ecosystem. A more complete understanding of fisheries management and the status of fisheries would provide perspective on the media depictions. The Council is seeking ways to reduce discards through bycatch avoidance, caps on capture of prohibited species, and fuller utilization and retention of catches. It should be noted that, while bycatch rates may be higher than desirable, in the North Pacific all

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29. Alecia M. Van Atta, *Lost at Sea: An Argument for Seaman Status of Fisheries Observers*, 18 SEATTLE U. L. REV. 629-664 (1995).

30. Peter Weber, *Net Loss: Fish, Jobs, and the Marine Environment,* WORLDWATCH PAPER 120 (1994).

discards are counted against the annual TACs and the catches on the larger vessels are monitored by one hundred percent observer coverage. The Council developed and implemented a Vessel Incentive Program (VIP) to push the vessels with high bycatch to improve their performance to more representative rates for the fleet. The Council has recently initiated analysis of a Vessel Bycatch Account Program (VBAP) to replace the VIP. Diligent efforts by fisheries enforcement officials and NOAA General Counsel have resulted in some cases being brought under VIP, but the consensus appears to be that the VIP is ineffective because of the constraints of due process in the U.S. legal system.

With respect to the international fishery for pollock in the Doughnut-hole, a new treaty is in place to prevent overharvest. Currently the fishery is closed.[31] Stock assessments in the region in 1995 show recovery almost to the threshold levels that would permit a limited fishery to resume.[32] Finally, the Council could call attention to the large no-fishing zones it established in the vicinity of endangered Steller's sea lion habitat as one example of efforts to incorporate other components of the marine ecosystem into the management equation. For the last several years, an ecosystem consideration chapter has been prepared to accompany the annual stock assessments by the fisheries management plan teams.[33]

IV. ANALYSIS OF HOUSE ACTION TO AMEND THE MAGNUSON ACT

Based on the foregoing discussion of management problems, House actions to amend the Magnuson Act can be grouped into categories relating to individual quotas and fishery capacity reduction, Community Development Quotas and coastal community preference, habitat, conservation, procedural reforms, and miscellaneous measures.

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31. David Fluharty, *Evolution of Pollock Fisheries Management in the North Pacific and East Asian Economies*, ROLE OF THE OCEANS IN THE 21ST CENTURY (Seoung-Yong Hong et al. eds., 1995). (Proceedings of the Law of the Sea Institute Twenty-Seventh Annual Conference, Seoul, Korea, July 13-16, 1993).

32. PLAN TEAM, NORTH PACIFIC FISHERIES MARINE COMMISSION, STOCK ASSESSMENT AND FISHERY EVALUATION REPORT FOR THE GROUNDFISH RESOURCES OF THE BERING SEA AND ALEUTIAN ISLANDS AS PROJECTED FOR 1996 (November 1995).

33. PLAN TEAMS FOR GROUNDFISH FISHERIES OF THE BERING SEA, ALEUTIAN ISLANDS, AND GULF OF ALASKA, NORTH PACIFIC FISHERIES MARINE COMMISSION, ECOSYSTEM CONSIDERATIONS 1996 (November 1995) (in consultation with staff of the Resource Ecology and Fisheries Management Division, Alaska Fisheries Science Center, National Marine Fisheries Service).

A. Individual Quotas and Fishery Capacity Reduction

By far the most important component of the House action on Magnuson Act reauthorization for the North Pacific are the provisions regarding individual quota systems. The House language would vastly decrease the options the Council has for design of a regionally appropriate quota system. The halibut/sablefish IFQ implemented in 1995, and "grandfathered in" for the present, contains many elements that would not be allowed by the House action. In addition, the halibut/sablefish IFQ program demonstrates how a regional council can craft the program to fit local and regional circumstances. Measures like nontransferability of individual quotas,[34] a seven-year sunset,[35] and a prohibition on creation of a property right[36] distinctly limit the value of the quota share and decrease the utility of the program for dealing with excess effort and over-capacity problems. Many in the fishing industry would accept a quota share that constitutes a use privilege that could be revoked in certain circumstances without necessitating compensation.[37] Without transferability, the Council rather than the market place remains the focus for allocation adjustments. The failure to reauthorize the Magnuson Act in a timely manner and the draconian measures suggested on transferability make a difficult Council job more intractable in dealing with overcapitalization and its attendant problems.

The provisions of the House action relative to individual quotas are not uniformly detrimental. Provisions that permit the collection of a fee for granting quota share or as an *ad valorem* tax on production are necessary and appropriate. Based on recent North Pacific experience with development of a fee system for the observer program, the proposed fee levels in the bill are quite low relative to the costs of management intended to be covered. The level of fee proposed may seem reasonable by itself, but when landing taxes and other tariffs on fishing activities are imposed by states and localities, the cumulative effect of the fees can become prohibitive. Justification for how the fee levels are set in the House action is not provided. If fees were to be set at the regional council level it is certain that full justification would have to be developed as a result of the Regulatory Impact Review.

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34. H.R. 39, 104th Cong., 1st Sess. § 16(b) (1995).

35. *Id.*

36. *Id.*

37. Interview with Paul MacGregor, Attorney at Law, Mundt, MacGregor, Happel, Falconer, Zulauf & Hall, in Seattle, Washington.

If a fishery is to be able to pay a fee for use of a public resource, value must be created. In many North Pacific fisheries, if the value of a fishery is dissipated among too many vessels, the industry cannot pay the management costs and still survive. Transferability provides a direct way for participants to voluntarily leave the fishery and to be compensated for so doing by those purchasing the quota share. Transferability operates on free market economic principles, and therefore there is no need for buyback programs or for Council involvement in allocation systems once the basic groundrules are set. Further, many of the measures critical for the functioning of a quota program, like establishment of a lien registry, are not inconsequential actions. Should the government serve this function or should it be done privately? Current language imposes the requirement on the council structure but provides little guidance, and additional funding is uncertain.

The House text authorizes a fairly elaborate scheme to permit voluntary fishing capacity reduction programs. It represents an alternative to dealing with problems of improving conservation and management through charging a fee for fishing and placing the proceeds into a fund used to "buy-out" part of the fishing effort. The basic concept certainly merits further investigation and appears to be a useful addition to approaches regional councils can consider implementing. The concept may have application in the North Pacific region although it is not presently under consideration by the Council. Some may regard the prohibition on use of funds to administer the program as a formula for failure because other public buyout programs have incurred large transaction costs. Also, some may argue that there is no more justification to subsidize exit of effort from a fishery, using funds generated from the resource, than there is to allow those resources to be exploited without full payment of management costs and a resource rent. Most vessel and effort buyout programs have been relatively ineffectual at accomplishing the stated purpose because only the marginal operators are willing to leave the fishery.

Most of the foregoing discussion applies to IFQ for the fish harvesting component of the fishery usually defined by vessel ownership. The House adds fishermen, crew members, and United States fish processors (undefined) to the list of persons to whom Councils may consider allocating quota share.[38] This action has major ramifications in

38. H.R. 39 § 16(b).

the North Pacific. Processors insist that they be part of any IFQ program in the North Pacific. This is resisted by the fish harvesters. The mere mention of processors as eligible quota share holders indicates a congressional intent to let quota share be distributed more broadly than in previous IFQ programs. The House restriction on processor quota share to United States entities is puzzling. Most of the large fish processors in Alaska and the Pacific Northwest have significant foreign ownership, yet they are registered as corporations and are eligible to equal treatment under United States law.

B. Community Development Quotas and Coastal Fisheries Preference

The Community Development Quota (CDQ) is already designed and implemented for the Bering Sea pollock as well as halibut and sablefish under existing Magnuson Act authority and other relevant laws. In this sense, it would seem that the House action on this provision is redundant. However, such action may serve to clarify the intent of Congress, to make the mechanism more broadly available to other regions, and to make legal challenge of the program more difficult. The CDQ program certainly addresses some of the fourteen fishery management problems the Council identified, but it is in conflict with others.

CDQ programs have been in successful operation for several years in Alaska and provide significant benefits to eligible communities. Recently, the NPFMC voted to expand the program to 7.5% of all crab and all species of groundfish. This program represents a transfer of millions of dollars from fishing enterprises largely based in Washington and Oregon to coastal communities in Alaska which, despite proximity, had never participated in or benefited from the fisheries. Some of the fishing companies benefit by serving as partners for the CDQ communities, but this opportunity is not available to all.

From the perspective of proponents of IFQs in the North Pacific, the Magnuson Act amendments reducing the possibility to use IFQs for management, the support for the CDQ mechanism for management, is disingenuous on the part of Alaskans. Why should the use of an IFQ mechanism be limited to one segment of the fishery? If it is appropriate for some, should it not be available to all? Similarly, the limited entry license program for salmon in Alaska created licenses that are freely

transferable and worth hundreds of thousands of dollars. They are not available to new entrants except at significant cost. The value of the salmon limited entry license transfer is in many ways the same as the value created in quota shares. In many ways, the salmon limited entry program illustrates the benefits of limited entry and rationalization programs, yet because there is no way to reduce capacity of the salmon fishing fleet, the salmon industry is struggling with economic viability at a time of record high landings and low salmon prices.

Sprinkled throughout the House version of Magnuson Act reauthorization is language promoting greater regional council attention to coastal communities, fisheries-dependent coastal communities, and other similar formulations.[39] In the North Pacific, the Council has made numerous plan amendments and regulations that respond to this concern where there is a conservation issue or a fishing grounds preemption issue. The prevalence of this language in expressing a preference in allocation for coastal communities is worrisome for fishing fleets based in Washington and Oregon. The large scale of the fisheries, their remoteness from shoreside processing facilities, and the difficult fishing conditions in Alaska dictate large boat fisheries are appropriate for efficient fish harvests. Thus, if the Council were required to take the House language seriously, the large vessel fleet would be at a disadvantage, yet it is the logical, competitive design for rational fisheries. Amazingly, the House even redefines efficiency with respect to utilization of fishery resources as fishing which "provides the maximum economic opportunity for, and participation of, local community-based fleets and the coastal communities which those fleets support."[40]

Such tampering with the realities of efficient fisheries and the court-confirmed right of equal access for citizens of other states to fish in federal waters could impose major dislocation of fishing effort. This, of course, might be the intent of proponents of such provisions. If these efforts to redefine efficiency remain intact, it appears that a regional council could be considered in violation of its current responsibility to uphold Magnuson Act National Standard Four,[41] with respect to discrimination against citizens of other states; National Standard Five,[42] which requires that conservation measures promote efficiency and not

39. H.R. 39 §§ 4, 9, 10, 16.
40. H.R. 39 § 4.
41. 16 U.S.C. § 1851(a)(4).
42. 16 U.S.C. § 1851(a)(5).

have economic allocation as a sole basis; and National Standard Seven,[43] which calls for management that minimizes cost and avoids duplication. Finally, the emphasis on coastal communities seems to contradict the oft repeated test of "fairness" in the House amended text.[44] Is it fair to favor coastal communities at the expense of those who developed and continue to participate in the fisheries, but happen to live in larger coastal communities more distant from the locus of the fishery?

C. Habitat

The habitat issue for the North Pacific may be somewhat different than for other regions. In the present legislation, the habitat provisions appear to be general statements that have limited applicability to the situation in the North Pacific. Councils are required to describe essential habitat for all fisheries in their Fishery Management Plans (FMP) within one year after the passage of the act.[45] The provisions to promote the conservation of essential fishery habitat by way of review of projects are rather vague. Should the Council be required to designate "essential fisheries habitat" or should they be permitted to designate it? Already, fisheries councils, agencies, and interests have an opportunity to comment on issues of federal consistency under the Coastal Zone Management Act,[46] Outer Continental Shelf Lands Act,[47] and Fish and Wildlife Coordination Act,[48] as well as others. The chief difference in the House provision is that other federal agencies are required to consult with the Secretary of Commerce on essential fish habitat protection instead of vice versa. In cases where negative impacts are expected, the proposing agency must identify mitigation measures. Magnuson Act amendments explicitly state that reauthorization does not repeal any existing laws for protection of fish habitat.[49] If some adjustment is not made then it creates a layer of competing mandates and potential jurisdictional ambiguity. It also requires the councils to become more proactive in performing research and developing inventories to protect essential fish habitat.

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43. 16 U.S.C. § 1851(a)(7).
44. H.R. 39 §§ 3, 9, 10, 16.
45. H.R. 39 §§ 9, 10.
46. 16 U.S.C. §§ 1451-1464 (1994).
47. 43 U.S.C. §§ 1801-1866 (1988 & Supp. 1993).
48. 16 U.S.C. §§ 661-668ee (1994).
49. H.R. 39 § 10.

In the North Pacific region, the relatively pristine waters have not suffered the incursions that exist in other areas. Still, much controversy swirls around the impact of trawling on benthic habitats. Anecdotal evidence about habitat impacts is used as a weapon in allocation battles but little research is performed to develop answers to critical habitat questions.[50] Does trawling lead to increased biological productivity because it stirs up the bottom sediments, or does it destroy habitat and lead to decline in habitat quality for valuable species? Unless funding is available to back up the House reauthorization admonition to take the impacts of fishing on habitat into account, management councils will remain unable to conform.

D. Conservation

The House has sought to remedy the widely perceived problems of overfishing by requiring the Councils and Secretary of Commerce to ensure that overfishing does not occur. There is some discrepancy between the definition of overfishing added to the Magnuson Act and the performance requirement that the Councils adopt a "measurable and objective determination of what constitutes overfishing" in the fisheries managed. In the North Pacific, overfishing levels are already defined and used in the annual quota setting for TACs. For species that are defined as overfished, the House requires that a rebuilding plan be adopted—also something that the North Pacific Council has done for Pacific ocean perch stocks depleted in the foreign fishery. The Secretary is directed to monitor regional council actions and to intervene to require that a rebuilding plan be developed if a council has not already done so.[51] The Secretary is also required to inform regional councils if fish stocks are approaching the condition of overfishing.[52]

Bycatch is increasingly portrayed as a conservation problem when, in fact, the issue is more complex. As noted above, in the North Pacific, all bycatch is counted against TAC and bycatch limits. Thus, it does not constitute a threat to overharvest. To the extent bycatch is discarded, there is concern over waste in terms of the wise use of the resources although much of the discarded fish is in the category of economic or regulatory discard. The pressure to "race for fish" provides

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50. TAIVO LAEVASTU, ET AL., EXPLOITABLE MARINE ECOSYSTEMS: THEIR BEHAVIOUR & MANAGEMENT (1996).

51. H.R. 39 § 10.

52. *Id.*

a disincentive for improved utilization. The House defines bycatch in its reauthorization measures as "fish which are harvested by a fishing vessel, but which are not sold or kept for personal use, including economic discards and regulatory discards."[53] This differs from the definition of bycatch used in North Pacific fishery management circles; i.e., nontarget species may be sold as long as they are not prohibited species, or caught in amounts that exceed TACs, or out of season. The House definition seems to describe discards rather than the general use of the term bycatch as species caught incidental to target species.

This definitional question is very important if the House language prevails because Councils would be required to minimize bycatch "to the maximum extent possible"[54] or other such formulations. It affects the way statistics are kept, and it ignores common but not approved of practices in fishing, like maximizing the catch of valuable nontarget fish in the bycatch. Under the House terms, if the nontarget fish is sold, it is no longer bycatch. In the North Pacific Council, the management attempts to provide incentives to avoid nontarget catches and to encourage full utilization of bycatch where legally and economically feasible.

Along the lines of fuller utilization of all fish caught, the House recognizes the contribution of bycatch to non-profit organizations and appropriately proposes a review of this practice over time. The opportunity to allow the needy to benefit from species that previously had to be discarded as prohibited species, like salmon and halibut in the North Pacific, is effective at reducing a small part of the waste.

Another definitional issue related to conservation is the House revision of the definition of optimum yield (OY). The addition of "taking into account the protection of the marine ecosystems"[55] is a welcome but hard to implement criterion. It is arguably already permitted to be considered under the present OY standards. The peculiar addition of OY as determined by whether or not it "provides employment opportunities and economic benefits through the sustained participation of local community-based fleets and the coastal communities which those fleets support"[56] is a major stretching of the concept. It seems to contribute little to the actual determination of what OY is in biological or economic

53. H.R. 39 § 4.
54. H.R. 39 § 7.
55. H.R. 39 § 4.
56. *Id.*

fact. Socially, it may advance a particular agenda, but it is not clear why a Plan Team or SSC would make an adjustment in OY especially if the purpose of the OY determination is setting TAC. OY should not be an allocative concept. The National Research Council's review panel on improving fishery management in the U.S. recommends that OY determination be clearly linked to biological parameters and that "only truly exceptional socio-cultural considerations" should be taken into account.[57]

The combination of measures of redefining bycatch and OY and requiring the Secretary to monitor overfishing may have one unintended consequence in the North Pacific. As more knowledge is gained of trophic level and ecosystem dynamics a Council may wish to manage fisheries in a way that increases their value by "cropping" populations of low value or highly predatory species in order to create better conditions for survival of a preferred fish. In the North Pacific, there is increased concern about the rising stocks of species that prey on crabs at all life stages. It is conceivable that prudent managers might attempt to reduce the populations of predatory species. Under the revised overfishing definition, the council would be precluded from taking this action because it constitutes overfishing.

E. Procedural Reforms

The House amendments clarify and strengthen the intent of Congress to limit participation by council members in decisions on matters in which their interests are significantly affected. Significantly affected means "a personal financial interest which would be augmented by voting on the matter and which would only be shared by a minority of other persons within the same industry sector or gear group whose activity would be directly affected by a Council's action."[58] The effect of the total package of the revisions and additions to the financial disclosure provides a slightly higher standard of personal conduct for Council members and allows for somewhat tighter oversight. It does not deal with the clear conflict of interest of persons employed to represent fishing interests.

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57. COMMITTEE ON FISHERIES, OCEAN SCIENCE BOARD, IMPROVING THE MANAGEMENT OF U.S. MARINE FISHERIES (1994).

58. H.R. 39 § 8.

The House amendments to the Magnuson Act consider fisheries in federal waters off Alaska subject to the management regulations of Alaska in the event there is no Council FMP.[59] This amendment deals with the problem of managing fisheries in federal waters raised by the scalloper mentioned above. One might speculate on why the measure is limited only to Alaska, but other regions may not have had similar negative experience. The House also allows a longer period for extending Emergency Closures.[60]

F. Miscellaneous

Certain measures in the House reauthorization package relate to specific issues in the North Pacific. The recent conclusion of an agreement on the maritime boundary between Russia and the United States (June 1, 1990), for example, adjusts the geographic scope of the Magnuson Act and the Marine Mammal Protection Act[61] to comply with the agreement. It also reserves application of certain provisions of the Act until the exchange of ratifications is complete. Another provision regarding transshipment of fish in U.S. and state waters lays out a detailed permit procedure to which the parties must adhere. It is curious that the Secretary of Commerce is not advised to notify or seek the advice of the Councils or adjacent states in making a decision about permitting these transshipments.

The House does address some aspects of the observer program needs by clarifying that the observer is not considered crew of the vessel and therefore is not eligible for a number of protections. Only if there is "willful misconduct" by the vessel owner can the observer seek civil action.[62] From the standpoint of the vessel owner, this is much appreciated relief from potential liability. It removes protection from the observer and may serve as a disincentive to take on a risky job. Technically, the observer should be covered by the contractor for whom he or she works. The North Pacific Council has explored a number of options through its Observer Oversight Committee. The redesign of the program will include further clarification of the observer status.

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59. H.R. 39 § 12.
60. H.R. 39 § 11.
61. 16 U.S.C. §§ 1361-1421(h) (1994).
62. H.R. 39 § 15.

Perhaps the most egregious micro-management action the House takes with respect to North Pacific fisheries is the provision that NPFMC must require that all fish processors and fish processing vessels begin weighing the fish processed by January 1, 1997.[63] The Council has struggled with this issue for several years. The concept seems to make common sense and seems fair until it is examined more closely. Presently only a few of the catcher processors have installed scales. There are several reasons why scales are not more prevalent at sea. First, the technology and procedures for weighing fish at sea are in an early stage of development. Second, retrofitting scales onto factory processing vessels costs several hundred thousand dollars for each vessel. Given the short time the House allows to implement the regulation, it is probably infeasible to make the retrofits using domestic shipyards. Assuming that the technological hurdles are overcome, the real question becomes how much of an improvement in accuracy over alternative catch estimation techniques would result, and what is that precision worth for fishery management?

What is driving this amendment is the desire of some elements in the fishing industry to impose costs on another element in the industry, in this case a continuation of the onshore—offshore debate between shoreside processors and at sea processors. It is clear to the Council that some greater level of accuracy is needed if and when IFQ programs might be implemented for groundfish fisheries in order to monitor quota share. The offshore sector also realizes this and has stated repeatedly that it would be willing to absorb the cost of scales if IFQ programs were implemented. Under the open-access competitive fishing, they are reluctant to accept such high cost for so little benefit.

On a positive note, the House makes several amendments explicitly allowing Councils to permit sale of fish caught in scientific research programs as long as they are part of an approved research plan. In light of the declining budgets and rapidly increasing costs for scientific research, such a provision may provide councils with a critical tool for obtaining scientific information for management.

V. ADJUSTMENTS TO ADDRESS REGIONAL PROBLEMS

Now that the House has acted on Magnuson Act reauthorization, the focus shifts to the Senate. The overwhelmingly favorable vote for the

63. H.R. 39 § 9.

House legislation may give impetus to the Senate to move quickly along similar lines. The 1995 Senate version of the Magnuson Act reauthorization bill[64] differs in some respects from the House version and will not be analyzed here. Undoubtedly, there will be considerable changes in the final version based on the intense lobbying by all affected interests. In light of the problems facing the North Pacific Fishery Management Council, a number of adjustments in the approach to reauthorization could be beneficial for management.

The most important adjustment the Senate could make would be to permit the Council to keep the IFQ mechanism in its management toolbox and available for use in appropriate circumstances.[65] The NPFMC has not endorsed the IFQ programs for all fisheries but is currently well into development of its second effort for the analysis for a pollock IFQ fishery. In addition, the desperate economic situation for North Pacific crab fisheries and the significant safety concerns over the way the fisheries are operated has rekindled Council interest in crab IFQ fisheries and other options for dealing with the problems.[66] In his teleconference with the NPFMC and the Alaska Board of Fish on January 30, 1996, Senator Stevens made it clear that his goal is to place a moratorium of three to five years on further development of IFQ programs. Ostensibly this is to gather information on the newly implemented halibut/sablefish IFQ program off Alaska and other IFQ programs and to allow for a nation-wide study of the utility of IFQ programs for future fishery management. Whatever the reasons, a moratorium would deliver a major blow to the momentum the NPFMC

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64. S. 39, 104th Cong., 1st Sess. (1995).

65. Memorandum from Clarence Pautzke, Draft Summary of Council Chairmen's Meeting, Memorandum to Council Executive Directors (May 26, 1994). At their annual meeting the Council Chairs discussed a variety of advice to Congress concerning Magnuson Act reauthorization. Among the numerous items they endorsed, one of the most significant was Congress's giving councils tools to deal with overcapitalization but not requiring specific action. In addition they advocated that Congress "[g]ive Councils clear authority to use ITQs, CDQs or other allocation systems, with sufficient guidelines to protect national interests, existing participants, and resource conservation." They apparently objected to Congress's taking a position on use of these measures (pro or con presumably), instead of leaving that to regional council discretion.

66. *See* discussion surrounding sinking of crab vessels in the Bering Sea with loss of seven lives in Jack Broom, et al., *This Can Happen, . . . But You Don't Dwell On It,* SEATTLE TIMES, January 30, 1996, at A-1; *see also* Marla Williams and Susan Gilmore, *Change Needed to Avoid More Deaths, Says Brother*, SEATTLE TIMES, January 30, 1996, at A-14. Crab fishing in the North Pacific is likely to be the most hazardous occupation in the United States. Extremely harsh weather year round makes for dangerous conditions at any time of year. The race for fish in the season opening in January places enormous pressure on skippers and crews to fish when they might otherwise wait out a storm in port.

has been developing for the last ten years in the direction of Comprehensive Rationalization.

The congressional mood to go slow on individual quotas is a slap in the face to councils that have developed IFQ type programs in the past. It implies that they have not properly dealt with the federal interest in fisheries management and that the decisions of the councils have been inappropriate for the regions. In contrast, it is not clear that micro-management by Congress or a one-size fits all approach to reauthorization regarding IFQs is the preferred way to go. The pace, timing, and configuration of management approaches are bound to differ by region, fishery, and degree of convergence on problem definition. In terms of Magnuson Act reauthorization, some interests in the fishing industry are requesting that Congress mandate use of IFQs in the North Pacific fisheries, while others seek congressional relief to overturn the Council's action and to prohibit further development of IFQ programs. Still others seek modifications to the IFQ programs that would tweak them according to their various persuasions. Delaying consideration of IFQs means using tools identified by the Council as less effective at solving management problems.

Clearly, if a moratorium and study is the course Congress chooses, the detailed treatment of individual quotas of the House version should be deleted from consideration. It is unduly restrictive and ill-constructed in comparison to the regionally crafted provisions of the halibut/sablefish IFQ in the North Pacific region. The study, if properly conducted, would provide Congress with public policy sideboards for future council IFQ development. If a study of IFQs is to be commissioned by Congress, the approach outlined in the House text does not inspire much confidence with respect to its ability to deliver impartial and credible results. The study should be done through professional societies like the American Fisheries Society or through the National Academy of Science. The highest quality of peer-reviewed objective science (biological, economic, and social components) is required. Already, much of the needed information is available from the research community. Still, there is inadequate information on modeling of alternative management approaches with respect to fundamental issues like: How is the value of quota share treated under capital gains tax law? What is the current net return to the public in the form of business tax on fishing compared to the return under an IFQ fishery? What are the benefits and costs to society of allocating fisheries to coastal communities

instead of using market forces to define allocation? What is the effect of allocating quota share to fish processors, skippers, or crew? Funding for basic research to identify the relationships between economic and sociocultural objectives[67] of fisheries management emerges as the top priority given the social engineering thrust of the current FCMA reauthorization. The only explicit funding direction from the House action is for improving fish stock assessments.

A variety of small but important problems in the North Pacific are left unresolved in the House text and could profitably be changed in the Senate version. First is the status of observers, their rights to health and other benefits, standards for compensation, insurance, and other factors. Second, the contradictions between the language on fairness and national standards should be addressed by Congress concerning a coastal community preference. Concomitantly, the Senate should support the inclusion of ecosystem consideration in the way OY is computed, but resist efforts to use OY determination as a way to allocate to a particular segment of the fishing community. Third, Congress should not attempt to micro-manage issues before the Council like the technically and economically difficult analysis of weighing fish onboard by at-sea processors. Fourth, the definition of bycatch should be reexamined to bring it into more customary usage. Fifth, Congress should not impose major new duties, e.g., assessing and protecting essential fish habitat, expanding stock assessments, incorporating ecosystem considerations into management, and analyzing economic and social costs and benefits for local communities without providing adequate funding. Sixth, Councils should be encouraged by Congress to consider fees that recover management costs from the fishing sector, and where possible to obtain revenue from the use of public resources. There are many options for Congress to consider, including the House-passed mechanism allowing funds for scientific research to be raised through sale of fish catch.

Congress is now embroiled in what is probably the most important decision the United States can make with respect to its "ocean range." It is not an exaggeration to assert that decisions surrounding the creation of IFQs are the marine equivalent of such public policy decisions for public lands as the Homestead Act[68] and Taylor Grazing Act.[69] The

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67. INTERORGANIZATIONAL COMMITTEE ON GUIDELINES AND PRINCIPLES FOR SOCIAL IMPACT ASSESSMENT, NATIONAL MARINE FISHERIES SERVICE, GUIDELINES AND PRINCIPLES FOR SOCIAL IMPACT ASSESSMENT (1994).

68. 43 U.S.C. §§ 161-302 (1988 & Supp. 1993).

ocean, as the last frontier, is now passing from an open-access system to a restricted access system. Thus, careful consideration based on sustainable management of renewable natural resources (conservation) and long-term economic and social sustainability must be addressed along with the biological integrity of the marine ecosystems that produce the fish. The congressional about-face on rationalization of fisheries exemplified in the present House action sets a course that fails to provide regional councils with the tools and blueprints for the necessary structural changes in the fishing industry and in fishery management. The House approach to Magnuson Act reform is timid at a time when boldness and leadership is needed. If sufficient will to chart new directions in fisheries management is not found in the Senate, managers will be unable to accomplish the task of maintaining and restoring valuable fisheries that provide income, employment, and enjoyment for the whole nation.

69. 43 U.S.C §§ 315-316 (1988 & Supp. 1993).