

PUTTING CONSERVATION INTO THE FISHERY CONSERVATION AND MANAGEMENT ACT: THE PUBLIC INTEREST IN MAGNUSON REAUTHORIZATION

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When the House of Representatives adjourned in January 1996 for a belated Christmas recess, it left in its wake an unprecedented series of attempts to roll back America's environmental laws. While many of these initiatives were foiled by the defection of party moderates and an upwelling of public sentiment opposing the majority's environmental agenda, the 104th Congress's assault on the conservation status quo was nevertheless extraordinary. Little noticed in the partisan wrangling over our country's environmental future was a remarkable episode of bipartisanship as House Republicans and Democrats worked together to reauthorize the Magnuson Fishery Conservation and Management Act (the Act),¹ the nation's framework for management of the nearly \$4 billion fishery resources of the U.S. 200-mile Exclusive Economic Zone.² Not only did the House vote chalk up the largest pro-conservation majority tallied in the 104th Congress, it was preceded by the first thorough floor debate on fishery management since the Magnuson Act was enacted two decades ago.³

Although not as familiar as mining or grazing reform, endangered species conservation, wetlands protection, or pollution control, reauthorization of the rules for using the public's fish resources engaged debate over the same themes as these higher profile issues: stewardship of public resources, waste, conflicts of interest, resistance by industry to

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1. 16 U.S.C. §§ 1801-82 (1994) (the Magnuson Act).

2. See Proclamation No. 5030, 48 Fed. Reg. 10605 (1983).

3. 141 CONG. REC. H10213 (daily ed. Oct. 18, 1995).

regulation, the cost to the taxpayer of free access to public resources, subsidies for their development and extraction and, finally, the cost of bailout and restoration after the system fails. For the first time, these themes were raised in a context of public interest and public resources, rather than constituent casework.

The nature of the debate changed substantially over a two-year period because of the entry into the fray of a critical mass of mainstream conservation and environmental groups. The introduction of the first vehicle in the House, a straight reauthorization introduced by Fisheries Subcommittee Chairman Thomas Manton, D-NY, was accompanied with the admonition that unless advocates could prove otherwise, he saw no need for reform of the fishery management system.⁴ By the close of the session, then Chairman of the National Ocean Policy Committee, Massachusetts Senator John Kerry, introduced a bill that he described as “ambitious in scope” and exhorted colleagues to join him in taking significant action to remedy fisheries management problems or “[f]ish on the dinner table . . . will not be there for future generations.”⁵

The 103rd Congress did not get around to the reauthorization before adjourning, but on the opening day of the 104th Congress, the new leadership introduced S. 39 and H.R. 39, bills containing most of the far-reaching reforms advocated by conservationists.⁶ In a year and a half, the nation’s fishery management law had gone from an obscure preoccupation of the fishing industry and coastal congressmen to the editorial pages of the nation’s major newspapers.

Of all the natural resources of the United States, fisheries remain the last great “commons.” Subject to neither sales, leases, licenses, or royalties, federal fisheries remain, for the most part, open to exploitation by anyone with the wherewithal to deploy gear beyond the band of waters controlled by the 50 states. Consumer demands for fishery products, and the industry’s desire to increase harvest effort, continue to grow. Landings at U.S. ports were worth \$3.7 billion in 1992,⁷ and the

4. *Magnuson Fishery Conservation and Management Act Reauthorization: Hearings on H.R. 780 Before the Subcomm. on Fisheries Management of the House Comm. on Merchant Marine and Fisheries*, 103rd Cong., 1st Sess. 103-28 (1993)(statement of Rep. Manton).

5. 140 CONG. REC. S14861 (daily ed. Oct. 7, 1994) (statement of Senator Kerry).

6. S. 39, 104th Cong., 1st Sess. (1995); H.R. 39, 104th Cong., 1st Sess. (1995).

7. NATIONAL MARINE FISHERIES SERVICE, U.S. DEPT. OF COMMERCE, *OUR LIVING OCEANS* 3 (1993).

National Marine Fisheries Service estimates that the indirect benefits to the economy from commercial fishing are worth more than \$50 billion.⁸

The National Marine Fisheries Service, the agency responsible for the conservation and management of U.S. fishery resources, also estimates that of 231 species of living marine resources, 65 are overfished, 71 are fully utilized, and the status of 42 stocks is unknown. The Agency estimates that substantial economic returns are lost due to fishing beyond our means (at levels that could produce the best long term yield)—\$350 million annually in New England alone, where the economic and social disruption brought about by overfishing necessitated a \$30 million disaster relief appropriation and is estimated to require tens of millions more to buy out the fleet.⁹ Elsewhere, examples of overfished species include spiny lobster in the Southeast; king mackerel and red snapper in the Gulf of Mexico, and large coastal sharks, bluefin tuna and swordfish in the Atlantic.¹⁰

As our capacity to catch fish has expanded through larger and faster fleets, more technology, and increased catching efficiency, the law that was devised twenty years ago to encourage and manage this growth has become an anachronism. Designed with development of U.S. fisheries in mind, the Magnuson Act has proven incapable of controlling the race for fish.

Members of the conservation community who had been active on ocean and marine wildlife issues saw reauthorization of the Magnuson Act as an opportunity to address the management problems in public fishery resources. In 1993, the Audubon Living Oceans Program, the Center for Marine Conservation, Greenpeace, the National Coalition for Marine Conservation, and the World Wildlife Fund banded together to create a public interest coalition to tackle the reauthorization and put the “C” for “conservation” back in the Magnuson Act.¹¹ The five-group steering committee enlisted other partners and developed a

8. *Id.* at 11.

9. National Marine Fisheries Service, news release NOAA95-R, “Secretary Brown Announces \$25 Million in Disaster Assistance for Northeast Fisheries” (Aug. 3, 1995).

10. North Carolina Sea Grant College Program, *Summary Report: Can America Save its Fisheries?* A SEA GRANT NATIONAL ISSUES FORUM 5 (1995).

11. *Magnuson Fishery Conservation and Management Act Reauthorization: Hearings on H.R. 780 Before the Subcomm. on Fisheries Management of the House Comm. on Merchant Marine and Fisheries*, 103rd Cong., 1st Sess. 103-28 (1993) (statement of Suzanne Iudicello, Senior Program Counsel, Center for Marine Conservation).

comprehensive proposal to reform the Act, introduced as H.R. 4404 in the 103rd Congress by Rep. Wayne Gilchrest of Maryland.¹²

In addition to elements that would prohibit overfishing and rebuild depleted fish populations, the steering committee's legislative agenda included measures to improve conservation of highly migratory species; minimize bycatch; protect marine fish habitats; and enhance research, monitoring, and enforcement in fishery management programs. By 1995, more than 100 conservation, environmental, recreational, and commercial fishing groups had joined the coalition, dubbed the Marine Fish Conservation Network (Network).

In 1995, rather than seek a sponsor to reintroduce its bill, the Network turned its combined grassroots energies toward incorporating conservation elements into the House and Senate vehicles introduced respectively by Rep. Don Young (R-AK), Chairman of the House Resources Committee, and Sens. Ted Stevens (R-AK), Frank Murkowski (R-AK), and John Kerry (D-MA). After a markup in the House Resources Committee in May substantially weakened what had been emerging as a bill with the potential to turn around America's fishery crisis, the group narrowed in on three issues: overfishing, bycatch, and habitat protection.

Currently, the Magnuson Act allows regional fishery management councils to set fishing levels above those that are biologically sustainable in order to meet short-term economic or social demands.¹³ The specific Network proposals to prevent overfishing include amending the Act to define overfishing, limit consideration of short-term social and economic factors that drive fishery management councils to set catch level in excess of biologically sustainable levels, and direct the Secretary to annually publish a list of overfished species. The proposal would further require councils to recognize overfishing and devise management plans containing objective and measurable determinations of overfishing for stocks in each management plan as well as adopt rebuilding programs for depleted species. The Network also advocates requiring councils to use a precautionary, risk-averse approach to management to provide a buffer for uncertainties in the available information and natural stock fluctuations.

12. 104th Cong. Rec. H3344 (daily ed. May 12, 1994).

13. 16 U.S.C. § 1801(6)(5)(B) (1994).

Bycatch is the incidental capture of nontargeted species. Worldwide, more than 27 million metric tons of nontargeted fish are discarded as waste annually.¹⁴ In some fisheries, such as the shrimp trawl fisheries in the Gulf of Mexico, 80% of what is caught is tossed overboard. In the North Pacific, more than 700 million pounds of groundfish, halibut, crab, salmon, and noncommercial species are discarded annually. The waste affects other fisheries because one vessel's discards are another's target. In the Southeast, the bycatch of weakfish in shrimp trawls must be reduced by 50% early this year, or closures of the commercial weakfish fishery will ensue.¹⁵ The Marine Fish Conservation Network advocates that the Magnuson Act, which is now silent on bycatch, should include a definition of undesirable bycatch, establish a new national standard to minimize the negative impact of bycatch on fish populations and the marine ecosystem, and require managers to include provisions to reduce the incidental capture of nontargeted species in fishery management plans.

Fish habitat destruction, coupled with overfishing, is playing a major role in the decline of many fisheries. Fish habitat is the place or places that contain a combination of food, shelter, protection from predators, and reproductive opportunities necessary for survival.¹⁶ For marine species, habitat encompasses areas from upland streams out to the continental shelf and beyond. In the Gulf of Mexico, 98% of commercially exploited fish species are dependent on estuarine areas. At the same time, Texas estuaries have lost almost 90% of their historic freshwater inflows due to upstream diversions,¹⁷ and, since 1900, Louisiana has lost 1.1 million acres of coastal wetlands due to oil and gas production activities.¹⁸ In the Northwest, the placement of dams in the Columbia River Basin has caused a 40% decline in spawning area for anadromous fish species such as salmon and steelhead.¹⁹ The Magnuson Act currently requires that Fishery Management Plans (FMPs) include readily available information regarding the effects of habitat alteration on

14. Food and Agriculture Organization of the United Nations, *A Global Assessment of Fisheries Bycatch and Discards* 19 (1995).

15. Atlantic Coast Weakfish Fishery; Moratorium in Exclusive Economic Zone, 60 Fed. Reg. 32130 (to be codified at 50 C.F.R. pt. 697) (proposed June 20, 1995).

16. Center for Marine Conservation, *Earth is a Marine Habitat: A Report on the National Marine Fisheries Service Habitat Program* 8 (1991).

17. JAMES R. CHAMBERS, WILDLIFE MANAGEMENT INSTITUTE, IN *TRANSACTIONS OF THE NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE* 17 (R.E. McCabe ed.) (1992).

18. S. REP. No. 375, 101st Cong., 2nd Sess. 2 (1990).

19. 16 U.S.C. § 1853(a)(7) (1994).

fisheries and that councils comment and make recommendations on activities that are likely to impact anadromous fish habitat.²⁰ The Network proposal aims to highlight the importance of fish habitat protection for the viability of U.S. marine fisheries. Some specific aspects of the proposal include that the Magnuson Act define essential fish habitat, require FMPs to include measures to protect essential fish habitat, and establish a stronger consultation process which requires that federal agencies respond to National Oceanic and Atmospheric Administration recommendations on habitat protection.

After months during which the jam-packed legislative calendar in the House kept the Magnuson Fishery Conservation and Management Act reauthorization from coming to the floor, the long-awaited vote in mid-October delivered a resounding victory for the fish. In the largest margin on an environment vote yet in the 104th Congress, H.R. 39 passed resoundingly, 388 to 37.²¹

A growing core of moderate, pro-environment Republicans joined a majority of Democrats to deliver the votes on the Network's three conservation amendments to strengthen the bill's provisions to protect habitat, limit catches, and reduce bycatch and discards in shrimp trawls. The first amendment, sponsored by Rep. Sam Farr of California, would require councils to take action to correct harm to fish habitat caused by fishing practices and gear.²² In arguing for the amendment, Rep. Farr said, "The problem is that the councils have done nothing to address this under current law. . . . [T]he councils could go on ignoring fish habitat issues under this bill."²³ The measure was adopted 251-162 over the objections of Resources Committee Chairman Don Young.²⁴

The second amendment, sponsored by Rep. Wayne Gilchrest of Maryland, closes a loophole in one of the law's definitions and prohibits the regional fishery management councils from allowing catches to go beyond what a stock of fish can sustain biologically.²⁵ Speaking in support of the amendment, Rep. Gerry Studds of Massachusetts used the New England groundfishery as an example of the "inability of a council to wisely and effectively manage a resource We have seen, to our

20. Center for Marine Conservation, *supra* note 13, at 28.

21. 141 CONG. REC. H10246-47 (daily ed. Oct. 18, 1995); *see also* H10213-47.

22. *Id.* at H10223-28.

23. *Id.* at H10224.

24. *Id.* at H10225-28.

25. *Id.* at H10232-36.

great pain, what happens when [councils take advantage of this] loophole . . . allowing maximum yield to be exceeded for economic and social reasons.”²⁶ The measure was adopted 304-113, again over the objections of the Committee Chairman.²⁷

The third conservation amendment, sponsored by Rep. Porter Goss of Florida and Rep. Elizabeth Furse of Oregon, omitted special treatment for shrimp trawlers in the Gulf of Mexico and South Atlantic, who were exempted from H.R. 39’s bycatch reduction provisions.²⁸ Calling it a “fairness issue,”²⁹ Rep. Goss described bycatch as “waste, pure and simple—the fish, turtles, sharks . . . are caught in the nets, die and are discarded.”³⁰ As co-sponsor of the amendment, Rep. Furse called upon her colleagues to support the amendment because “every other fisher man and fisher woman in the United States is working to fish more cleanly. . . . [while] the gulf fishery has the worst bycatch rate of any fishery in the United States.”³¹ After heated debate, the House approved the amendment by 294-129.³²

The New York Times described the action in an October 24 story: “These amendments to the original version, which was drafted by a committee heavily influenced by conservative Republicans, were approved by lopsided votes in the House. The moderates . . . cite votes like these as part of a progression in which more and more Republicans are voting for environmental protection.”³³

Along with several other factors, this growing core of moderates contributed to the resounding victory. The 24-month grassroots campaign of the Marine Fish Conservation Network brought voices from all over the country into the debate and increased media attention to fisheries issues. One analyst, who interviewed many of the Members who voted for the amendments, said their Magnuson votes were based on

26. *Id.* at H10234.

27. *Id.* at H10236.

28. *Id.* at H10236-42.

29. *Id.* at H10237.

30. *Id.* at H10236.

31. *Id.* at H10237.

32. *Id.* at H10237.

33. John H. Cushman, Jr., *Moderates Soften G.O.P. Agenda on Environment*, N.Y. TIMES, Oct. 24, 1995, at A1.

knowledge of the issues and a recognition that the conservation amendments “made sense economically.”³⁴

Unfinished Business

If the congressional debate over Magnuson Act reauthorization demonstrates that bipartisan support exists for sustainable fishing, it also shows how regional squabbles over declining fisheries can undermine sound policy. The legislation passed by the House of Representatives addresses the overfishing that has decimated many coastal fisheries. However, it fails to address one of the principal causes of overfishing—the overcapitalization of fishing fleets and the lack of effective programs to limit fishing effort.

Many major U.S. fisheries are seriously overcapitalized. In New England, thousands of fishing vessels compete for dwindling stocks of cod and haddock. In the Gulf of Mexico, the annual commercial quota for red snapper is exhausted in a matter of weeks. Here and elsewhere a race for fish has developed as the size and power of fishing fleets have overmatched sustainable catch levels. The oft-cited phenomenon of too many boats chasing too few fish is among the most important threats to fish populations, marine biodiversity in general, and the economic vitality of fishing communities.

Unfortunately, successful programs to reduce fishing effort will nearly always eliminate some fishing jobs and create real hardship for some individuals. (Of course, this is also true if we do nothing and wait for fisheries to collapse.) More importantly, from a political perspective, the benefits and burdens of effort reduction schemes are never distributed “equally.” Indeed, the design of effort reduction policies are typically driven by infighting between competing regional fishing interests. This helps explain why so few successful effort control programs exist today.

Nevertheless, recognizing the inevitable consequences of the failure to control fishing effort, participants in some fisheries have attempted to limit access and reduce the size of fishing fleets. These efforts include longstanding programs establishing private rights to shellfish beds, entry moratoria, license limitation schemes, and programs creating individual transferable quotas in fish stocks.³⁵ Clearly, any such

34. Interview with Constance Harriman, former Assistant Secretary of Fish, Wildlife and Parks, U.S. Dept. of Interior, in Washington, D.C. (Jan. 3, 1996).

35. See KARYN L. GIMBEL, *LIMITING ACCESS TO MARINE FISHERIES: KEEPING THE FOCUS ON CONSERVATION* (1994).

program must be evaluated against a panoply of ecological, economic, and sociological concerns. But just as clearly, it is unwise at this juncture to create unnecessary impediments to the establishment of such regimes. Whether this debate will occur in the Senate or simply strangle the Magnuson Act reauthorization process because of the regional economic rivalries it engenders remains to be seen.

For too long Congress has acquiesced in the “business as usual” of leaving national fishery policy to the few coastal members whose constituents make their living from the sea. That practice has resulted in special treatment, exclusive programs, and ad hoc policy. There is potential, despite the conservation victory in the House, that the momentum for fishery reform will be lost as the Senate makes its trades to accommodate special interests in the Gulf of Mexico, the Gulf of Maine, the Gulf of Alaska, and elsewhere. At worst, Congress will hamstring attempts to reduce fishing fleet size because it is unwilling to compel fishing constituents to resolve localized allocation disputes, or unable to proffer a workable effort reduction regime of its own, preferably one that does not depend on dubious appropriations from the federal government. So far no such plan has been proposed. Until Congress comes to grips with the need to effectively trim fishing effort, its progress in reforming the rules governing America’s fisheries will be tempered by the harsh reality of overcapitalization and the destructive race for fish that results.