

# HAS CONGRESS MADE IT HARDER TO SAVE THE FISH? AN ANALYSIS OF THE LIMITED ACCESS PRIVILEGE PROGRAM (LAPP) PROVISIONS OF THE MAGNUSON- STEVENS FISHERY CONSERVATION AND MANAGEMENT REAUTHORIZATION ACT OF 2006

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## INTRODUCTION

United States marine fisheries are a classic example of Garrett Hardin's "tragedy of the commons."<sup>1</sup> Federally managed fisheries are largely characterized by a regulatory regime in which no one "owns" an interest in the resource. As a result, many fish stocks are depleted, entire species of fish are disappearing, and the long-term viability of commercial and recreational fishing is at great risk.<sup>2</sup>

For decades economists have recommended using quasi-property rights instruments to encourage more stable and sustainable fishing practices.<sup>3</sup> To some extent the economists'

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<sup>1</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

<sup>2</sup> See discussion *infra* Part I.

<sup>3</sup> These instruments are generally referred to as rights-based management techniques and in the fisheries context they have been called individual fishing quotas (IFQs), individual transferable quotas (ITQs), or dedicated access

prescriptions have been heeded: quasi-property rights instruments have been implemented in a growing number of U.S. marine fisheries, especially off the coast of Alaska.

Recently, Congress established binding national guidelines governing limited access privilege programs (LAPPs) in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA or the Act).<sup>4</sup> This paper analyzes the provisions of section 303A of the reauthorized MSRA outlining the LAPP guidelines, and evaluates whether these provisions will facilitate or hinder the appropriate implementation of LAPPs. I argue that Congress, in response to political pressures from interests groups in fisheries, included in section 303A a number of complexities that will hinder the implementation of LAPPs and therefore the recovery of fish stocks. In addition, I suggest changes that should be made to section 303A to facilitate the implementation of quasi-property rights in fisheries going forward.

Part I of this paper provides some background on the current status of U.S. marine fisheries, the traditional management framework for U.S. marine fisheries, the arguments for LAPPs, and progress to date in implementing LAPPs. Part II critically analyzes section 303A of the MSRA, highlighting its key provisions. Part III recommends reforms to further facilitate the use of LAPPs in U.S. marine fisheries.

This is the first academic paper to analyze the provisions of section 303a of the recently enacted MSRA. I emphasize that provisions of section 303A must be reconsidered in future legislation. As it currently stands, the MSRA unnecessarily constrains the implementation of LAPPs by regional fishery management councils that desperately need to experiment with new regulatory strategies to protect wild fisheries.

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privileges (DAPs). While there are slight differences among these acronyms, they all are used to connote the creation of quasi-property rights and lead to the allocation of quota shares or access privileges, which will be used interchangeably in this paper. Congress, in creating the legislation that is the focus of this paper, used the term “limited access privilege,” which this paper will use when discussing any quasi-property instrument used in fisheries management.

<sup>4</sup> See Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, § 106(a), § 303A, 120 Stat. 3575, 3586–94 (codified as amended at 16 U.S.C. §§ 1853, 1853a (2000)).

## I. BACKGROUND

Unlike the terrestrial wildlife of the United States, marine fish species continue to be exploited as an important economic resource. Fisheries supply a significant portion of domestic food supply, as well as adding billions of dollars to the U.S. economy.<sup>5</sup> Given the benefits that fisheries generate, it is shocking that fisheries are burdened by poor management, unsustainable practices and the threat of total collapse.<sup>6</sup> This Part provides some background on the status of U.S. marine fisheries and the framework through which they are regulated that is important to have in mind in analyzing section 303A.

### A. *Current Status of U.S. Marine Fisheries*

Over the last decade there has been extensive research regarding the long-term viability of marine fishes. While there may be some disagreement as to when, or if, fish stocks may collapse, there is a general consensus that marine fishes are under intense pressure and that the current management regime for U.S. fisheries is dangerously unsustainable.<sup>7</sup> The current problems with U.S. marine fisheries are evident from the National Oceanic and Atmospheric Administration's Fisheries Service (NOAA Fisheries) annual report to Congress detailing the status of U.S. fisheries. In the Report on the Status of U.S. fisheries for 2006,

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<sup>5</sup> In 2004, the commercial fishing industry's total annual value was reported to exceed \$28 billion and the recreational saltwater fishing industry's value was reported to be approximately \$20 billion. See U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 2 (2004).

<sup>6</sup> In 2006, one controversial study estimated that global fisheries may collapse by 2048. See Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCI. 787, 790 (2006). See *Letters and Technical Comment Abstracts*, 316 SCI. 1281, 1281-85 (2007), for criticisms and responses.

<sup>7</sup> See Andrew Rosenberg et al., *Rebuilding US Fisheries: Progress and Problems*, 6 FRONTIERS IN ECOLOGY AND THE ENV'T 303 (2006) (discussing how statutorily mandated rebuilding plans for depleted fish stocks have generally not been successful). For further discussion of the health of marine fisheries, see J.R. Beddington et al., *Current Problems in the Management of Marine Fisheries*, 316 SCI. 1713, 1713 (2007) (arguing that claims of the inevitable decline in the status of fisheries are incorrect, and appropriate management tools exist, but have not been widely implemented). The authors also state that there has been limited success in improving management in a way that facilitates recovery of depleted stocks.

NOAA Fisheries identified 530 fish stocks. The data published in this report indicate that 36 percent of stocks are known to not be “subject to overfishing” and 26 percent of all stocks are known to not be “overfished.”<sup>8</sup> My presentation of the data may be a bit convoluted and unclear, but it is clear this has been the trend in U.S. fisheries for some time.<sup>9</sup> Even to the casual observer, it indicates that there are serious problems with the management and conservation of U.S. fisheries

A cursory review of the literature illustrates that the problems facing marine fisheries and the U.S. fishing industry are multifaceted and highly complex.<sup>10</sup> There is not one simple solution to these problems, but increasing the application of quasi-property rights instruments in the U.S. fisheries management regime may help to alleviate some of the major pressures.

#### B. *Magnuson-Stevens Fishery Conservation and Management Act*

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), first enacted as the Fishery Conservation and Management Act of 1976, is the primary law governing fisheries management in the United States.<sup>11</sup> The formal name of this legislation makes clear that conservation was one of the defined goals, yet the MSA was primarily seeking to limit the

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<sup>8</sup> See NAT’L OCEANIC AND ATMOSPHERIC ADMIN., MARINE FISHERIES SERVICE REPORT ON THE STATUS OF U.S. FISHERIES FOR 2006 (2007), available at [http://www.nmfs.noaa.gov/sfa/domes\\_fish/StatusoFisheries/2006/2006RTCFinal\\_Report.pdf](http://www.nmfs.noaa.gov/sfa/domes_fish/StatusoFisheries/2006/2006RTCFinal_Report.pdf).

<sup>9</sup> The data in the annual reports to Congress are typically presented in a way that deflects attention from the fact that a majority of identified fish stocks cannot be assessed because of a lack of information. For instance, for the 2006 report only 242 of the 530 identified stocks had assessments allowing for “known overfishing” determinations, and only 187 stocks had assessments allowing for “known overfished” determinations. Thus, NOAA Fisheries reports that 80 percent of the assessed stocks were not subject to overfishing, and 75 percent of the assessed stocks were not overfished. To illustrate the difficulty in fully ascertaining the health of U.S. fisheries, I have re-tabulated the figures to account for the large number of stocks with unknown statuses. In addition, it should be noted that the fish stocks are not assessed individually each year, thus, “subject to overfishing” and “overfished” assessments, in some cases have not been re-analyzed for several years.

<sup>10</sup> See, e.g., U.S. COMM’N ON OCEAN POLICY, *supra* note 5.

<sup>11</sup> See Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (current version at 16 U.S.C. §§ 1801–1891d (2000)).

fishing activities of foreign vessels in U.S. territorial waters, while at the same time promoting the domestic fishing industry.<sup>12</sup>

The MSA established a conservation zone (now referred to as the Exclusive Economic Zone (EEZ))<sup>13</sup> extending federal management of marine fisheries out to two hundred miles offshore, and the MSA gave coastal state governments control over waters out to three miles offshore.<sup>14</sup> To effectively manage the nearly four and a half million square miles of ocean that is the EEZ, the MSA created eight Regional Fishery Management Councils (RFMCs).<sup>15</sup> As the main drivers of federal fisheries policy, the RFMCs were designed to incorporate the diverse views of commercial and recreational fishers and environmental groups into regional fisheries management.<sup>16</sup> However, in practice, the RFMCs are comprised primarily of representatives of the commercial and recreational fishing industries.<sup>17</sup>

The RFMCs have been given considerable authority over the fisheries in their jurisdiction and are responsible for proposing the

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<sup>12</sup> The purpose of the Magnuson-Stevens Fishery Conservation and Management Act is to “promote domestic commercial and recreational fishing under sound conservation and management principles.” 16 U.S.C. § 1801(b)(3). Announcing the goal of the Act, Congress stated that “[c]ommercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation . . . [and] . . . [t]he activities of massive foreign fishing fleets in waters adjacent to such [domestic] coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fisherman.” 16 U.S.C. § 1801(a)(3).

<sup>13</sup> President Reagan officially renamed the “The Fishery Conservation Zone” the EEZ by an Executive Order in 1984, which also demarcates the boundaries of federal management. *See* Proclamation No. 5030, 3 C.F.R. 5030 (Mar. 10, 1983).

<sup>14</sup> *See* 16 U.S.C. § 1856(a) (setting forth state jurisdiction). The federal Councils and agencies can supersede state regulation under certain circumstances. *See* 16 U.S.C. § 1856(b).

<sup>15</sup> *See id.* § 1852.

<sup>16</sup> *See id.* § 1852(b)(2)(A).

<sup>17</sup> A critical analysis of the RFMCs is outside the scope of this paper, but it is important to consider that the membership is heavily skewed towards commercial and recreational fishing interests, which results in little diversity of perspective on conservation questions. In addition, depending on the constituencies of the Council members, the interests of companies with large fishing fleets may take priority over the interests of smaller fishers with less capital invested in a fishery. *See generally* JOSH EAGLE ET AL., TAKING STOCK OF REGIONAL FISHERY MANAGEMENT COUNCILS (2003), available at [http://fisheries.stanford.edu/Stanford\\_Council\\_Report.pdf](http://fisheries.stanford.edu/Stanford_Council_Report.pdf).

fishery management plans (FMPs) used to manage these fisheries.<sup>18</sup> The FMPs are subject to approval from NOAA Fisheries, but the oversight role played by NOAA Fisheries is generally weak and limited to determining if FMPs and other RFMC proposed regulations are compatible with the MSA and any other relevant statute.<sup>19</sup> In practice, there has been an almost complete devolution of authority to the RFMCs.<sup>20</sup>

The MSA of 1976 effectively ended foreign fishing in U.S. territorial seas. Massive government subsidies and tax incentives created to encourage domestic fishing led to a dramatic increase in the size of the U.S. commercial and recreational fishing industry.<sup>21</sup> When it became apparent that some fisheries were being overfished, the RFMCs' predominant management strategy was to regulate fishers by targeting inputs and outputs.<sup>22</sup> Fishery managers regulate input by limiting access to permits and licenses, requiring certain types of fishing gear, and by limiting the fishing season.<sup>23</sup> Output is controlled by setting total allowable catch, limiting bycatch and limiting trips by individual vessels.<sup>24</sup> In essence, the fishery managers told fishers what to fish, where to fish and when to fish.

These management policies, along with the continued use of federal subsidies and tax incentives offered to domestic fishers to support the U.S. fishing industry, quickly led to problems. There was dramatic overcapitalization in the fishing industry.<sup>25</sup> Input

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<sup>18</sup> See 16 U.S.C.A. § 1852g(3)(A).

<sup>19</sup> See EAGLE ET AL., *supra* note 17, at 32.

<sup>20</sup> See David L. Allison, *Problems with U.S. Ocean Governance and Institutional Structures: the Impact on Waters, Fish, and Fisheries in the U.S. Exclusive Economic Zone*, in MANAGING MARINE FISHERIES IN THE UNITED STATES: PROCEEDINGS OF THE PEW COMMISSION WORKSHOP ON MARINE FISHERY MANAGEMENT 25, 27 (Pew Oceans Commission ed., 2002), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting\\_ocean\\_life/environment\\_pew\\_oceans\\_managing\\_fisheries.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/environment_pew_oceans_managing_fisheries.pdf).

<sup>21</sup> See U.S. COM'N ON OCEAN POLICY, *supra* note 5, at 290.

<sup>22</sup> *Id.* at 287.

<sup>23</sup> See COMM'N TO REVIEW INDIVIDUAL FISHING QUOTAS, NAT'L RES. COUNCIL, SHARING THE FISH: TOWARD A NATIONAL POLICY ON INDIVIDUAL FISHING QUOTAS (1999).

<sup>24</sup> *Id.* at 119–124.

<sup>25</sup> See Eugene H. Buck, *Overcapitalization in the U.S. Commercial Fishing Industry*, CRS REPORT FOR CONGRESS 35-296 ENR (1995), available at <http://ncseonline.org/nle/crsreports/marine/mar-6.cfm>.

controls targeting specific fishing gear only led fishers to develop more efficient gear. Limiting vessel length led to more creatively designed vessels that met length requirements but allowed for larger load capacity by increasing boat width.<sup>26</sup> In a drastic example of limiting input, the historically year-round halibut/sablefish fishery in the Gulf of Alaska was ultimately shortened, due to fishing pressure, to less than a week in the 1990s.<sup>27</sup> Overall, the management policies created fishing derbies.<sup>28</sup> The “race to fish” not only led to unsustainable fisheries but also safety and environmental concerns. With dwindling seasons, fishers fished in unsafe weather and with little regard to the environmental degradation caused by their fishing gear.<sup>29</sup> If gear becomes tangled or damaged during a short season, the incentive is to cut one’s losses, drop the gear, and use backups.<sup>30</sup>

### C. LAPPs

As discussed above, the traditional management policies used in U.S. fisheries fail to address the factors that contribute to unsustainable fishing practices, and in many cases these policies exacerbate the problem. The traditional regulations aimed at controlling inputs and outputs do not create any incentive for fishers to harvest fish in a sustainable way. Giving fishers secure, durable and transferable harvesting rights to fish can help create these incentives. While many fisheries currently require permits or licenses to fish, these licenses do not create any rights to a specific portion of the fish, only a right to compete with all other fishers for the same fish. Legally enforceable harvesting rights eliminate this race to fish. If implemented properly, harvesting rights give fishers an enforceable right to exclude others from the fishery and

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<sup>26</sup> See U.S. COMM’N ON OCEAN POLICY, *supra* note 5, at 287.

<sup>27</sup> See *id.*

<sup>28</sup> See COMM. TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra* note 23, at 2–3.

<sup>29</sup> See ENVIRONMENTAL DEFENSE FUND, SUSTAINING AMERICA’S FISHERIES AND FISHING COMMUNITIES: AN EVALUATION OF INCENTIVE-BASED MANAGEMENT 16 (2007), available at [http://www.edf.org/documents/6119\\_sustainingfisheries.pdf](http://www.edf.org/documents/6119_sustainingfisheries.pdf) (discussing consequences of dropped gear); U.S. COMM’N ON OCEAN POLICY, *supra* note 5, at 287 (mentioning fishing in unsafe conditions).

<sup>30</sup> Dropped or abandoned gear often leads to “ghost fishing.” This term is used to describe how dropped or abandoned gear can continue to catch fish and other organisms. See ENVIRONMENTAL DEFENSE FUND, *supra* note 29.

encourages sustainable behavior that will ensure a long-term flow of benefits from these assets. These are the goals of LAPPs and analogous instruments currently used in some U.S. federal fisheries.

LAPPs are not a novel concept, and economists and other researchers have promoted the use of LAPPs, and other rights-based instruments, in fisheries for decades.<sup>31</sup> Starting in the 1970s, LAPPs were implemented in Australia, New Zealand and Iceland.<sup>32</sup> In practice, output controls in the form of annual catch limits are still used by fishery managers in LAPPs. Portions, or quotas, of the total percentage of the annual catch limits are then allocated to fishers in advance of the fishing season.

With individual fishing quotas, fishers are certain that they will be entitled to shares of the allowable catch and no longer need to race to catch fish before they are caught by competitors. With no incentive to race other fishers, the fishing season can expand, creating a shift away from high-paced and dangerous fishing. A longer season and slower paced fishing addresses overcapacity by reducing the need for excess fishing gear, which can also lead to a reduction in bycatch. Many LAPPs also allow fishers to trade their individual quotas, which produces additional benefits. When the quotas are tradeable, less efficient fishers can sell their quotas to more efficient fishers. Tradeable limited access privileges also may promote a greater stewardship ethic in fishers. As fishers come to regard access privileges as a tradeable asset, they may seek to maximize their value by protecting the underlying fish stocks by curtailing overfishing and habitat degradation. In short, LAPPs may produce more sustainable fisheries that reduce the overfishing and habitat degradation that is common in open access fisheries.<sup>33</sup>

While LAPPs have important potential benefits, LAPPs have also been a source of controversy in U.S. fisheries. The primary

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<sup>31</sup> See Katrina Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 155 (2005).

<sup>32</sup> For a summary of limited access programs in Iceland, New Zealand, and Australia, see, COMM'N TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra* note 23, at 150–51, 322–65.

<sup>33</sup> The theory is that allocating access privileges will create an incentive for fishers to reduce their harvest in the short-term in exchange for the likelihood of harvesting the fishery in the long-term. See Wyman, *supra* note 31, at 159. See also COMM'N TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra* note 23, at 33–37.



criticisms are based on distributional and equitable arguments.<sup>34</sup> Critics of LAPPs are concerned that fishers who have historically harvested fisheries may not receive quota allocations and will be excluded from fisheries, leading to economic hardship.<sup>35</sup> Critics also fear that trading in LAPPs will allow some fishers to consolidate large portions of quotas and further exclude fishers that have fewer economic resources.<sup>36</sup> There is no doubt that, as the critics contend, increasing efficiency in overcapitalized fisheries by implementing LAPPs will have significant effects on the distribution of resources among prior users. But these concerns about the distributional consequences of LAPPs can be partially addressed when designing limited access programs, particularly through the initial allocation of quota shares.<sup>37</sup>

LAPPs have also attracted criticism from some environmentalists who reject the argument that allocating secure quota shares will promote environmental stewardship among fishers.<sup>38</sup> These critics believe that quotas will encourage fishers to engage in “highgrading,” whereby fishers selectively harvest high-valued fish and discard the lower-valued fish they catch.<sup>39</sup> In addition, some environmentalists, fishers and scientists fear that the allocation of quota shares privatizes a public resource<sup>40</sup> and gives holders of quota shares an ability to assert the legal rights associated with traditional property.<sup>41</sup>

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<sup>34</sup> See MARINE FISH CONSERVATION NETWORK, *INDIVIDUAL FISHING QUOTAS: ENVIRONMENTAL, PUBLIC POLICY, AND SOCIOECONOMIC IMPACTS* 1, 10–12 (2004), available at [http://www.conservefish.org/site/mediacenter/network\\_reports/ifqwhitepaper.pdf](http://www.conservefish.org/site/mediacenter/network_reports/ifqwhitepaper.pdf).

<sup>35</sup> See M. Hartley and M. Fina, *Allocation of Individual Vessel Quota in the Alaskan Pacific Halibut and Sablefish Fisheries*, in *CASE STUDIES ON THE ALLOCATION OF TRANSFERABLE QUOTA RIGHTS IN FISHERIES* 262–63 (R. Shotton, ed. 2001), available at [http://www.fao.org/DOCREP/005/Y2684E/y2684e22.htm#P0\\_0](http://www.fao.org/DOCREP/005/Y2684E/y2684e22.htm#P0_0).

<sup>36</sup> See MARINE FISH CONSERVATION NETWORK, *supra* note 34, at 1.

<sup>37</sup> Allocation of limited access privileges will be discussed further, *infra* Parts II and III of this paper.

<sup>38</sup> See Wyman, *supra* note 31, at 160.

<sup>39</sup> See COMM’N TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra* note 23, at 36.

<sup>40</sup> See Kevin J. Lynch, Note, *Application of the Public Trust Doctrine to Modern Fishery Management Regimes*, 15 N.Y.U. ENVTL. L.J. 285, 288 (2007).

<sup>41</sup> See MARINE FISH CONSERVATION NETWORK, *supra* note 34 at 4–5. The fear is that if the quota shares are revoked the fishers may be able to assert a “takings” claim against the government.

As mentioned previously, LAPPs have been implemented in the U.S., just in a limited fashion. The mid-Atlantic surf clam and ocean quahog fishery implemented a LAPP in 1990, followed by the South Atlantic wreckfish fishery in 1992.<sup>42</sup> By 1995 some form of quota-based limited access system had been implemented in four federally managed U.S. fisheries.<sup>43</sup> These programs were adopted following the Council process, whereby the RFMC regulating the particular fishery proposed an amendment to the FMP, and the amendment was approved by NOAA Fisheries.

Fishing industry groups, and some public interest groups, continued to oppose the use of limited access programs.<sup>44</sup> The growing level of criticism was enough to mobilize opposition within Congress.<sup>45</sup> When MSA was reauthorized in 1996, a moratorium on the creation of new limited access programs by the Councils and the Secretary of Commerce was included in the Act.<sup>46</sup> Although limited access programs were established in federal fisheries through the congressional appropriations process during the moratorium,<sup>47</sup> the Councils were effectively dissuaded from pursuing limited access programs on a broad scale. After the moratorium expired in 2002, but before the 2006 reauthorization of the MSA, there was a small push to create new limited access programs, and currently 10 federally managed fisheries have implemented some version of limited access programs.<sup>48</sup>

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<sup>42</sup> See NAT'L OCEANIC AND ATMOSPHERIC ADMIN., THE DESIGN AND USE OF LIMITED ACCESS PRIVILEGE PROGRAMS 115–16 (Lee G. Anderson and Mark C. Holliday, eds., 2007), available at <http://spo.nmfs.noaa.gov/tm/tm86.pdf>.

<sup>43</sup> A community development quota program in western Alaska and an individual fishing quota program in the halibut and sablefish fishery followed the LAPPs created in the mid-Atlantic surf clam and ocean quahog fishery and the South Atlantic wreckfish fishery. See *id.* at 103–06.

<sup>44</sup> See U.S. COMM'N ON OCEAN POLICY, *supra* note 5, at 288–89.

<sup>45</sup> *Id.*

<sup>46</sup> See Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(d)(1)(A), 110 Stat. 3559, 3576 (1996). The Sustainable Fisheries Act also repealed any limited access system (referred to at the time as “individual fishing quotas”) approved by the Secretary on or after January 4, 1995. See *id.* § 108(d)(1)(B).

<sup>47</sup> For a discussion on the moratorium and a description of how some limited access programs were established during the moratorium, see Wyman, *supra* note 31, at 187–88 & n.193.

<sup>48</sup> For a description of current programs, including the six LAPPs that were created during the moratorium, see See NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 42, at 103–117.

## II. CRITICAL ANALYSIS OF SECTION 303A OF THE MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT REAUTHORIZATION ACT OF 2006

As the expiration date of the moratorium neared in the early 2000s, opponents of LAPPs continued to express a desire to see the moratorium continue. To hedge their bets in case the moratorium lapsed, opponents of LAPPs argued for an increased national role in setting guidelines for LAPPs.<sup>49</sup> Recognizing the controversy surrounding limited access programs, those who supported LAPPs were also in favor of national guidelines, thinking that such guidelines might sufficiently placate the critics of LAPPs to allow them to be introduced in more fisheries.<sup>50</sup> After the moratorium expired in 2002 and during the years before the MSRA, several bills including guidelines for LAPPs were introduced in Congress but failed to pass.<sup>51</sup> There were slight differences in the language of these bills, but all included provisions requiring referenda for creating LAPPs as well as

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<sup>49</sup> Consider, for example, the testimony of W.F. “Zeke” Grader, Jr., Executive Director of the Pacific Coast Federation of Fishermen’s Associations, to the House Subcommittee on Fisheries Conservation, Wildlife and Oceans. He stated: “PCFFA supports the continued moratorium on the implementation of IFQ systems in the U.S. fishery. If, however, the IFQ moratorium is lifted, then specific standards must be imposed, to assure the systems are not abused. NMFS and the regional councils cannot be given *carte blanche* in developing IFQ systems.” *H.R. 4749, The Magnuson-Stevens Act Amendments of 2002: Hearing Before the H. Subcomm. on Fisheries Conservation, Wildlife and Oceans of the H. Comm. on Resources*, 107th Cong. 93 (2002).

<sup>50</sup> For example, see the testimony of William Hogarth, Assistant Administrator of Fisheries at NOAA:

We believe that Congress should allow the existing moratorium on new IFQs to lapse, and we will be pleased to work with the Congress as it considers legislation to set additional appropriate conditions under which new IFQ programs could be approved. . . . The MSA currently provides much of the guidance that NMFS and the Councils need to move forward with new IFQs. Nevertheless, difficult and controversial issues remain. Several of these issues are broader than the Councils’ prerogative and require a solution at the national level. NMFS would be pleased to work with the Subcommittee on any or all of these issues.

*Individual Fishing Quotas (IFQs): Oversight Hearing Before the Subcomm. on Fisheries Conservation, Wildlife and Oceans of the H. Comm. on Resources*, 107th Cong., 3–10, 5, 9 (2002) (statement of William Hogarth).

<sup>51</sup> See, e.g., Fishing Conservation and Management Amendments Act of 2004, S.2066, 108th Cong. § 11(a) (2004); Fishing Quota Act of 2003, S. 1106, 108th Cong. § 2(a)(1) (2003); see also Fishing Quota Standards Act of 2003, H.R. 2621, 108th Cong. § 2(a)(1) (2003).

restrictions for the duration of allocated quotas.<sup>52</sup>

After a period of legislative inaction, Congress finally passed legislation in late 2006 addressing the litany of concerns regarding the use of LAPPs.<sup>53</sup> Section 303A of the MSRA is devoted to describing a set of national guidelines regarding the establishment of LAPPs.<sup>54</sup> Based on the sheer size of section 303A, Congress clearly set out to be as comprehensive as possible in describing the rules governing the implementation of LAPPs.

I will discuss how section 303A addresses three topics: Section A analyzes the provisions governing the initiation of LAPPs; Section B addresses the provisions governing the initial allocation of limited access privileges;<sup>55</sup> and Section C analyzes the provisions governing characteristics of LAPPs.

#### A. Program Initiation

As discussed briefly in section C of Part I, previous LAPPs were initiated after an RFMC or NOAA Fisheries, in the case of fisheries controlled by the Secretary of Commerce, proposed an FMP or an amendment to an FMP and began the process of determining how many quotas to create and the formula for allocating them.<sup>56</sup> Congress, under section 303A(c)(6) of the

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<sup>52</sup> See Fishery Conservation and Management Amendments Act of 2004, S.2066, 108th Cong. § 11(d)(5) (10 year duration of quotas) and § 11(d)(6) (referendum requirement) (2004); S. 1106 at § 2(d)(5) (10 year duration of quotas) and § 2(d)(6) (referendum requirement); and H.R. 2621 at § 2(a)(1) (fixed-duration, not to exceed seven years) and § 2(d)(4) (referendum requirement).

<sup>53</sup> See Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, § 106(a), § 303A, 120 Stat. 3575, 3586-94 (2006) (codified as amended at 16 U.S.C.A. § 1853, § 1853a (2000)).

<sup>54</sup> See 16 U.S.C.A. § 1853a.

<sup>55</sup> In this paper I will use the acronym “limited access privileges” interchangeably with “access privileges” or sometimes “privileges.”

<sup>56</sup> The Gulf of Mexico red snapper ITQ and the Bering Sea and Aleutian Islands (BSAI) Crab Rationalization Program were exceptions. As a result of an appropriations rider, the red snapper fishery managed by the Gulf Council required a two part referendum that allowed permit holders in the fishery to vote for implementing the LAPP. A Congressional rider placed into an appropriations bill by Senator Ted Stevens required the Secretary of Commerce to approve, by regulation, the North Pacific Fisheries Management Council’s crab rationalization program. H.R. 2673, 108th Cong. § 801 (2004). For further discussion on Senator Stevens’s role, see Wyman, *supra* note 31, at 188, n.193.

MSRA, has altered the ability of some RFMCs to initiate LAPPs going forward.<sup>57</sup>

Under section 303A(c)(6)(A) all but two Councils may still initiate an FMP or FMP amendment to establish a LAPP of their own accord.<sup>58</sup> The two Councils who are subject to distinct processes are the New England and Gulf of Mexico Fishery Management Councils (NEFMC and GMFMC).<sup>59</sup> Under section 303A(c)(6)(D) the NEFMC and GMFMC cannot submit, and the Secretary is prohibited from approving or implementing, an FMP or amendment creating a LAPP in any fishery unless it has been approved by referendum.<sup>60</sup> For a referendum to pass in the NEFMC a two-thirds majority vote of eligible permit holders is required.<sup>61</sup> A referendum can pass in the GMFMC with a simple majority of votes from eligible permit holders.<sup>62</sup> In federally controlled fisheries requiring permits, the permits are issued to individual vessels and not to individual fishers.<sup>63</sup> Thus, the permit holders voting for a proposed LAPP will only be vessel owners or operators, not fishing crew or other stakeholders who, like vessel owners, will be affected by the introduction of LAPPs

The inclusion of the referendum requirements in the MSRA most likely reflects the pressure exerted on Congress by fishing groups in the Gulf of Mexico and New England leading up to the passage of the MSRA. For example, the testimony of Wilma Anderson, Executive Director of the Texas Shrimp Association, before the House Resources Committee indicates that interest groups from the Gulf of Mexico fisheries were seeking a referendum requirement. Anderson pointed out that the

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<sup>57</sup> It should be noted that Congress wrote a “grandfather” clause into the MSRA that exempts all quota programs previously in existence, or which have been submitted by a Council to the Secretary within six months of the MSRA’s enactment, from the provisions of § 303A, except for the review requirements found in § 1853a(c)(1)(g). *See* 16 U.S.C.A. § 1853a(i).

<sup>58</sup> *See* 16 U.S.C.A. § 1853a(c)(6)(A).

<sup>59</sup> *See* 16 U.S.C.A. § 1853a(c)(6)(D).

<sup>60</sup> *See id.*

<sup>61</sup> *See* 16 U.S.C. § 1853a(c)(6)(D)(i).

<sup>62</sup> *See id.* The guidelines for the referenda in both Councils are described in § 1853a(c)(6)(D)(ii).

<sup>63</sup> The Regional Councils, when creating Fishery Management Plans, have discretionary authority to require any U.S. fishing vessel, or the operator of any fishing vessel, to obtain a fishing permit. *See id.* § 1853(b)(1)(A) & (B).

reauthorization bill that passed the Senate only required a simple majority vote. She requested that a two-thirds majority referendum required for the NEFMC also be required for the GMFMC.<sup>64</sup>

NOAA Fisheries, which has supported LAPPs for many years, clearly did not favor requiring referenda to introduce LAPPs.<sup>65</sup> During different hearings before the House Resources Committee on proposed amendments to the MSA, two officials

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<sup>64</sup> In her testimony Anderson stated:

We respectfully request that a provision be added to your bill that, like New England fishermen, also provides Gulf of Mexico shrimp fishermen with the opportunity to hold a referendum before the Gulf Council is allowed to submit, or the Secretary approve or implement, an IFQ program. We too support a threshold of 2/3rds of the voting eligible permit holders to approve such a plan. We also note that the Senate Magnuson-Stevens Act reauthorization bill (S. 2012), includes such a referendum provision for the Gulf, but at the 50% threshold.

See *H.R. 5018, H.R. 4940 & H.R. 1431, Legislation to Amend the Magnuson-Stevens Fishery Conservation and Management Act: Legislative Hearings before the House Committee on Resources*, 109th Cong. 95-102, 101-102 (2006) (statement of Wilma Anderson). The “engrossed in Senate” version of the reauthorization bill (s. 2012) ultimately changed the Gulf to a majority vote requirement, while leaving New England with the two-thirds majority vote requirement. See *Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, S. 2012*, 109th Cong. 60-61 (2006). A number of witnesses testified to the opposition of many New England fishers to LAPPs. George LaPointe, Commissioner of the Maine Department of Marine Resources testified:

[a]s reauthorization has been discussed over the past few years, Maine has been in the somewhat difficult position of providing input on standards for a system that the majority of people in the state hope will never be used to manage our fisheries. There is a fundamental belief that the implementation of Limited Access Privileges, or ITQs as they were previously known, would mean the end of the traditional character of the New England fleet. Under the traditional ITQ structure, corporate consolidation of the fisheries seemed an inevitable result.

See *Hearings to Consider the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2005: Hearings Before the Senate Committee on Commerce, Science and Transportation*, 109th Cong. (2005) (statement of George LaPointe). See also *Operations of the Regional Fishery Management Councils and Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act: Oversight Hearings on Fishery Conservation before the House Committee on Resources*, 109th Cong. (2005) (statement of Francis Blount, Jr., Chairman of the New England Fisher Management Council) (“[O]ur Council notes that fishery participants in New England consider [IFQs] an extremely sensitive issue and a very real threat to fishing communities and small boat fleets.”).

<sup>65</sup> See Wyman, *supra* note 31, at 182-183 & n.175.

from NOAA Fisheries spoke about the inclusion of the referenda requirements. William Hogarth, Assistant Administrator of Fisheries at NOAA, and Steven Murawski, Director of Scientific Programs and Chief Science Advisor at NOAA Fisheries, both testified that a referendum requirement was not needed, as existing law and regulations already ensure transparent debate about the choice of management options, and provide stakeholders the opportunity to raise concerns during the decision-making process.<sup>66</sup> Murawski went further, testifying that requiring a referendum in select Councils suggests a lack of confidence in the existing law and the local institutions used to apply them.<sup>67</sup>

In addition to introducing referendum requirements for two Councils, Congress, under section 303A(c)(6)(B), made it possible for fishers holding permits in federal fisheries to petition the Secretary of Commerce to request that any Council be authorized to initiate a LAPP. To fulfill the petition requirements a group of fishers that represent more than 50 percent of permit holders in the relevant fishery must be party to the request. Once the Secretary has verified the signatures and confirmed that they meet the necessary requirements the Secretary will certify the petition to the appropriate Council. This, however, does not assure that a LAPP will actually be initiated. Under section 303A(c)(6)(A) “a Council *may* initiate . . . a limited access privilege program . . . on its own initiative or if the Secretary has certified an appropriate petition.”<sup>68</sup> This provision means that the Councils still will have the discretion to decide whether to initiate consideration of a LAPP, even if there are petitions for LAPPs.

From a normative perspective, it may be desirable to allow a

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<sup>66</sup> See H.R. 5018, H.R. 4940 & H.R. 1431, *Legislation to Amend the Magnuson-Stevens Fishery Conservation and Management Act: Legislative Hearings before the House Committee on Resources*, 109th Cong. 75–81, 78 (2006) (statement of William Hogarth).

<sup>67</sup> During his testimony, Murawski stated:  
Mandating such a referendum for New England suggests the IFQ option or the New England region requires special attention or a lack of confidence in our current law or the local institutions to fairly interpret them. Such a provision could result in a costly and unnecessary impediment to the implementation of limited access programs in this region.

See *id.* at 10–16, 15 (statement of Steven Murawski).

<sup>68</sup> See 16 U.S.C. § 1853a(c)(6)(A) (emphasis added).

community of fishers, who may be greatly affected by the implementation of a limited access system, to vote on whether to initiate a LAPP. However, in only saddling the NEFMC and GMFMC with referenda requirements, Congress did not provide any explanation for justifying this obstacle for implementing LAPPs in the fisheries in only these two regions.

If LAPPs are considered an effective tool in stabilizing unsustainable fisheries, the referenda requirements, particularly the two-thirds majority requirement in the NEFMC are quite perplexing. According to the Report on the Status of U.S. fisheries for 2006, of the forty-eight assessed stocks “subject to overfishing,” five stocks are managed by the GMFMC, and nine are managed by the NEFMC.<sup>69</sup> Fifteen of the forty-seven “overfished” stocks are managed by the NEFMC, and two are managed by the GMFMC.<sup>70</sup> Against this backdrop, the Congressional decision to require the NEFMC and GMFMC to put LAPPs to a vote appears to have hamstrung two councils that badly need the flexibility to introduce LAPPs.

As it stands, the referendum hurdle will likely make it very difficult for LAPPs to be implemented in the Gulf and New England Councils. At a minimum, the requirements for referenda will increase the administrative and political complexity of establishing LAPPs in the Gulf of Mexico and New England compared with other Councils. In addition, these requirements will discourage these two Councils from implementing LAPPs because the requirements will force the Councils to risk expending considerable time and resources developing an extensive and detailed plan for a LAPP, only to have it fail in a referendum.

#### B. *Initial Allocation of Limited Access Privileges*

Determining who will receive individual quotas in the initial allocation and the formula for awarding them are very important, as the initial allocation largely determines which parties receive the early benefits of the LAPP. In the limited access programs currently in use in federal fisheries, crew and entry-level fishers were excluded from initial allocations in favor of long-term

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<sup>69</sup> See NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 8, at tbl.11.

<sup>70</sup> See *id.* at tbl.12.



owners of capital in the fisheries.<sup>71</sup> Individual quota shares initially were given to eligible participants administratively, and essentially for free, based on various formulae that considered the prior effort of fishers in the fishery.<sup>72</sup> For example, in the Alaska halibut and sablefish IFQ programs quotas were initially allocated for free to owners or leaseholders of vessels that had landings at any time in 1988–1990.<sup>73</sup>

The national guidelines created by Congress regarding the initial allocations of access privileges, appropriately, give the Councils great flexibility in initially allocating limited access privileges. The criteria that “shall” be considered in establishing a fair and equitable initial allocation are described in section 303A(c)(5)(A).<sup>74</sup> The Councils are required to consider historical and current harvest, employment in the harvesting and processing sectors, investments in and dependence on the fishery, and current and historical participation of fishing communities.<sup>75</sup> Councils are required to consider policies to promote participation of “small owner-operated fishers” and fishing communities that depend on the fisheries.<sup>76</sup> Limited access privileges can only be issued, held, acquired, or used by persons who “substantially participate” in the fishery.<sup>77</sup> Reflecting the concerns of the critics of LAPPs, the

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<sup>71</sup> See COMM’N TO REVIEW INDIVIDUAL FISHING QUOTAS, *supra* note 23, at 96.

<sup>72</sup> See NAT’L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 42, at 61.

<sup>73</sup> See *id.* at 103. The highly contentious nature of the initial allocation is evident in *Alliance Against IFQs v. Brown*, a legal challenge to the initial allocation in the Alaska Halibut and Sablefish IFQ program. Some fishers who were excluded from the initial allocation of quotas because they had only fished during 1991–1993 argued, among other things, that the regulations violated the MSA by failing to take into account present participation in the fishery. Crewmembers with no capital investment in the vessel also felt that they should have been eligible for the allocation of shares. They argued that excluding them from the initial allocation violated the statutory command of fairness and equity to all the fishers. The Court deferred to the findings of the Council, and these challenges were unsuccessful. The excluded fishers were left with no other option other than attempting to buy quotas from fishers willing to sell their allocated shares. See *Alliance Against IFQS v. Brown*, 84 F.3d 343 (9th Cir. 1996).

<sup>74</sup> See 16 U.S.C.A. § 1853a(c)(5)(A) (2000).

<sup>75</sup> See *id.* § 1853a(c)(5)(A)(i)–(iv).

<sup>76</sup> See *id.* § 1853a(c)(5)(B)(i).

<sup>77</sup> See *id.* § 1853a(c)(5)(E). (“Substantially participates” is not defined in the MSRA.).

Councils are required to establish a maximum share that any eligible participant is allowed to hold to prevent an inequitable concentration of access privileges.<sup>78</sup>

Perhaps in an attempt to address the problems associated with past initial allocations favoring the long-term owners of capital, the Councils are required to include in any LAPP measures to assist entry-level fishers, small vessel owner-operators, captains, crew and fishing communities. According to section 303A(c)(5)(C), these measures may include set-asides of access privileges or economic assistance in purchasing access privileges.<sup>79</sup>

“Fishing communities” can become eligible for initial allocations of access privileges as described in section 303A(c)(5)(A).<sup>80</sup> To gain eligibility, the residents of the “fishing community” must submit a detailed sustainability plan following criteria developed by the relevant Council, which addresses the social and economic needs of the community, including the parties that have not historically had the resources to participate in the fishery.<sup>81</sup> After the Council approves the sustainability plan, a fishing community otherwise meeting the requirements in section 303A(c)(3)(A)(i) can become eligible for the initial allocation of access privileges.<sup>82</sup>

Besides individuals and fishing communities, a third group is also allowed to participate in LAPPs, although this group is not eligible for the initial allocation of access privileges. Regional Fishery Associations (RFAs), described in section 303A(c)(4), may acquire privileges after the initial allocation. RFAs are described in section 303A(c)(4)(A)(iv) as consisting of participants in a LAPP already holding access privileges in a specific region or subregion of the management area of the relevant Council, and may include commercial and recreational fishers, processing and fishery-dependent support businesses or fishing communities.<sup>83</sup> RFAs are required to be voluntary and have established by-laws and operating procedures.<sup>84</sup> A potential RFA must submit an RFA

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<sup>78</sup> See *id.* § 1853a(c)(5)(D)(i).

<sup>79</sup> See *id.* § 1853a(c)(5)(C).

<sup>80</sup> See *id.* § 1853a(c)(3)(A).

<sup>81</sup> See *id.* § 1853a(c)(3)(A)(i)(IV).

<sup>82</sup> See *id.* § 1853a(c)(3).

<sup>83</sup> See *id.* § 1853a(c)(4)(A)(iv).

<sup>84</sup> See *id.* § 1853a(c)(4)(A)(iii).

plan to the relevant Council,<sup>85</sup> which will review it based on the administrative and fiduciary soundness of the association.<sup>86</sup>

The additional requirements for fishing communities and RFAs, while seemingly burdensome, appear to be appropriate measures to ensure that potentially diffuse groups of fishers are committed to the sustainable exploitation of fisheries.

Recognizing the variety of ways that access privileges can be initially allocated, Congress also gave the Councils the option to use an auction system for initial allocations.<sup>87</sup> In fact, according to section 303A(d), the Councils are required at least to consider providing, if appropriate, an auction or similar program to collect royalties for the initial or subsequent allocation. Any auction system used in a LAPP must be administered in a way that distributes access privileges as required by the other provisions in section 303A.<sup>88</sup> While the Councils are required to consider auctions for allocating access privileges, the history of federal fisheries management demonstrates that the free formula-based allocation, unfortunately, has been the method of choice for the Councils.<sup>89</sup>

An auction system for limited access privileges would allow for price discovery, which helps fishers plan their investments and allows for easy assessment of the value of access privileges.<sup>90</sup> Auctions promote efficient initial allocations, avoiding the political wrangling over formula-based allocations.<sup>91</sup> Auctions also represent a potential source of revenue for the government. Section 303A(d)(2) requires that the revenue generated by an auction be deposited in the Limited Access System Administration, which administers the "Central Registry," discussed in greater detail in section C, Part II, *infra*. Alternatively, the revenue may be available for use by the fishery that collected the revenue.<sup>92</sup>

Considering the regionally specific problems faced by the

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<sup>85</sup> See *id.* § 1853a(c)(4)(A)(vi).

<sup>86</sup> See *id.* § 1853a(c)(4)(C).

<sup>87</sup> See *id.* § 1853a(d).

<sup>88</sup> See *id.* § 1853a(d)(1).

<sup>89</sup> See NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 42, at 61.

<sup>90</sup> See *id.* at 67.

<sup>91</sup> See *id.* at 66–67.

<sup>92</sup> See 16 U.S.C.A. § 1853a(d)(2).

Councils in managing the fisheries in their jurisdictions, it can be argued that Congress was left with little choice but to make available a diverse and complex array of tools to the Councils for initially allocating access privileges. However, it is curious that the provisions in section 303A that discuss the use of auctions are found towards the end of a considerably lengthy section of the MSRA.<sup>93</sup> When contemplating the creation of a LAPP, the Councils will hopefully not view the substantial benefits of a well managed, auction-style allocation process as an afterthought, and fall back unthinkingly on the, free, administratively administered allocation systems used in already established quota systems.

### C. *Characteristics of Limited Access Privileges*

Economists advocate limited access privileges as a way of providing fishers quasi-property rights in fisheries.<sup>94</sup> The idea is that fishers with quasi-property rights in fisheries will internalize externalities of fishing and not over-invest in labor and capital to harvest the fish. The reason fishers will internalize these externalities is that the access privilege will give them a stake in the health of the fish stocks, because the market value of the access privilege will be based on the continued viability of the fishery. Fishers within LAPPs should optimally invest in fishing because the limited access privilege guarantees them a share of the allowable catch each season, and thereby ends the need to invest in labor and capital to beat other fishers to the fish. To incentivize fishers in the ways economists hope they will, access privileges need to have a number of characteristics: transferability, durability, security and exclusivity. To the extent limited access privileges only weakly possess these characteristics, access privileges are less likely to prompt fishers to internalize the externalities of fishing and to invest optimally in labor and capital. Unfortunately, the Congressionally mandated guidelines mean that limited access privileges may not enjoy sufficient transferability and durability to properly incentivize fishers.

Generally, it is the ability of the fisher to easily transfer and

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<sup>93</sup> See *id.* § 1853a(d).

<sup>94</sup> See, e.g., ROGNVALDUR HANNESSON, *THE PRIVATIZATION OF THE OCEANS* 56–67 (2004); GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 86 (1989).

accumulate privileges that gives the privileges their value. In a fishery with transferable privileges, less efficient fishers can gain immediate financial benefits by selling or leasing their privileges to more efficient fishers. The durability, or period of time the allocated privileges are valid, is important because it will encourage fishers to invest in the fishery and adopt a long-term view of the fishery's health. Additionally, limited access privilege-holders need to be assured that their fishery rights are secure and that held privileges will be free from arbitrary revocation by the Councils. Finally, without effective mechanisms to ensure exclusivity, the property nature of access privileges is weakened. The privilege-holders hold rights in common with other privilege holders, and as a result, privilege holders must have assurances that they will be protected from any unauthorized behavior from non-privilege holders, as well as other privilege holders who may try to exceed their harvest rights.

Congress appropriately avoided creating an actual property interest when describing the rights to which the privilege-holders are entitled. The statutory language used in section 303A(b) clearly states that the allocation of limited access privileges does not create any rights in or to the fish until the privilege-holder has harvested the fish.<sup>95</sup> The actual quantity of fish to which privilege-holders are entitled will depend on the total allowable catch (TAC) set by the relevant RFMC. In addition, the limited access privileges "shall not confer any right of compensation to the holder of such limited access privilege" if the privileges are "revoked, limited, or modified."<sup>96</sup> These provisions will enable the Councils and NOAA Fisheries to maintain control over federal fisheries, and to minimize the likelihood of wasteful "takings" claims asserted by disgruntled fishers who may have privileges revoked for violating LAPP guidelines.

Overall, has Congress struck the right balance between the limitations and the strengths of limited access privileges? Limited access privileges, to be successful, still must encourage privilege-holders to behave as if they have acquired a traditional property interest in the fishery they exploit.

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<sup>95</sup> See 16 U.S.C.A. § 1853a(b)(4).

<sup>96</sup> See *id.* § 1853a(b)(3). The effect of this provision is to limit the ability of a holder of a modified or revoked limited access privilege to assert a "takings" claim under the 5th Amendment of the United States Constitution.

Congress contemplated that limited access privileges would be transferable. In section 303A(c)(7) Congress requires the Councils to establish a policy and set of criteria for the transferability of privileges through sale or lease.<sup>97</sup> Presumably this section of the Act will work in conjunction with the “Central Registry for Limited Access System Permits” that was to be established pursuant to the enactment of the Sustainable Fisheries Act of 1996 and is described in section 305(h) of the MSRA.<sup>98</sup> The central registry provides for the registration of title to, and interests in, access privileges, as well as “for procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosure of interests, enforcement of judgments thereon, and related matters deemed appropriate by the Secretary.”<sup>99</sup>

While Congress appropriately provided that privileges could be sold and leased, it did not go as far as to explicitly permit limited access privileges to be used as forms of collateral. In fact, on its face the statute appears to have made it difficult for access privileges to be used as collateral for loans. In section 303A(c)(7)(A), Congress has required that the criteria established by the Councils for the transferability of access privileges must be “consistent with the policies” adopted under section 303A(c)(5), which only permits persons who substantially participate in the fishery to hold access privileges.<sup>100</sup> If a bank foreclosed on a loan collateralized by access privileges, it would become the record holder of an access privilege, for a however brief period of time, in apparent violation of the Act. If this was Congress’s intent it is unfortunate. The ability to use limited access privileges as collateral for loans is important for the financial well-being of small fishers. It is also useful for increasing the price discovery and overall marketability of access privileges.

The duration of limited access privileges has long been a source of controversy between opponents and proponents of LAPPs, and the issue came up during the many congressional hearings leading up the reauthorization of the MSA. For example,

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<sup>97</sup> See *id.* § 1853a(c)(7)(A)–(B).

<sup>98</sup> See *id.* § 1855(h).

<sup>99</sup> See *id.* § 1855(h)(1).

<sup>100</sup> See *id.* §§ 1853a(c)(7)(A), 1853a(c)(5)(E).

Lee Crockett, the Executive Director of the Marine Fish Conservation Network, testified to the importance of placing time limits on LAPPs.<sup>101</sup> Dorothy Childers, the Executive Director of the Alaska Marine Conservation Council, explicitly called for a seven to ten year time limit on all LAPPs.<sup>102</sup> In contrast, both Louis Daniel, Chair of the South Atlantic Fishery Management Council, and Chris Oliver, Executive Director of the North Pacific Fishery Management Council, testified that there should not be an explicit “sunset” provision included in the MSRA and that periodic reviews carried out by the Councils would be sufficient.<sup>103</sup>

In what could be described as a compromise, Congress has required the Councils to create for any LAPP a monitoring system that includes “a formal detailed review five years after the implementation of the program” and subsequent reviews “no less

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<sup>101</sup> Crockett, during his testimony to the House Committee on Resources stated, “The U.S. Commission and the State of Alaska have called for these programs to have time limits. Time limits are necessary to reenforce [sic] the fact that a limited access program are [sic] a privilege, not a property right, and to add force to any program reviews.” See *H.R. 5018, H.R. 4940 & H.R. 1431, Legislation to Amend the Magnuson-Stevens Fishery Conservation and Management Act: Legislative Hearings before the House Committee on Resources*, 109th Cong. 107–114, 108 (2006) (statement of Lee Crockett).

<sup>102</sup> See *Fisheries Management Successes in Alaska and the Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act: Oversight Field Hearings before the Subcommittee on Fisheries and Oceans of the House Committee on Resources*, 109th Cong. 132–138, 138 (2005) (statement of Dorothy Childers).

<sup>103</sup> Daniel testified that:

[t]he council does not support establishing a sunset provision for IFQ programs. The individual Council should review each IFQ program periodically and determine if and when it should be terminated. The Councils are qualified to evaluate use of IFQ’s and determine whether or not they meet the objectives of a specific fishery management plan. Predetermining the tenure of an IFQ program will render this management strategy ineffective as fishermen will have no incentive to make a long term investment in the fishery.

See *Operations of the Regional Fishery Management Councils and Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act: Oversight Hearings on Fishery Conservation before the House Committee on Resources*, 109th Cong. (2005) (statement of Louis Daniel). Oliver succinctly stated, “We do not support requirements for referenda or sunset provisions for these [dedicated access privilege] programs.” See *Operations of the Regional Fishery Management Councils and Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act: Oversight Hearings on Fishery Conservation before the House Committee on Resources*, 109th Cong. (2005) (statement of Chris Oliver).

frequently than once every seven years.”<sup>104</sup> In addition to the periodic Council reviews, Congress went farther in creating what looks like a “sunset” provision, by providing in section 303A(f) that privileges be allocated for a fixed-term of not more than ten years.<sup>105</sup> However, Congress went on to provide that a privilege “will be renewed before the end of that period, unless it has been revoked, limited or modified” by the Secretary.<sup>106</sup> This provision is curious. First, it appears to be superfluous when read together with the other provisions requiring detailed monitoring and review of limited access privilege programs.<sup>107</sup> Second, it does not really appear to establish a clear termination of the access privileges, and essentially states that as long as the rules and regulations of the LAPP are followed privileges could be held indefinitely or at least for as long as the program exists.

It appears that Congress attempted to find a middle ground in establishing the durability of limited access privileges. The difficulty is that this compromise may discourage privilege-holders from behaving like property owners. While the Act clearly states that limited access privileges *will* be renewed after the fixed-term, unless the holder has violated the applicable guidelines, there is a danger that the inclusion of the fixed-term will unnecessarily cast doubt on the durability of the limited access privileges. The apparent lack of permanency not only weakens the perceived durability of access privileges, but also undermines the property nature of the limited access privileges. The fixed-term will likely increase uncertainty regarding their long-term durability and may reduce their market value. To maximize the ability of fishers to behave as if they own a stake in a fishery, they must be confident that the privileges acquired will be valid in the long-term. Any uncertainty decreases the chances of fishers widely adopting a long-term time horizon in relation to the fisheries.

### III. RECOMMENDATIONS

In light of my criticisms of the current provisions in section 303A of the MSRA, this Part sets out what I believe that Congress

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<sup>104</sup> See 16 U.S.C.A. § 1853a(c)(1)(G).

<sup>105</sup> See *id.* § 1853a(f).

<sup>106</sup> See *id.* § 1853a(f)(1).

<sup>107</sup> See *id.* §§ 1853a(c)(1)(G), (H) and (J).



should do, going forward, to the national guidelines for creating and implementing LAPPs. As will become evident, I maintain that Congress's main task should be to undo some of the compromises in section 303A of the MSRA.

A. *Simplify the Process for Establishing LAPPs in New England and the Gulf of Mexico*

As created by the original MSA, the RFMCs, with oversight from NOAA Fisheries, are charged with managing federal fisheries within their jurisdiction. As it is currently drafted, section 303A removes too much authority from the New England and Gulf of Mexico Fishery Management Councils by requiring referenda to establish LAPPs in these regions. The referendum requirement unnecessarily complicates the establishment of LAPPs in these two regions, which badly need to adopt new approaches to managing their fisheries. Congress should completely do away with any referendum requirement for initiating LAPPs. Councils should have the final say on whether a fishery should adopt a LAPP.

The RFMCs are well-equipped to devise approaches to managing the fisheries under their jurisdiction. The Councils operate openly and provide many opportunities for public participation. The interests of commercial and recreational permit holders in a fishery are adequately represented in the current membership structure of the Councils, and if fishing interests oppose the introduction of LAPPs, they can make their opposition heard through the Council process.

B. *Create a Rebuttable Presumption in Favor of Using Auctions to Allocate Limited Access Privileges*

After a Council has decided that a particular fishery should be managed under a LAPP, the next step is deciding how to initially allocate the harvest privileges. Appropriately, Congress did not limit the methods of allocation to Councils.

However, Congress, in crafting section 303A, appears to give auction-style allocation short shrift. This is unfortunate considering the benefits available from an auction system. One of the benefits of using an auction to initially allocate privileges is that the auction will ensure that privileges are initially allocated to those who value them most highly (provided of course that the highest value users can afford to buy the privileges in the auction,

a point I discuss further below). Allocating privileges to the highest value users at the outset is important especially if it's likely that legal rules or transactions costs will impede the subsequent transferability of privileges. A second benefit of auctions is that they promote price discovery by openly establishing the value of the privileges. Another benefit of auctions is that they enable governments to capture some of the rents from fishing, which after all is an industry based on harvesting a public resource.

Bearing in mind the regionally specific problems facing the Councils, and the difficulties of implementing auctions in some fisheries, Congress should require that Councils use some form of an auction to initially allocate harvest privileges unless the Councils can provide a detailed justification for not using an auction approach. A Council's justification for not pursuing an auction system would need to be reviewed and approved by NOAA Fisheries and the Secretary of Commerce before a formula-based allocation is utilized.

As mentioned above, one of the downsides of initially allocating privileges through auctions is that they may exclude small-scale fishers with limited access to capital from harvesting going forward. To address this distributional concern, the provisions that Congress included in section 303A(c)(5)(C) requiring the Councils to take steps to provide for small vessel-operators, captains, crew and fishing communities in initial allocations should apply when auctions, as well as administrative allocations, are used. One of the benefits of initially auctioning privileges is that the auction could generate funds that Councils could direct to assist these individuals and groups. Councils also could address concerns about the distributional consequences of auctions through tiered auctions that carve out certain numbers of access privileges for special classes of participants.

### C. *Strengthen the Quasi-Property Characteristics of Limited Access Privileges*

Key to the success of a LAPP is the creation of a quasi-property instrument that encourages privilege-holders to adopt the long-term time horizon of traditional property owners. As previously discussed, Congress may not have given privilege-holders sufficient scope for transferring their privileges, or sufficient guarantees of their durability to make privilege-holders

care about the long-term health of the fisheries for which they hold privileges.

As it stands, Congress has provided that limited access privileges can be sold and leased, but it is unclear whether limited access privileges can be used as collateral on loans. To strengthen property characteristics of access privileges, Congress should explicitly allow limited access privileges to be used as collateral for loans and as security for mortgages.

To further strengthen the property characteristics of limited access privileges, while at the same time recognizing that there must be checks to ensure that the privilege-holders are not abusing their privileges and undermining the management goals of the fishery, Congress should clarify that access privileges may be held for as long as the fishery remains managed under a limited access program, subject to revocation for violating the guidelines as prepared by the Council in charge. "Sunset" provisions, and language that undermines the durability of access privileges, are counterproductive to the goals of limited access management strategies. Superfluous language, like that found in section 303A(f) of the Act, purportedly creating a fixed-term for limited access privileges, even though they will be renewed if applicable guidelines are followed, accomplishes nothing other than creating confusion.

In summary, then, there are three aspects of section 303A that Congress should revisit to promote the greater use of LAPPs, and the success of the LAPPs that are implemented. These concern the process for establishing LAPPs, the process for initially allocating limited access privileges, and the characteristics of those privileges.

#### CONCLUSION

U.S. fisheries characterized by open access management are overexploited and unsustainable. Limiting access by allocating privileges to specific portions of fish, as measured by a share of the TAC, is an appropriate management tool to help stabilize these fisheries. Strictly from a conservation and management perspective, so long as the TAC is determined using the appropriate scientific basis and is abided by, LAPPs hold out considerable promise of doing much good at very little cost.

After years of legislative inertia, it was encouraging that Congress was able to finally agree on a set of national guidelines for the creation and implementation of limited access privilege programs in federally managed U.S. fisheries. The sheer statutory space of section 303A is a clear indication of how important Congress considers these guidelines. Fishing industry groups, community based groups, and fisheries management agencies looked towards Congress to provide a roadmap for designing LAPPs in a way that would reduce the disparities that are either evident in already existing limited access programs, or feared to arise in the future. However, Congress appears to have bowed to political pressure in unfortunate ways that may decrease the likelihood for the success of LAPPs by unnecessarily weakening the property-like characteristics of limited access privileges, and creating obstacles to initiating and implementing LAPPs in the fisheries desperately in need of this type of management tool. I have attempted to describe the problematic provisions in the Act, and offer proposals that will strengthen the RFMCs' ability to create and implement successful limited access privilege programs in U.S. marine fisheries to help ensure their sustainable use for generations to come.