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## An Annotated Guide To The Major Provisions Of The Sustainable Fisheries Act

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# AN ANNOTATED GUIDE TO THE MAJOR PROVISIONS OF THE SUSTAINABLE FISHERIES ACT

## I. INTRODUCTION

The piece that follows is an annotated reprint of proceedings in the *Congressional Record* regarding the Sustainable Fisheries Act.<sup>1</sup> Part II is an introduction to federal fishery management and the need for the Sustainable Fishery Act given by Senator Kerry on January 4, 1995. Part III provides a Summary of the Manager's Amendment as it was reported in the Congressional Record on September 19, 1996. Neither Part analyzes the Act.

## II. STATEMENT OF SENATOR KERRY, JANUARY 4, 1995<sup>2</sup>

Mr. KERRY.

Mr. President, on March 1, 1977, the Fishery Conservation and Management Act<sup>3</sup> was signed into law in response to an urgent threat to the valuable living marine resources of our coastal waters. At that time, the threat to our domestic fisheries came in the form of an efficient and aggressive state-of-the-art foreign fishing fleet that was operating within sight of our shores and displacing our domestic fishermen and processors. In response, Congress, led by Senator Warren Magnuson, passed the Fishery Conservation and Management Act establishing a 200-mile fishery conservation zone and asserting United States management authority over fish within the conservation zone,<sup>4</sup> as well as over anadromous species such as salmon throughout their migratory range. In honor of Senator

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1. Pub. L. No. 104-297, 110 Stat. 3559 (1996).

2. 141 CONG. REC. S247-48 (1995).

3. Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified as amended at 16 U.S.C.A. §§ 1801-1883 (West 1985 & Supp. 1997)).

4. Pub. L. No. 94-265, § 101, 90 Stat. 331 (1976), *reprinted in A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976*, at 6-7 (1976). The fishery conservation zone was renamed the "exclusive economic zone" when the Act was amended in 1986. Pub. L. No. 99-659, § 101, 100 Stat. 3706, 3707 (1986) (codified as amended at 16 U.S.C. § 1811 (1994)).

Magnuson's leadership, in 1980, the act was officially retitled the Magnuson Fishery Conservation and Management Act.<sup>5</sup>

The Magnuson Act succeeded—it limited the operation of foreign fishing vessels and processors and encouraged the development of the U.S. domestic fishing fleet and processing industry. In 1993, U.S. commercial fishermen landed over 10 billion pounds of fish, producing \$3.4 billion in dockside revenues. By weight of catch, the United States is now the world's sixth largest fishing nation. The United States is also the top seafood exporter, with exports valued at \$3.1 billion in 1993.

However, we have succeeded too well in some ways, and today there is another threat to our coastal fisheries. The threat is not from abroad but from ourselves. Since the implementation of the Magnuson Act, the number of commercial groundfish vessels in New England has increased by 70 percent, and the number of fishermen has risen by 130 percent. Although fish and shellfish are renewable resources, they are not unlimited. In several U.S. fisheries, a pattern has been repeated: Fishermen, lured by the promise of large and lucrative harvests, enter a fishery when fish populations are abundant. As the fishery develops, larger boats often replace smaller boats, the number of boats increases, and new technologies are continually introduced to improve each vessel's fishing power and efficiency. In several U.S. fisheries, these trends have been bolstered by government policies, including tax incentives and Federal loan guarantees, designed to stimulate development of the domestic fishing industry. The result is that the harvesting capacity in many fisheries has out-paced the capacity of the fisheries to renew themselves. U.S. fisheries also have suffered from destruction of essential habitat, destructive fishing practices, and water pollution.

The key to the success of the Magnuson Act is the ability of the eight regional fisheries management councils established under the act<sup>6</sup> to work with the National Marine Fisheries Service to manage the fisheries on a regional level while meeting the national standards set forth in the act.<sup>7</sup> The councils have made a substantial effort to manage the Nation's

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5. Pub. L. No. 96-561, § 238(a), 94 Stat. 3286 (1980).

6. 16 U.S.C.A. § 1852(a) (West 1985 & Supp. 1997).

7. *Id.* § 1851(a).

fisheries—as of September 1, 1993, 33 fishery management plans are in effect with several others in development. However, their success in managing the nation's fisheries has been mixed. Critics charge that since the enactment of the Magnuson Act, the councils have sometimes reacted to developments in fisheries rather than anticipating problems—even when looming problems are apparent. In addition, the complexity of the process has impeded the council response, often exacerbating the problem. In many instances, minor management actions could have been taken sooner to avoid the need for more dramatic measures later. In some regions, including parts of the Northwest, the council members are no longer perceived as stewards of the public resource, providing fair and balanced representation, but are seen as protectors of special economic interests. The Magnuson Act requires that council members be knowledgeable or experienced with regard to the conservation and management, or the recreational or commercial harvest, of the fishery resources within their respective geographic areas of responsibility.<sup>8</sup> However, this requirement has created situations in which a council member may have personal or financial interests in a fishery he or she is responsible for managing.

In fact, despite the work of the councils, problems continue to exist in varying degrees in many regions. These include: continued overfishing; lack of coordination between councils and the Federal Government; lack of accountability; inconsistency in State and Federal management measures; and adoption of unenforceable management measures.

Perhaps the most visible example of the problems in fisheries management is one with which I unfortunately am too familiar—the collapse of the traditional New England groundfish stocks of cod, haddock, and yellowtail flounder. In 1990, the commercial fishing industry in Massachusetts was a \$300 million industry. By 1993, revenues had dropped to almost \$232 million, and their year revenues are certain to be much lower.

In 1993, the decline of these valuable fish stocks necessitated a substantial amendment to the fisheries management plan for these stocks in an effort to eliminate overfishing by cutting in half fishing mortality

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8. *Id.* § 1852(b)(2)(A).

over the next five to seven years. The initiation of regulations necessary to rebuild the fishery has already had significant economic impact on the coastal communities throughout New England. However, even before those programs could be fully implemented, scientific information from the National Marine Fisheries Service indicated that the situation was worse than predicted, and as a result the New England Fisheries Management Council voted to recommend that the Secretary of Commerce take emergency action to address the crisis in New England while it develops a plan amendment under normal procedures. In December, the Secretary took emergency action to close portions of U.S. waters of the Georges Bank and southern New England to commercial fishing in an effort to save the traditional groundfish stocks from commercial extinction. These emergency measures are the latest blows to the New England fishing industry that is already staggering from the dire situation which they face. Further fishing restrictions are likely to have disastrous economic and social impacts on the historic fishing communities of the Northeast. These problems must be addressed and reversed for the sake of the fishermen and the fish in New England and throughout the Nation.

Over the last 2 years, the Commerce Committee has conducted a series of hearings here in Washington and in fishing communities around the U.S. coast. We have reviewed comments from members of the fishing industry, the administration, conservation groups and other public interest groups.<sup>9</sup> This has been a bipartisan effort. I have worked closely with the

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9. S. 39, *Hearing on the Reauthorization of the Magnuson Fishery Conservation and Management Act: Hearing Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. (1995) (Mar. 4, 1995, Rockport, Maine); S. 39, *Hearing on the Reauthorization of the Magnuson Fishery Conservation and Management Act: Hearing Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. (1995) (Mar. 4, Boston, Massachusetts); S. 39, *Hearing on the Reauthorization of the Magnuson Fishery Conservation and Management Act: Hearing Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. (1995) (Mar. 25, Anchorage, Alaska); S. 39, *Hearing on the Reauthorization of the Magnuson Fishery Conservation and Management Act: Hearing Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. (1995) (May 13, New Orleans, Louisiana).

senior Senator from Alaska. We and our colleagues share the desire to ensure plentiful yields of fish for years to come.

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. . . [T]he fisheries of the United States are at a crossroads and significant action is required to remedy our fisheries management problems and preserve the way of life of our fishing communities. Fish on the dinner table is something that many Americans may have taken for granted in the past; but unless we take steps to ensure that these vital resources are conserved, they will not be there for future generations.

### III. SUMMARY OF MANAGER'S AMENDMENT TO S. 39<sup>10</sup>

#### *A. Authorization of Appropriation*

The manager's amendment authorizes appropriations through fiscal year (FY)1999 for the purposes of carrying out the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).<sup>11</sup>

#### *B. Definitions*

The amendment defines a number of new terms for the purposes of the Magnuson Act and amends a number of existing definitions. New defined terms include: "bycatch"; "charter fishing"; "commercial fishing"; "economic discards"; "essential fish habitat"; "fishing community"; "individual fishing quota"; "overfishing"; "Pacific Insular areas"; "recreational fishing"; "regulatory discards"; "special areas"; and "vessel subject to the jurisdiction of the United States."<sup>12</sup> The amendment amends

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10. 142 CONG. REC. S10,907-09 (1996). With the exception of a few minor amendments, the Manager's Amendment to S. 39 represents the final version of the Sustainable Fisheries Act that was signed into law on October 11, 1996. Senator Snowe added amendment number 5381 dealing with management of the American lobster fishery on September 18, 1996, codified at 16 U.S.C.A. § 5107a (West 1985 & Supp. 1997). 142 CONG. REC. S10,822 (1996). Senator Hutchinson presented amendment number 5383, as modified on September 19, 1996 (dealing with a few clerical changes). 142 CONG. REC. S10,909 (1996).

11. Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, § 103, 110 Stat. 3559, 3563 (1996).

12. 16 U.S.C.A. § 1802 (West 1985 & Supp. 1997).

the existing definition of "optimum" with respect to the yield of fishery to mean the amount of fish prescribed on the basis of the maximum sustainable yield "as reduced" (rather than "as modified") by any relevant economic, social, or ecological factor.<sup>13</sup> This change prevents the maximum sustainable yield of a fishery from being exceeded.

### C. *Bycatch Reduction*

The amendment adds a new national standard to the Magnuson Act requiring that, to the extent practicable, conservation and management measures minimize bycatch and minimize the mortality of bycatch that cannot be avoided.<sup>14</sup> The amendment specifically requires the Councils to establish standard reporting methods under fishery management plans to assess the amount and type of bycatch occurring in each fishery,<sup>15</sup> and to include measures to minimize bycatch to the maximum extent they can, and to minimize the mortality of bycatch that cannot be avoided in the first place.<sup>16</sup> The amendment provides the Councils with the new tools of harvest preferences and other harvest incentives to achieve this bycatch reduction.<sup>17</sup> In addition, the amendment requires the Councils to assess the type and amount of fish being caught and released alive in recreational fisheries, and include measures to ensure the extended survival of such fish.<sup>18</sup>

The amendment requires the Secretary of State to seek to secure international agreements for bycatch standards and measures equivalent of those of the United States.<sup>19</sup>

The amendment requires the North Pacific Council, in carrying out the new bycatch requirements, to reduce the total amount of bycatch occurring in the North Pacific, and authorizes the North Pacific Council to use, in addition to harvest preferences or other harvest incentives, fines

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13. *Id.* § 1802(28).

14. *Id.* § 1851(a)(9).

15. *Id.* § 1853(a)(11).

16. *Id.*

17. *Id.* § 1853(b)(10).

18. 16 U.S.C.A. § 1853(a)(12) (West 1985 & Supp. 1997).

19. *Id.* § 1822(h)(1).

and non-transferable annual allocations of regulatory discards as incentives to reduce bycatch and bycatch rates.<sup>20</sup> The amendment requires the North Pacific Council to submit a report on the advisability of requiring the full retention and full utilization of the economic discards in the North Pacific that cannot be avoided in the first place.<sup>21</sup> The Council must report on any measures it already has approved, or approves during the period of the study, to require full retention or full utilization, and is not meant to preclude the Council from taking all actions that it can to achieve these goals.<sup>22</sup>

The amendment requires the Secretary to conclude within nine months the collection of data in the program to assess the impact on fishery resources of incidental harvest by shrimp trawl fisheries, and to conduct additional data collection and evaluation activities for stocks identified by the program which are considered to be overfished.<sup>23</sup> Within 12 months of enactment, the Secretary must complete a program to develop technology, devices, and changes in fishing operations necessary to minimize the incidental mortality of bycatch in the course of shrimp trawl activity to the extent practicable as measured against the level of mortality which occurred in a fishery before November 28, 1990.<sup>24</sup>

Any measures taken are required to be consistent with measures that are applicable to fishing throughout the range within the United States by the bycatch species.<sup>25</sup>

#### *D. Overfishing*

The amendment defines "overfishing" to mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.<sup>26</sup> It requires the Councils to specify, in each FMP, criteria for determining when a fishery

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20. *Id.* § 1862(f)-(g).

21. *Id.* § 1862(i).

22. *Id.* § 1862(i)(1).

23. *Id.* § 1881d.

24. 16 U.S.C. § 1881d(d) (West 1985 & Supp. 1997).

25. *Id.* § 1881d(f).

26. *Id.* § 1802(29).



is overfished and to include measures to rebuild any overfished fishery.<sup>27</sup> It also requires the Secretary to report annually to Congress and the Councils on the status of fisheries, and to identify fisheries that are overfished or approaching a condition of being overfished using the Council's overfishing criteria.<sup>28</sup> The Secretary is required to notify the Council immediately if a fishery is overfished.<sup>29</sup>

Within one year of the Secretary's annual report, the appropriate Council must submit an FMP, amendment or regulation to prevent overfishing in fisheries determined to be approaching that condition,<sup>30</sup> and to stop overfishing and begin to rebuild fisheries classified as overfished.<sup>31</sup> For an overfished fishery, the Councils must specify as short a time period as possible to stop the overfishing, taking into account the harvest status and biology of the overfished stock, the needs of fishing communities, recommendations by international organizations in which the United States participates, and interaction between the stock and the ecosystem.<sup>32</sup> The duration cannot exceed 10 years except under extraordinary circumstances.<sup>33</sup> The Secretary is required to prepare an FMP or amendment if a Council fails to take sufficient action within one year on an FMP, amendment or regulations to rebuild an overfished fishery.<sup>34</sup> The amendment allows the Secretary to recommend appropriate measures to the Council,<sup>35</sup> and requires that the allocation of both overfishing restrictions and recovery benefits be fairly and equitably distributed among sectors of the fishery.<sup>36</sup>

The manager's amendment allows the Secretary to use interim authority to reduce overfishing for up to 180 days, with one additional 180 day

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27. *Id.* § 1853(a)(10).

28. *Id.* § 1854(e)(1).

29. *Id.* § 1854(e)(2).

30. 16 U.S.C.A. § 1854(e)(3) (West 1985 & Supp. 1997).

31. *Id.* § 1854(e)(4).

32. *Id.* § 1854(e)(4)(A)(i).

33. *Id.* § 1854(e)(4)(A)(ii).

34. *Id.* § 1854(e)(5).

35. *Id.* § 1854(e)(7)(B).

36. 16 U.S.C.A. § 1854(e)(4)(B) (West 1985 & Supp. 1997).

period, provided that a public comment period on the measure is provided.<sup>37</sup>

### *E. Habitat Protection*

The amendment defines "essential fish habitat" for the purposes of the Magnuson Act as "waters and substrate necessary to fish for spawning, breeding, or growth to maturity."<sup>38</sup> It requires the Councils to identify essential fish habitat under each FMP, to minimize, where practicable adverse impacts on the habitat caused by fishing,<sup>39</sup> and to identify actions that should be considered to encourage the conservation and enhancement of essential fish habitat.<sup>40</sup> The Secretary is required to establish guidelines to assist the Councils in describing and identifying essential fish habitat and to review programs administered by the Department of Commerce to ensure they further the conservation and enhancement of essential fish habitat.<sup>41</sup> Federal agencies are required to consult with the Secretary with respect to any action authorized, funded or proposed to be undertaken that may adversely affect any essential fish habitat identified under the Magnuson Act.<sup>42</sup>

The amendment authorizes the Councils (similar to existing law) to comment on and make recommendations to the Secretary and other Federal or State agencies on any agency actions that may affect habitat, including essential fish habitat,<sup>43</sup> and requires the Councils to comment on and make recommendations on agency activities that in the view of the Council are likely to substantially affect the habitat, including essential fish habitat, of an anadromous fishery resource.<sup>44</sup>

Upon notification of any action authorized, funded, undertaken, or proposed to be authorized, funded, or undertaken by a Federal agency

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37. *Id.* § 1855(c).

38. *Id.* § 1802(10).

39. *Id.* § 1853(a)(7).

40. *Id.* § 1855(b)(1)(B).

41. *Id.* § 1855(b)(1)(A).

42. 16 U.S.C.A. § 1855(b)(2) (West 1985 & Supp. 1997).

43. *Id.* § 1855(b)(3)(A).

44. *Id.* § 1855(b)(3)(B).

that may adversely affect essential fish habitat, the Secretary is required to recommend measures that can be taken to conserve the habitat.<sup>45</sup> Federal agencies must respond in writing to such recommendations, and explain reasons for not following any recommendations.<sup>46</sup>

#### *F. Council Reform*

The amendment requires Council members to recuse themselves from voting on Council decisions that would have a "significant and predictable effect" on their financial interests.<sup>47</sup> Such a decision is defined as one where there is "a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery."<sup>48</sup> This language is intended to prevent Council members from voting on decisions that would bring substantially disproportionate financial benefits to themselves, but not to prevent Council members from voting on most matters on which they have expertise.

The Secretary, in consultation with the Council, is required to select a "designated official"<sup>49</sup> with Federal conflict-of-interest experience to attend Council meetings and make determinations on conflicts of interest.<sup>50</sup> The determinations will occur at the request of the affected Council member or at the initiative of the designated official.<sup>51</sup> Any Council member may request a review by the Secretary of a determination.<sup>52</sup> Regulations for the recusal process are required to be promulgated by the Secretary within one year of enactment.<sup>53</sup>

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45. *Id.* § 1855(b)(4)(A).

46. *Id.* § 1855(b)(4)(B).

47. *Id.* § 1852(j)(7)(A).

48. 16 U.S.C.A. § 1852(j)(7)(A) (West 1985 & Supp. 1997).

49. *Id.* § 1852(j)(1)(B).

50. *Id.*

51. *Id.* § 1852(j)(7)(B).

52. *Id.* § 1852(j)(7)(C).

53. *Id.* § 1852(j)(7)(F).

The amendment adds an additional seat to the Pacific Council for Pacific Northwest Indian tribes, to be selected by the Secretary from a list of 3 individuals from tribes with Federally recognized fishing rights.<sup>54</sup> The amendment adds two additional seats to the Mid-Atlantic Council to provide representation for the State of North Carolina.<sup>55</sup>

The amendment requires the Councils to keep detailed minutes of meetings.<sup>56</sup> It also allows any voting member of the Council to request that a matter be decided by roll call vote, and requires all roll call votes to be identified in the Council's minutes.<sup>57</sup> All written data submitted to the Council are required to include a statement of the information's source.<sup>58</sup> The reported bill allows the Councils (and the Secretary with respect to Atlantic highly migratory species) to establish fishery negotiation panels to assist in the development of difficult conservation and management measures.<sup>59</sup>

### *G. Fishery Management Plans*

The amendment simplifies the review process by the Secretary of proposed FMPs and amendments submitted by the Councils, and includes a new section addressing proposed regulations submitted by the Councils. It eliminates the preliminary FMP evaluation required under current law.<sup>60</sup> After transmittal of an FMP or amendment by the Council to the Secretary, the Secretary immediately must publish notice of the plan in the Federal Register and provide a 60-day comment period.<sup>61</sup> The Secretary must approve, partially approve, or disapprove a plan within 30 days of the end of the comment period.<sup>62</sup>

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54. 16 U.S.C.A. § 1852(b)(5)(A) (West 1985 & Supp. 1997).

55. *Id.* § 1852(a)(1)(B).

56. *Id.* § 1852(i)(2)(E).

57. *Id.* § 1852(e)(5).

58. *Id.* § 1852(i)(2)(D).

59. *Id.* § 1855(g)(1)(A).

60. 16 U.S.C. § 1854(a) (1994) (current version as amended at 16 U.S.C.A. § 1854(a) (West 1985 & Supp. 1997)).

61. 16 U.S.C.A. § 1854(a)(1)(B) (West 1985 & Supp. 1997).

62. *Id.* § 1854(a)(3).

The amendment creates a new framework for the Secretary to review proposed regulations from the Councils and allows the Councils to submit proposed regulations simultaneously with an FMP or amendment, or at any time after an FMP or amendment has been approved.<sup>63</sup> The Secretary has 15 days to review proposed regulations for their consistency with an FMP.<sup>64</sup> If they are consistent, regulations must be published in the Federal Register for a comment period of 15 to 60 days.<sup>65</sup> The Secretary must publish final regulations within 30 days of the end of the comment period.<sup>66</sup>

The amendment requires the Councils to describe the commercial, recreational, and charter fishing occurring in each fishery<sup>67</sup> and to allocate any harvest restrictions or recovery benefits fairly and equitably among these three sectors.<sup>68</sup> The amendment codifies existing authority of the Councils to restrict the sale of fish for conservation and management purposes, including [authority] to ensure that any fish that is sold complies with federal and state safety and quality requirements.<sup>69</sup>

#### *H. Individual Fishing Quotas*

The amendment prevents Councils from submitting and the Secretary from approving or implementing any new individual fishing quota (IFQ) programs until after September 30, 2000,<sup>70</sup> and directs the National Academy of Sciences, in consultation with the Secretary, Councils, and others, to submit a comprehensive report on IFQs to the Congress by October 1, 1998.<sup>71</sup>

The Academy report must address, among other things, IFQ transferability, foreign ownership, processor quotas, effective IFQ enforcement,

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63. *Id.* §§ 1853(c), 1854(b)(1).

64. *Id.* § 1854(b)(1).

65. *Id.* § 1854(b)(1)(A).

66. 16 U.S.C.A. § 1854(b)(3) (West 1985 & Supp. 1997).

67. *Id.* § 1853(a)(13).

68. *Id.* § 1853(a)(14).

69. *Id.* § 1853(b)(3)(B).

70. *Id.* § 1853(d)(1)(A).

71. Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(f)(1), 110 Stat. 3559, 3577 (1996) (incorporated by reference in 16 U.S.C.A. § 1853(d)(5) (West 1985 & Supp. 1997)).

IFQ auctions, windfall profits, and potential economic impacts including capital gains revenue.<sup>72</sup> The report must additionally analyze IFQ programs already in existence in the United States (wreckfish, surf clam/ocean quahog, and halibut/sablefish), IFQs outside the United States, and characteristics unique to IFQs<sup>73</sup> as well as alternative measures that accomplish the same objectives as IFQs.<sup>74</sup> Two working groups (West Coast/Alaska/Hawaii and East Coast/Gulf) will assist in preparing the report.<sup>75</sup> After September 30, 2000, in the event that amendments to the Magnuson Act have not been adopted to implement a national IFQ policy, the councils will be allowed to submit new IFQ programs to the Secretary following certain guidelines.<sup>76</sup>

The amendment requires the Secretary to establish a fee of up to three percent of the annual ex-vessel value of fish harvested under IFQ programs to pay for management costs.<sup>77</sup> The surf clam/ocean quahog and wreckfish IFQ fisheries will not begin paying fees until January 1, 2000.<sup>78</sup> The amendment allows the Councils to reserve up to 25 percent of these fees be used for loan obligations for IFQs for small vessel fishermen and entry level fishermen.<sup>79</sup> The North Pacific Council is required to reserve the full 25 percent for such a program in the halibut and sablefish fisheries.<sup>80</sup>

The amendment requires the Secretary to collect a fee under the authority of a new section 304(d)(2)(A)(i) to recover the actual costs directly related to the management and enforcement of any IFQ program,<sup>81</sup> including any program that may be created under section 313(g)(2) in the North Pacific to reduce per vessel bycatch and bycatch rates.<sup>82</sup> It is expected that the fee collected under any program created

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72. Sustainable Fisheries Act, § 108(f)(1), 110 Stat. at 3577-79.

73. *Id.* § 108(f)(2), 110 Stat. at 3579.

74. *Id.* § 108(f)(3), 110 Stat. at 3579.

75. *Id.* § 108(f)(4), 110 Stat. at 3579.

76. 16 U.S.C.A. § 1853(d)(5) (West 1985 & Supp. 1997).

77. *Id.* § 1854(d)(2)(A)-(B).

78. Sustainable Fisheries Act, Pub. L. No. 104-297, § 109(d), 110 Stat. 3559, 3584.

79. 16 U.S.C.A. § 1853(d)(4)(A) (West 1985 & Supp. 1997).

80. Sustainable Fisheries Act § 108(g), 110 Stat. at 3579-80.

81. 16 U.S.C.A. § 1854(d)(2)(A)(i) (West 1985 & Supp. 1997).

82. *Id.* § 1862(g).

under section 313(g)(2) would not exceed one percent of the estimated annual value of the target species in the fishery in which the program is created.

### *I. State Jurisdiction*

The manager's amendment restates in greater detail existing law with respect to a state's ability to regulate fishing vessels registered in that state in federal waters. It allows states to regulate all fishing vessels in a fishery in the EEZ off that State if a fishery management plan delegates such authority to the State.<sup>83</sup> Further, it allows the State of Alaska to regulate fishing vessels not registered under Alaska laws in the EEZ off Alaska if there is no fishery management plan in place for a fishery,<sup>84</sup> and allows the states of California, Oregon and Washington to enforce certain state laws in the EEZs off their respective coasts with respect to dungeness crab fishing until October 1, 1999, or if a fishery management plan for that species is implemented.<sup>85</sup>

### *J. Lien Registry*

The amendment requires the Secretary to establish a central registry system for limited access permits (including IFQ permits), 6 months after the enactment of the Act,<sup>86</sup> and requires the Secretary to charge a fee of

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83. *Id.* § 1856(a)(3)(B).

84. *Id.* § 1856(a)(3)(C). Specifically, § 1856(a)(3)(C) provides that a state may regulate a fishing vessel outside the boundaries of the state where:

The fishing vessel is not registered under the law of the State of Alaska and is operating in a fishery in the exclusive economic zone off Alaska for which there was no fishery management plan in place on August 1, 1996, and the Secretary and the North Pacific Council find that there is a legitimate interest of the State of Alaska in the conservation and management of such fishery. The authority provided under this subparagraph shall terminate when a fishery management plan under this chapter is approved and implemented for such fishery.

*Id.*

85. Sustainable Fisheries Act, Pub. L. No. 104-297, § 112(d), 110 Stat. 3559, 3596 (1996).

86. 16 U.S.C.A. § 1855(h)(1) (West 1985 & Supp. 1997).

not more than one half of one percent of the value of a permit upon registration and transfer to pay for the system.<sup>87</sup> The amendment requires the Secretary to determine whether the Secretary of the Treasury has placed any liens against limited access system permits and to provide this information to both the buyer and seller of any permit before collecting a fee on the transfer of a permit.<sup>88</sup> Consistent with the requirements of the Internal Revenue Code of 1986, the Secretary of the Treasury may withdraw a notice of lien filed against a limited access system permit if the withdrawal will facilitate the collection of a tax liability by allowing the owner of the permit to derive income from the use of the permit.<sup>89</sup> The amendment establishes a Limited Access System Administration Fund in the Treasury.<sup>90</sup> Funds from this fund are available without appropriation to the Secretary to administer the central lien registry system and manage the fishery in which IFQ fees were collected.<sup>91</sup> Any fees collected on the ex-vessel value of the fish harvested under an IFQ system can be spent only in the fishery in which they were collected.<sup>92</sup>

### *K. Pacific Community Fisheries*

The amendment requires the North Pacific Council and Secretary to establish a western Alaska community development quota (CDQ) program under which a percentage of the total allowable catch of each Bering Sea fishery is allocated to western Alaska communities that participate in the program.<sup>93</sup> The amendment prevents the North Pacific Council from increasing the percentage of any CDQ allocation approved by the Council prior to October 1, 1995 until after September 30, 2001.<sup>94</sup> The amendment includes a sentence at the end of a new section 305(i)(1)(C)(i) making clear that this cap through September 30, 2001 does not prevent

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87. *Id.* § 1855(h)(5)(A).

88. *Id.* § 1855(h)(3).

89. *Id.*

90. *Id.* § 1855(h)(1)(B).

91. *Id.* § 1855(h)(1)(B)(i).

92. 16 U.S.C.A. § 1855(h)(5)(B)(ii) (West 1985 & Supp. 1997).

93. *Id.* § 1855(i)(1)(A).

94. *Id.* § 1855(i)(1)(C)(i).



the extension of the pollock CDQ allocation beyond 1998.<sup>95</sup> In complying with the western Alaska CDQ requirement, a percentage of the pollock fishery (and each Bering Sea fishery) must be allocated to the program every year.<sup>96</sup> . . .

The Council retains the ability to revise CDQ allocations, except as provided in the amendment for crab fisheries, provided that the allocations not exceed the levels approved by the Council prior to October 1, 1995 (after September 30, 2001, the Council retains the full ability to revise CDQ allocations).<sup>97</sup> The Secretary is required to phase in the CDQ percentage already approved by the North Pacific Council for the Bering crab fisheries, allocating 3.5 percent in 1998, 5 percent in 1999 and 7.5 percent in 2000 and thereafter, unless the Council submits a percentage no greater than 7.5 percent for 2001 or any other percentage on or after October 1, 2001.<sup>98</sup> CDQ allocations already approved by the Council (pollock, halibut, sablefish, crab and groundfish) do not need to be resubmitted by the Council or reapproved (if already approved) by the Secretary.<sup>99</sup>

The amendment requires the National Academy of Sciences to submit a report to Congress on the performance and effectiveness of the community development quota programs under the authority of the North Pacific Council.<sup>100</sup> The amendment requires CDQ fees collected by the Secretary to be reduced by the amount of costs imposed on CDQ program participants that are not imposed on other participants in the fishery.<sup>101</sup> The Secretary is required to transfer to the State of Alaska up to 33

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95. *Id.*; See also NOAA, Office of General Counsel, Guide to the Sustainable Fisheries Act: Public Law 104-297, at 47, n.2 (1997) (unpublished guide, on file with the *Ocean and Coastal Law Journal*) (available on the Sustainable Fisheries Act web site at <<http://kingfish.ssp.nmfs.gov/sfa/>>).

96. 16 U.S.C.A. § 1855(i)(1)(C)(ii) (West 1985 & Supp. 1997).

97. *Id.*

98. *Id.* § 1855(i)(1)(C)(iii).

99. *Id.* § 1855(i)(1)(D).

100. Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(h), 110 Stat. 3359, 3580 (1996).

101. 6 U.S.C.A. § 1855(i)(3) (West 1985 & Supp. 1997).

percent of any CDQ fees to reimburse the State for its costs in the CDQ program.<sup>102</sup>

The amendment authorizes the Western Pacific Council to establish a western Pacific community development program.<sup>103</sup> It additionally authorizes the Secretary and Secretary of Interior to make direct grants, not to exceed a total of \$500,000 annually, to eligible western Pacific communities to establish from three to five fishery demonstration projects which foster and promote the involvement of western Pacific communities.<sup>104</sup>

#### *L. Reducing Fishing Capacity*

The amendment authorizes the Secretary to implement a vessel and/or permit buyout program at the request of a Council (or Governor for a fishery under a State's authority) if adequate steps are taken to ensure that vessels and permits are removed permanently and the program is needed for conservation and management.<sup>105</sup> Eligible funding sources could include Saltonstall-Kennedy funds, funds appropriated for the purpose of the buyout section, funds provided by an industry fee system (which cannot exceed 5 percent of the ex-vessel value of fish harvested), of funds provided by a State or other source.<sup>106</sup> The amendment authorizes the Secretary to provide direct loan obligations of up to \$100 million per fishery to finance buyout programs, which must be paid back over a twenty year period. Any catch history must be forfeited by the owner of a vessel or permit that is purchased under a buyout program.<sup>107</sup>

#### *M. Fisheries Disaster Relief*

At the discretion of the Secretary or at the request of an affected state or fishing community, the Secretary must determine whether a commer-

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102. *Id.* § 1854(d)(2)(C)(ii).

103. *Id.* § 1855(i)(2)(A).

104. Sustainable Fisheries Act § 111(b), 110 Stat. at 3594.

105. 16 U.S.C.A. § 1861a(b)(1)-(2) (West 1985 & Supp. 1997).

106. *Id.* § 1861a(c)(1).

107. *Id.* § 1861a(b)(2)(B).

cial fishery failure has occurred, caused by natural causes; man-made causes beyond the control of a Council; or undetermined causes.<sup>108</sup> If the Secretary determines that a commercial fishery failure has occurred, the Secretary may make funds available to an affected State, fishing community or other activity the Secretary determines appropriate to restore the fishery or prevent a similar failure in the future.<sup>109</sup> The Federal share of the cost of any activity under the authority of the section cannot exceed 75 percent of the total cost.<sup>110</sup> The amendment authorizes such sums as are necessary for each fiscal year for fisheries disaster relief.<sup>111</sup>

#### *N. Research*

The amendment creates a new title IV of the Magnuson Act, titled "Fishery Monitoring and Research"<sup>112</sup> that contains existing Magnuson sections (with some modifications) dealing with information collection,<sup>113</sup> confidentiality,<sup>114</sup> fisheries research,<sup>115</sup> shrimp trawl incidental harvest research,<sup>116</sup> [and] observers.<sup>117</sup> It also contains new sections dealing with vessel registration,<sup>118</sup> and the creation of an advisory panel to develop recommendations to expand the application of ecosystem principles in fishery conservation and management activities.<sup>119</sup> The amendment requires the National Academy of Sciences to complete a peer review of the Northeast Multispecies Fishery Management Plan by February 1, 1997.<sup>120</sup>

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108. *Id.* § 1861a(a)(1).

109. *Id.* § 1861a(a)(2).

110. *Id.* § 1861a(a)(3).

111. 16 U.S.C.A. § 1861a(a)(4) (West 1985 & Supp. 1997).

112. Sustainable Fisheries Act, Pub. L. No. 104-297, § 201, 110 Stat. 3359, 3604-05 (1996).

113. 16 U.S.C.A. § 1881a (West & Supp. 1997).

114. *Id.* § 1881a(b).

115. *Id.* § 1881c.

116. *Id.* § 1881d.

117. *Id.* § 1881b.

118. *Id.* § 1881(a)-(b).

119. 16 U.S.C.A. § 1882(a) (West 1985 & Supp. 1997).

120. Sustainable Fisheries Act, Pub. L. No. 104-297, § 210, 110 Stat. 3559, 3615 (1996).

### O. Vessel Registration

The amendment requires the Secretary to develop recommendations for implementation of a standardized vessel registration and data management system, centralized on a regional basis, that would be required to integrate and standardize all federal marine resource vessel registration and data collection requirements, as well as State requirements if a State chooses to participate.<sup>121</sup> The system must avoid duplication with any existing State or other systems.<sup>122</sup> Within 16 months of the date of enactment, and after providing for public comment, the Secretary must transmit the proposal to Congress.<sup>123</sup> Within 15 months of enactment, the Secretary must report to Congress on the need to include private recreational fishing vessels in a national fishing vessel registration and data collection system.<sup>124</sup>

### P. Observers

The Secretary is required to promulgate regulations for vessels required to carry observers, including guidelines to determine when the facilities of a vessel are not safe or adequate for an observer, or how to reasonably make them safe or adequate.<sup>125</sup> The Secretary also must establish, in cooperation with States and Sea Grant College Programs, programs to train and ensure the competence of observers.<sup>126</sup> The Secretary is required to use university training facilities, such as the North Pacific Observer Training Center, where possible, to carry out the observer section.<sup>127</sup> The amendment treats observers as Federal employees for the purposes of compensation under the Federal Employee Compensation Act.<sup>128</sup>

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121. 16 U.S.C.A. § 1881(a) (West 1985 & Supp. 1997).

122. *Id.* § 1881(a)(2).

123. *Id.* § 1881(e)-(f).

124. *Id.* § 1881(g).

125. *Id.* § 1881b(a).

126. *Id.* § 1881b(b)(i)-(3).

127. 16 U.S.C.A. § 1881b(b)(4) (West 1985 & Supp. 1997).

128. *Id.* § 1881b(c).

*Q. Other Reauthorizations*

The amendment extends the authorization of appropriations for several other marine statutes, including the Inter Jurisdictional Fisheries Act,<sup>129</sup> the Atlantic Coastal Cooperative Fisheries Management Act,<sup>130</sup> the Anadromous Fish Conservation Act<sup>131</sup> and an authorization for other NOAA marine fisheries programs.<sup>132</sup> The amendment requires the Secretary to submit a report reviewing New England fishing capacity reduction programs.<sup>133</sup>

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129. Sustainable Fisheries Act, Pub. L. No. 104-297, § 402(a), 110 Stat. 3359, 3618 (1996).

130. *Id.* § 404(c), 110 Stat. at 3619, 3620.

131. *Id.* § 403, 110 Stat. at 3619.

132. *Id.* § 401(a)-(d), 110 Stat. at 3617-3618.

133. *Id.* § 402(b), 110 Stat. at 3618.