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## Navigating Complex State and Federal Fisheries Jurisdictions

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# NAVIGATING COMPLEX STATE AND FEDERAL FISHERIES JURISDICTIONS

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## Introduction

Compliance with fisheries regulations is in part, complicated as a result of the current resource allocation regime between the federal government and the individual states. Maritime boundaries delimit areas of state waters extending a certain distance offshore with the remainder under federal control. Fisheries are managed with respect to these separate jurisdictions and while state and federal interactions have led to various combinations of authority with respect to management plans, authority over a fishery is generally vested according to territorial sovereignty. Consequently, cognizance of differing state and federal regulations and their applicable locales is of particular importance to fishing vessel operators. A striped bass in state waters remains blissfully unaware of its new federal designation after crossing an invisible line drawn over the water, but a fisherman in pursuit who remains unaware soon runs afoul of federal enforcement.

This paper examines state and federal fisheries jurisdictions in the context of regulatory compliance in areas of complex maritime territorial boundaries. That both states and the federal government independently regulate their fisheries is uncontroversial for states with relatively featureless coastlines. In those instances, the boundary between the two territories is a relatively straight line posing little risk for accidental or necessary transit. Complex coastlines however, whether the result of deep coastal indentations or offshore islands, isolate pockets of territory and create ample opportunity for a fishing vessel operator to run afoul of incongruent state and federal regulations. For example, Block Island sits more than six miles off the Rhode Island mainland. Because the state has a three-mile territorial sea, the placement results in two areas of Rhode Island waters, one wholly removed from the other by a narrow band of federal territory. Block Island's popularity among the fishing community combined with its sequestered nature makes Block Island Sound an apt case study of the problems arising from a regime comprised of dual state and federal fisheries jurisdictions.

Part I of this paper considers the issue of a federally licensed<sup>1</sup> fishing vessel transiting a state's territorial waters. That this occurs is unsurprising considering the necessity of returning to port to offload the catch. However, state regulations pertaining to the catch on board are often more restrictive than their federal counterparts. The question becomes whether the transit of state waters is legal when the catch on board does not satisfy these more restrictive regulations. The answer is in the negative, as federal fisheries regulations do not preempt those of the state unless the vessel is unregistered in the state and fished wholly outside its waters. The same vessel now transiting state waters to reach adjacent federal waters encounters fewer roadblocks; state transit provisions allow the vessel to proceed provided gear remains stowed and passage is continuous and expeditious.

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<sup>1</sup> Note that there is no federal "fishing license." Permits are sought a per species basis, sometimes including multiple species of similar characteristics. To effectuate a general discussion, "licensed" will refer to a vessel with the necessary permit.

Part II examines the less frequent issue of a state licensed<sup>2</sup> vessel transiting federal waters. Few state licensed vessels could ever have legitimate purpose to venture seaward into federal waters but on occasion, offshore islands create “bubbles” of state waters within which the vessels may fish. The issue becomes the legality of the return trip across federal waters. The result is bifurcated; commercial vessels are barred from returning while recreational vessels may transit the federal waters under certain conditions. The commercial vessel is barred as a result of strict federal commercial permit requirements. The reverse of the “most restrictive rule” in Part I governs recreational vessels. Lacking the strict requirements, the recreational vessel may transit federal waters provided that the catch on board satisfies federal regulations more restrictive than those of the state.

Part III discusses the ability of a state to exercise fisheries jurisdiction over a portion of federal waters to alleviate the incongruous fisheries management schemes described in Part II. Massachusetts exercises fisheries jurisdiction over the federal waters within Nantucket Sound under the justification that state management of fisheries in federal waters is proper where state waters nearly or totally encompass federal waters. This part discusses whether the application of this rule could extend to Block Island Sound and concludes that while the geography is dissimilar, the problems raised are worse, offering a more compelling reason to extend jurisdiction. While legislation could provide for transit on a species-specific basis, a total extension of jurisdiction would be more efficient.

Part IV describes a broader solution to fisheries problems; state annexation of federal territory. While Massachusetts solved its fisheries issues in Nantucket sound through an extension of fisheries jurisdiction, New York accomplished the same in Long Island Sound through an extension of sovereignty. The issue here is whether Rhode Island could classify Block Island Sound as the state’s internal waters, eliminating the problematic federal waters. While Block Island Sound possesses all the necessary characteristics of a “juridical bay,” the Supreme Court previously held that the while Long Island Sound is a bay, Block Island Sound is not.<sup>3</sup> Rhode Island’s burden is to show that the Court’s subsidiary tests for defining a bay are unnecessary and arbitrary in light of current treaty law.

## **I. Federal Permit – State Waters**

A fishing vessel operating under a federal permit may legally transit state waters in order to return to port or reach adjacent waters. To return to port, the vessel must abide by any state regulation more restrictive than those applicable to federal fisheries. If merely seeking adjacent federal waters, the vessel may proceed in accordance with state mandated transit requirements. At issue in this part are the legal justifications for subjecting a federally licensed vessel to state law rather than acknowledging the supremacy of federal law and preempting state fisheries regulations.

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<sup>2</sup> State saltwater fishing licenses generally cover a broad array of species.

<sup>3</sup> See U.S. v. Maine (The Rhode Island and New York Boundary Case), 469 U.S. 504 (1985).

State control over coastal waters is a product of a settlement between the individual states and the federal government. The resulting regime grants the territory a certain distance offshore to the individual states with the remainder left to the federal government. Specifically, states retain jurisdiction over the waters and marine resources three nautical miles beyond their coastlines under the Submerged Lands Act and the Outer Continental Shelf Act.<sup>4</sup> This system of allocating marine resources between the federal government and coastal states provides the basis for state and federal fisheries management.

The Magnuson-Stevens Fisheries Conservation and Management Act (“Magnuson Act”) grants the United States control over fishing activities and fishery resources within its waters.<sup>5</sup> Specifically, the United States exerts regulatory and enforcement powers over a radius extending 200 miles from the coastline.<sup>6</sup> With respect to the settlement between the federal government and the states, the landward boundary of the area “[for the purpose] of applying [the Magnuson Act]... is a line coterminous with the seaward boundary of each of the coastal States.”<sup>7</sup> In further deference to the states, the Magnuson Act also states, “Nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.”<sup>8</sup>

Neither § 1802(11) nor § 1856(a)(1) explicitly provides individual States authority over federally licensed vessels but Congressional hearings on the authorization of the Magnuson Act suggest that this was the result intended:

Under United States law, the biological resources within the territorial sea of the United States are the management responsibility of the adjacent several States of the Union. Whatever regulation of both fishermen and fish harvest, what occurs in this area is as deemed necessary and appropriate by each concerned State.<sup>9</sup>

Taken together, the intent and language of the Magnuson Act suggest that a state does have regulatory authority over any fishing vessels that enter its waters. In plain evidence of this interpretation, the language of the “most restrictive rule” appears in many federal fisheries regulations.<sup>10</sup>

Opponents of the most restrictive rule argue that possession of a federal permit allows a fishing vessel to disregard state management measures given the supremacy of

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<sup>4</sup> Submerged Lands Act, Pub. L. No. 83-31, 67 Stat. 29 (1953); Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462 (1953).

<sup>5</sup> 16 U.S.C.S §§ 1801 *et seq.* (LexisNexis 2013).

<sup>6</sup> 16 U.S.C.S §§ 1853(c); 1855(d) (LexisNexis 2013).

<sup>7</sup> 16 U.S.C.S § 1802(11) (LexisNexis 2013).

<sup>8</sup> 16 U.S.C.S. § 1856(a)(1) (LexisNexis 2013).

<sup>9</sup> H.R. Rep. No. 445, 94th Cong., 2d Sess., at 29 (1976), reprinted in 1976 U.S.C.C.A.N. 593, 602.

<sup>10</sup> 50 C.F.R. § 648.3 (2013) (Relation to Other Laws; Fisheries of the Northeastern United States); (Nothing in these regulations supersedes more restrictive state management measures for any of the species referenced in § 648.1 and, for Atlantic salmon, more restrictive local management measures).

federal law and that consequently, federal fisheries regulations preempt those of the state. Based on the language of the Magnuson Act, its legislative history, and acknowledgement within federal regulations, it would appear settled that there is no federal-state conflict. However, courts disagree whether the Magnuson Act and its implementing regulations preempt state fisheries law.<sup>11</sup>

Rhode Island courts do hold that the Magnuson Act preempts state fisheries regulations in certain situations. For instance in State v. Sterling, a Rhode Island regulation established a catch limit of yellowtail flounder landed at Rhode Island ports or possessed in Rhode Island territorial waters regardless of origin.<sup>12</sup> State environmental police found the defendant fishing vessel operator in excess of the limit, who argued that the regulation conflicted with federal law.<sup>13</sup> The Rhode Island Supreme Court held that through the Magnuson Act, Congress preempted the states where federal regulations existed for specific species.<sup>14</sup> In this instance, federal regulations governing the fishing of yellowtail flounder were in effect, thereby barring the state from indirectly regulating the species outside its boundaries.<sup>15</sup>

The apparent contradiction between the Sterling decision and the Magnuson Act arises from the court's reading of 16 U.S.C.A. § 1856(a)(3), which explains the limited circumstances a state can regulate a vessel outside of its waters.<sup>16</sup> The court then applied these requirements for extraterritorial jurisdiction to regulation of all vessels within its waters, citing the indirect effect this has on a vessel's activities outside of them. This is likely a misreading of the statute, as § 1856(a) states that, "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." The explicit "nothing in this chapter" appears to indicate that any court's construction that another provision in fact does diminish the authority of the state to regulate vessels entering its waters is entirely untenable. Moreover, the Sterling court's interpretation also would severely restrict a state's authority to regulate fishing off its waters, contrary to the express purpose of the Magnuson Act.<sup>17</sup>

Raffield v. State espouses the more common reading of the law: that a vessel submits to the state's jurisdiction by docking within its territorial limits.<sup>18</sup> There, a fish processor violated a Florida statute barring possession of redfish caught with a purse

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<sup>11</sup> See Jay M. Zitter, Annotation, Preemption of State and Local Regulations by Magnuson Fishery Conservation and Management Act (16 U.S.C.A. §§ 1801 to 1883), 31 A.L.R. Fed. 2d 337 (2008).

<sup>12</sup> 448 A.2d 785, 786 (R.I.1982).

<sup>13</sup> Id.

<sup>14</sup> Id. at 787.

<sup>15</sup> Id.

<sup>16</sup> A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances: (A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.

<sup>17</sup> 16 U.S.C.S § 1801(b) (LexisNexis 2013).

<sup>18</sup> 565 So. 2d 704 (F.L 1990).

seine.<sup>19</sup> The processor possessed a federal permit to catch red fish in federal waters in the Gulf of Mexico and argued that federal law preempted the federal statute.<sup>20</sup> The court noted that by their own language, the federal regulations pertaining to red drum expressly encouraged more restrictive state regulation.<sup>21</sup> The rules' preamble stated:

It is the intent of the Secretary to supplement the States' efforts to conserve red drum. Therefore, the emergency rule does not supersede any State landing laws which apply to red drum.<sup>22</sup>

In concurrence with the statement of intent, the actual federal rules for red drum provided:

(a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities...(d) These regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum.<sup>23</sup>

That federal regulations constitute a floor, not a ceiling to state fisheries regulations and as such do not preempt state regulations is the view of the First Circuit. In Davrod Corp. v. Coates, a Massachusetts regulation set a catch limit for the amount squid a “freezer boat” could process and barred vessels with a length greater than 90 feet from fishing in Massachusetts waters.<sup>24</sup> Found in violation of both regulations, the vessel owner argued federal law, namely, the Magnuson Act, preempted the state regulation.<sup>25</sup> The court dismissed this contention and held that section §1856(a), expressly provided regulatory authority to the state of Massachusetts over its coastal waters.<sup>26</sup>

It follows then, that a federally licensed vessel would be subject to the regulatory authority of the state merely by transiting state waters to reach adjacent federal waters. Regardless, states generally allow passage provided that the vessel does not stop and the vessel's fishing gear is stowed. For example, Rhode Island regulations governing the cod fishery state that “vessels in possession of a federal permit allowing the commercial harvest of cod may also transit state waters in possession of cod . . . so long as all of the fish harvesting gear on board the vessel is stowed while in state waters.”<sup>27</sup> Transit

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<sup>19</sup> Id. at 705.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> 51 Fed. Reg. 23,553 (1986).

<sup>23</sup> Id. at 23,554.

<sup>24</sup> 971 F.2d 778, 781 (1st Cir. 1992).

<sup>25</sup> Id. at 785.

<sup>26</sup> Id. at 786-787.

<sup>27</sup> 25-8-4 R.I. CODE R. § 7.22 (LexisNexis 2013) (Vessels in possession of a federal permit allowing the commercial harvest of cod may also transit state waters in possession of cod . . . so long as all of the fish harvesting gear on board the vessel is stowed while in state waters).

allowances are often both species and gear specific. For winter flounder, “fishing harvesting gear” that is “stowed” means for a net that is stowed below deck, “it is located below the main working deck from which the net is deployed and retrieved, the towing wires, including the “leg” wires are detached from the net; and it is fan-folded (flaked) and bound around its circumference.”<sup>28</sup>

A federally licensed fishing vessel operator should therefore be cognizant of more restrictive Rhode Island regulations if the vessel is to land at a Rhode Island port. While the Rhode Island Supreme Court has held otherwise, the holding appears to be a misreading of the law and in contradiction to the suggestive precedent of other courts, the plain language of the Magnuson Act, and the Magnuson Act’s implementing regulations. Regardless, the same vessel operator may transit across intervening state waters provided he abides by the state transit requirements pertaining to the catch on board the vessel.

## **II. State Permit – Federal Waters**

A tangle of state and federal regulations results where federal waters sequester areas of state waters that are popular fishing grounds. To illustrate: a fishing vessel operating under a Rhode Island permit is perfectly capable of crossing the federal waters dividing Block Island Sound with an empty hold in order to reach the state waters around Block Island. The legal repercussions begin on the return trip, but largely depend on the type of fishing activity. Because of the reciprocity between the United States and Rhode Island pertaining to recreational saltwater licenses, the recreational vessel may navigate unimpeded back across the federal waters of Block Island Sound to the mainland. Commercial vessels operating under a Rhode Island permit have no such luxury. The totality of federal commercial fisheries regulations suggests that legal transit of the EEZ is impossible without a federal permit.

Federal regulations pertaining to fishing vessels in the EEZ are a product of Fishery Management Plans produced by eight Regional Fishery Management Councils for their respective portion of the EEZ and implemented by NOAA Fisheries Service. For commercial vessels in Rhode Island, the problematic regulation at issue is 50 C.F.R. § 648, which governs the federal fisheries of the northeastern United States. An initial reading of the regulation suggests that only fishing without a federal permit is prohibited, but a further reading of the regulation suggests that simple possession is prohibited as well.

Section 50 C.F.R § 648.14 covers general prohibitions for the fisheries of the northeastern United States and declares it is unlawful for a person to:

Possess, import, export, transfer, land, or have custody or control of any species of fish regulated pursuant to this [Part 648] that do not meet the minimum size provisions in this part, unless such species were harvested exclusively within state waters by a vessel not issued a permit under this part or whose permit has been surrendered in accordance with applicable regulations.<sup>29</sup>

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<sup>28</sup> 25-8-4 R.I. CODE R. §10.10.

<sup>29</sup> 50 C.F.R. § 648.14(a)(7).

This language appears to permit a state licensed vessel to cross the EEZ in violation specific federal regulations provided that the vessel fished only in state waters. The difficulty here would be for the vessel operator to demonstrate that the species were harvested exclusively within state waters. The prohibition section also includes specific provisions for vessel and operator permits, which state that it is unlawful for a person to:

Fish for, take, catch, harvest or land any species of fish regulated by this part in or from the EEZ, unless the vessel has a valid and appropriate permit issued under this part and the permit is on board the vessel and has not been surrendered, revoked, or suspended.<sup>30</sup>

Here, there is a federal license requirement for fishing within the EEZ, but no specific requirement for *possession* of a species within the EEZ. Under this provision, a state licensed vessel would still be able to cross the EEZ to reach state waters. However, while 50 C.F.R. §§ 648.14(a)(7) and (b)(1) do not appear to prohibit possession of a species without a federal permit, other statutory provisions imply and expressly require that a vessel operator possess a federal permit in the EEZ.

While the issue is one of possession, federal regulations do not clearly differentiate between instances of “fishing” and instances of mere possession. A “fishing trip” means “a period of time during which fishing is conducted, beginning when the vessel leaves port and ending when the vessel returns to port.”<sup>31</sup> Therefore, the fact that 648.14(b)(1) does not explicitly prohibit possession without a license is moot, because “fish for” would include the entirety of the voyage, including the time the vessel’s gear was not deployed and the vessel was merely transiting the EEZ. Read in this light, it is apparent that both sections 648.14(a)(7) and (b)(1) simply reaffirm the principle that states are free to regulate their territorial waters and make no allowances for state licensed vessels in federal waters.

Federal regulations for specific species support this proposition. For example, the North East Multispecies permit, which allows for harvest of a variety of groundfish, is expressly required if the vessel is in possession of one of the species within the EEZ. The regulation reads:

Except for vessels that have been issued a valid High Seas Fishing Compliance permit, have declared their intent to fish, and fish exclusively in the NAFO Regulatory Area as provided in § 648.17, any vessel of the United States, including a charter or party boat, must have been issued and have on board a valid multispecies permit to fish for, possess, or land multispecies finfish in or from the EEZ.<sup>32</sup>

Similarly and for a single species, the requirements for harvest of summer flounder state that:

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<sup>30</sup> 50 C.F.R. § 648.14(b)(1).

<sup>31</sup> 50 C.F.R. § 648.2.

<sup>32</sup> 50 C.F.R. § 648.4(a).

Any vessel of the United States that fishes for or retains summer flounder in the EEZ must have been issued and carry on board a valid summer flounder permit, except for vessels other than party or charter vessels that observe the possession limit set forth in § 648.106.<sup>33</sup>

For species for which possession is banned under federal law such as Atlantic salmon, it is illegal to use any vessel to fish for the species, with the strict presumption that “the Atlantic salmon on board were harvested in or from the EEZ, unless the preponderance of reliable evidence available indicates otherwise.”<sup>34</sup>

From a recreational standpoint, the issue is whether differences in state and federal rules would put recreational fishermen at risk during transits between areas of state waters. Unlike state commercial permits, state recreational licenses are often afforded reciprocity in federal waters. For instance, Rhode Island’s saltwater recreational license, “applies in all offshore federal waters, which extend seaward from the seaward edge of all state waters.”<sup>35</sup> Moreover, federal regulations state, “a state licensed recreational fishing vessel may transit the EEZ provided that “the State’s laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.”<sup>36</sup> It follows that if federal rules pertaining to size season and catch limits are more restrictive than that of the state, the vessel cannot legally proceed through the EEZ. In situations where a species is closed in federal waters, but open in state waters, the vessel must also defer to the Federal regulation. This rule is essentially the reverse of the “most restrictive rule” pertaining to federal vessels transiting state waters.

In Rhode Island, as in much of the northeast, recreational fishermen regularly encounter species such as black sea bass, bluefish, cod, haddock, lobster, pollock, scup, striped bass, summer flounder, tautog, and weakfish.<sup>37</sup> Within the federal waters of Block Island Sound, a state licensed recreational fishing vessel faces potential liability for possession of a species not satisfying federal season, size, possession limits. Currently, the only instances federal regulations more restrictive than Rhode Island regulations are for possession of black sea bass, scup and winter flounder. While also a potential liability, regulations resolved the issue of striped bass as discussed below.

For black sea bass, federal and Rhode Island size and possession limits are the same, but the respective fishing seasons are incongruent. For the EEZ and Rhode Island waters, a recreational fisherman is unable to retain a black sea bass less than 13 inches

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<sup>33</sup> 50 C.F.R. § 648.3(b).

<sup>34</sup> 50 C.F.R. § 648.14(h)(1).

<sup>35</sup> Rhode Island Department of Environmental Management, Division of Fish & Wildlife Recreational Saltwater Fishing License Information, available at <http://saltwater.ri.gov/> (last visited February 1, 2013).

<sup>36</sup> 16 U.S.C.S 1856(a)(3)(a) (LexisNexis 2013).

<sup>37</sup> A chart including every species is attached below.

and can possess up to 15 fish per person.<sup>38</sup> The federal season runs from January 1<sup>st</sup> to the end of February, and then from May 19<sup>th</sup> to October 14<sup>th</sup>, and from November 1<sup>st</sup> to December 31<sup>st</sup>.<sup>39</sup> The state season runs from June 15<sup>th</sup> to December 31<sup>st</sup>. A Rhode Island recreational fisherman would therefore be unable to cross the EEZ from Block Island from October 14<sup>th</sup> to November 1<sup>st</sup>. For scup, Rhode Island catch limits increase from 20 per person between May 1<sup>st</sup> and August 31<sup>st</sup> to 40 per person between September 1<sup>st</sup> and October 31<sup>st</sup>. During the 40 per person time period, a recreational fisherman is in violation of the federal regulation mandating a 20 per person catch limit for the entire year.<sup>40</sup>

For winter flounder, federal possession is banned south and east of Cape Cod, while Rhode Island permits possession of 2 flounder per person of 12 or more inches in most areas below Narragansett Bay.<sup>41</sup> Possession of winter flounder within the EEZ by a Rhode Island recreational fisherman would therefore be banned.

While federal regulations ban possession of striped bass in federal waters as well, an exception makes an allowance for possession within the EEZ surrounding the waters of Block Island. This possession exception arose out of a showing that the enforcement of the no possession rule was unduly onerous, difficult to enforce, and that state licensed vessels had no choice but to traverse the EEZ. The striped bass exception appears to be a workable solution to the issue of difficulties in regulatory compliance while transiting federal waters, but the length of the process involved suggests that attempting the same on a per species basis may not be the most efficient solution to compliance issues.

For striped bass, taking, retaining, or possessing a federally protected species in federal waters is illegal under federal rules meant to conserve the species.<sup>42</sup> In 1989 NOAA Fisheries solicited public comment on options presented to regulate fishing for striped bass in the EEZ on the Atlantic Coast.<sup>43</sup> NOAA posited four options: (1) prohibition on the harvest and the possession of striped bass in the EEZ; (2) prohibition on the harvest of striped bass in the EEZ; (3) application of state regulations to fish caught in the EEZ; and (4) status quo or take no action.<sup>44</sup>

NOAA Fisheries' proposed rule prohibited a person to "Possess any Atlantic striped bass on board a fishing vessel while such vessel is engaged in fishing within the

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<sup>38</sup> 50 C.F.R. § 648.145(a) (2013) (Black sea bass Possession Limit); 50 C.F.R. § 648.147 (2013) (Black Sea bass Minimum fish sizes); 25-8-4 R.I. CODE R. §7.14.2 (Black Sea Bass Recreational Harvest).

<sup>39</sup> 50 C.F.R. § 648.146 (2013) (Black sea bass Recreational Fishing Season); 25-8-4 R.I. CODE R. §7.14.2-2 (Recreational Season).

<sup>40</sup> 50 C.F.R. § 648.128(a) (2013) (Scup Possession Restrictions); 50 C.F.R. § 648.127 (2013) (Scup Recreational Fishing Season).

<sup>41</sup> 50 C.F.R. § 648.86 (2013) (NE Multispecies Possession Restrictions); 50 C.F.R. § 648.81 (2013) (NE Multispecies Closed Areas); 25-8-4 R.I. CODE R. §7.8 (Winter Flounder Recreational Regulations).

<sup>42</sup> Atlantic Striped Bass Conservation Act, 16 U.S.C.S. §§ 5151-5158 (LexisNexis 2013).

<sup>43</sup> Atlantic Coast Striped Bass Regulations in the Exclusive Economic Zone, 54 Fed. Reg. 33735 (August 16, 1989) (Advance notice of proposed rulemaking).

<sup>44</sup> Id.

EEZ.”<sup>45</sup> In a public comment to the rule, both the New England Fisheries Management Council (NEFMC) favored Option 4, noting the need to transport Atlantic striped bass that were legally taken in state waters through the EEZ (such as in the waters of Block Island Sound).<sup>46</sup> Disregarding NEFMC’s objection, NOAA Fisheries decided that an outright ban with no exceptions was more practicable.<sup>47</sup>

The Mid Atlantic Fisheries Management Council supported the proposed rule, but suggested that possession of Atlantic striped bass on a vessel in the EEZ while the vessel is not engaged in fishing be allowed only in the area between Block Island and the Rhode Island mainland.<sup>48</sup> The Coast Guard commented that prohibiting possession would be very difficult to enforce and suggested that possession of Atlantic striped bass be prohibited on a vessel unless that vessel is in continuous transit from one location in state waters to another location in state waters.<sup>49</sup> In response, NOAA limited the exception to the Rhode Island area because the only location where a fisherman can take Atlantic striped bass legally in state waters and must traverse the EEZ en route to the mainland is Block Island, Rhode Island.<sup>50</sup> The Prohibitions and Block Island Sound area exceptions were consolidated and clarified in 1996.<sup>51</sup> There, NMFS consolidated regulations pertaining to the Atlantic striped bass and weakfish fisheries, which were contained in two C.F.R. parts, into a single part.<sup>52</sup> In a final action, NMFS responded to U.S. Coast Guard suggestions to clarify current language and address enforcement issues by defining the Block Island Sound Area through GPS coordinates.<sup>53</sup>

All told, it took 7 years for the NMFS to construct an exception to allow possession of striped bass by recreational fishermen in a small area of the EEZ, provided the vessel remained in continuous transit. The difficulty in applying an exception such as this on a per species basis is not only the time involved, but also the regularity of which state and federal fisheries regulations can change. Constant change means updating transiting exceptions on a per species basis becomes a continuous and needless burden; therefore the “striped bass exception” is likely not the model for which to base any future exceptions unless the exception contains a broader base more able to withstand future changes.

Regardless, the current state of affairs for recreational fishermen is that when fishing vessels have no choice but to cross federal waters in order to return to port with their catch, federal regulations distinguish between commercial and recreational vessels.

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<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Atlantic Striped Bass Fishery, 55 Fed. Reg. 40181 (October 2, 1990) (Final Rule, 50 C.F.R. 656).

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Atlantic Striped Bass Fishery; Atlantic Coastal Fisheries Cooperative Management; Consolidation and Revision of Regulations, 61 Fed. Reg. 29321 (June, 10, 1996) (50 C.F.R. §§ 656, 697).

<sup>52</sup> Id.

<sup>53</sup> Atlantic Coast Weakfish Fishery; Change in Regulations for the Exclusive Economic Zone, 62 Fed. Reg. 24921 (September, 22, 1997) (50 C.F.R. § 697).

Commercial vessels are unable to transit federal waters due to permit requirements whereas recreational vessels may transit provided federal regulations are not more restrictive than those of the state. While individual transit provisions aid recreational vessels where a species is heavily regulated under federal law, drafting individual provisions for all the instances where federal regulations are more restrictive would be an inefficient solution to this complex problem.

### III. Extensions of State Fisheries Jurisdiction

Complex coastlines result in incongruous fisheries management schemes likely to confuse and frustrate fishing vessel operators. One solution to this problem is to allow for allows for state management of fisheries in federal waters in instances where state waters nearly or totally encompass federal waters. This part of the paper discusses the “Nantucket Sound exception” contained within the language of the Magnuson Act, which allows Massachusetts to exert fisheries jurisdiction over the whole of the Sound. This part of the paper then discusses the applicability of the Nantucket Sound Exception to the case of Rhode Island, which has a similar opportunity to enclose the federal waters of Block Island Sound for the purpose of establishing state fisheries jurisdiction.

Nantucket and Vineyard Sounds are subject to the fisheries jurisdiction of Massachusetts under the Magnuson Act.<sup>54</sup> The Magnuson Act expressly authorizes Massachusetts' exercise of regulatory authority over the harvesting and at-sea processing of fish in Nantucket and Vineyard Sounds.<sup>55</sup> Pursuant to the Magnuson Act, “The jurisdiction and authority of a state shall extend . . . with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich.”<sup>56</sup> This extension of jurisdiction arose to address the limited situations where federal waters were entirely surrounded by state waters.<sup>57</sup> Addressing these limited situations, Congress allowed for the extension of state jurisdiction because “the presence of these pockets creates incongruous fishery management schemes and presents significant problems in the area of fisheries law enforcement.”<sup>58</sup> While Nantucket Sound is not entirely enclosed by the territorial sea of Massachusetts, it creates the same fisheries management problems that §1856 of the Magnuson Act alleviates.<sup>59</sup>

Rhode Island could seek enclose Block Island Sound for the purpose of fisheries jurisdiction as a result of the same fisheries management problems Massachusetts faced. On the face of the statute, Block Island Sound is not a candidate for exemption under 16 U.S.C. § 1856(a), which applies to “any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea...”<sup>60</sup> However, like Nantucket

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<sup>54</sup> 16 U.S.C.S. §§ 1851 et seq. (LexisNexis 2013).

<sup>55</sup> Davrod Corp. v. Coates, 971 F.2d 778 (1st Cir. Mass. 1992).

<sup>56</sup> 16 U.S.C.S § 1856(a) (LexisNexis 2013).

<sup>57</sup> Merchant Marine and Fisheries Committee, H.R. Rep. No. 94-445, at 29 (1975) *reprinted in* § 2 1976 U.S.C.C.A.N. 602.

<sup>58</sup> 128 Cong. Rec. 31685 (97th Cong. 2d Sess., Dec. 16, 1982).

<sup>59</sup> At the eastern edge, the lines delimiting the “bubble” of federal territorial waters within Nantucket Sound come within one mile of intersecting each other.

<sup>60</sup> 16 U.S.C.S § 1856(a) (LexisNexis 2013).

Sound, Block Island Sound creates “incongruous fishery management schemes and presents significant problems in the area of fisheries law enforcement,” the situation for which Congress designed the section.<sup>61</sup>

While Block Island Sound is similar to Nantucket Sound in that the federal waters are not entirely enclosed, Block Island Sound is open in to the greater federal waters in two different locations rather than one. This makes an argument for expanded state jurisdiction more persuasive because vessels fishing in state waters off of Nantucket Island could conceivably take a “great circle” route around the bay until it reached Chatham Harbor, the whole time avoiding entering federal water. Here, vessels fishing off of Block Island must traverse the EEZ en route to the mainland. In this way, partial enclosure of federal waters by those of the state presents greater difficulties for fishermen than do nearly or totally enclosed state waters.

Unlike the Nantucket Sound Exception, H.R. 3906 (To Amend the Atlantic Striped Bass Conservation Act) sought to extend Rhode Island fisheries jurisdiction over federal waters for a single species. Here, it would appear that any extension of jurisdiction for a single species would have to demonstrate that modification of current no possession requirements are insufficient, that enclosure is consistent with federal management and conservation issues and that enclosure would not undermine regulatory efforts in other states.

Modification of no-possession requirements is sufficient for the area of federal waters lying between Block Island and the mainland (“Block Island Transit Zone”). The Striped Bass Management Board of the ASMFC and the New England Fishery Management Council noted in 1990 the need to transport Atlantic striped bass legally taken in state waters through the EEZ where possession was illegal. The proposed rule<sup>62</sup> accommodated this by allowing a recreational vessel to transport Atlantic striped bass through the EEZ, provided that person does not engage in fishing while in the EEZ.<sup>63</sup>

H.R. 3906 is also inconsistent with current management principles, executive orders, and could undermine regulatory efforts in other states.<sup>64</sup> In 1990, NMFS implemented a federal ban on the harvest and possession of striped bass. In 2006, NMFS reanalyzed potential effects of opening the EEZ to Atlantic striped bass harvest and received overwhelming support for continuation of the ban. In 2007, an Executive Order affirmed as policy of the United States the goal of conserving striped bass and NMFS determined that the current prohibition on fishing for striped bass in the EEZ was consistent with the executive order.<sup>65</sup> Critics argue that granting exceptions to the rule will give way to further exceptions in other states, rendering piecemeal the overall federal

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<sup>61</sup> 128 Cong. Rec. 31685 (97th Cong. 2d Sess., Dec. 16, 1982).

<sup>62</sup> 55 Fed. Reg. 25677 (June 22, 1990).

<sup>63</sup> See Atlantic Striped Bass Fishery, 55 Fed. Reg. 40181 (October 2, 1990) (Final Rule, 50 C.F.R. 656).

<sup>64</sup> *Anadromous Fish Reauthorization and Recreational Fishing in Block Island Sound: Hearing on H.R. 6096, H.R. 6007 and H.R. 3906 Before the Subcomm. on Fisheries, Wildlife, Oceans, & Insular Affairs, of the H. Comm. On Natural Resources*. 112 Cong. 2 (2012) (Statement of Samuel D. Rauch, Dept. Ass. Adm. for Regulatory Programs, NOAA).

<sup>65</sup> Exec. Order No. 13449, 72 Fed. Reg. 60531 (Oct. 20, 2007).

conservation effort detailed above.<sup>66</sup> Finally, the Atlantic States Marine Fisheries Commission (ASMFC) is cautious about expansion of harvesting opportunity, such as opening federal waters, without an analysis of the impacts on the overall harvest and the stock status. In a hearing on H.R. 3906, the ASMFC stated, “given the choice between the painful measures taken to rebuild the fishery or regulatory adjustments to sustain a stock at a sustainable level of biomass, our states choose the latter.”<sup>67</sup>

A wholesale extension of Rhode Island fisheries jurisdiction over the waters of Block Island Sound appears more likely to be successful than a piecemeal approach. Such extensions have already proven successful in Massachusetts, are based on federal law, address a specific problem and avoid concerns over the breakdown of uniform applicability of federal fisheries regulations.

#### **IV. Extensions of State Sovereignty**

While Massachusetts resolved the issue of excessively intervening federal waters within Nantucket Sound through an extension of state fisheries jurisdiction, New York accomplished the same in Long Island Sound through an extension of sovereignty. Where federal waters excessively intervene upon those of a state, annexation of the federal waters is proper only when the state demonstrates that the body of water satisfies the statutory, treaty, and jurisprudential requirements for annexation. While Block Island fulfills the definition of a juridical bay under the Submerged Lands Act and Article 7 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (1958 Convention), current Supreme Court jurisprudence suggests that Block Island Sound would not be enclosed as a juridical bay.

Under the 1958 Convention, a bay is a “well-marked indentation” that is “more than a mere curvature of the coast;” the area of which area is “as large as, or larger than that of a semi-circle whose diameter is a line drawn across the mouth of that indentation” and where islands divide the mouth of the indentation, the semi-circle is “drawn on a line as long as the [sum] of the lengths of the lines across the different mouths.”<sup>68</sup>

However, the Supreme Court has held that nothing in the 1958 Convention or in the Submerged Lands Act of 1953 indicates whether islands may be treated as extensions of the mainland for the purpose of forming a headland of a juridical bay.<sup>69</sup> In some circumstances, an island or group of islands may be considered part of the mainland and therefore treated as headlands if they are so integrally related to the mainland that they

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<sup>66</sup> *Anadromous Fish Reauthorization and Recreational Fishing in Block Island Sound: Hearing on H.R. 6096, H.R. 6007 and H.R. 3906 Before the Subcomm. on Fisheries, Wildlife, Oceans, & Insular Affairs, of the H. Comm. On Natural Resources*. 112 Cong. 2 (2012) (Statement of Samuel D. Rauch, Dept. Ass. Adm. for Regulatory Programs, NOAA).

<sup>67</sup> *Anadromous Fish Reauthorization and Recreational Fishing in Block Island Sound: Hearing on H.R. 6096, H.R. 6007 and H.R. 3906 Before the Subcomm. on Fisheries, Wildlife, Oceans, & Insular Affairs, of the H. Comm. On Natural Resources*. 112 Cong. 2 (2012) (Statement of Robert Beal, Acting Exec. Dir. of ASMFC).

<sup>68</sup> Convention on the Territorial Sea and Contiguous Zone, Art. 7(2).

<sup>69</sup> *U.S. v. Louisiana*, 394 U.S. 1, 67 (1969); *U.S. v. Maine*, 469 U.S. 504, 526 (1985).

are realistically parts of the coast within the meaning of the 1958 Convention.<sup>70</sup> Whether a particular island is treated as part of the mainland depends size, distance from the mainland, depth and utility of the intervening waters, shape of the island, and relationship to the configuration or curvature of the coast.<sup>71</sup> An island's "origin and resultant connection with the shore" is also considered.<sup>72</sup>

The 1958 Convention is the applicable law in all disputes between the United States and the individual states in regard to coastal boundaries.<sup>73</sup> In U.S. v. California, the Court held that "the meaning of 'inland waters' in the Submerged Lands Act should conform to the Convention of the Territorial Sea and the Contiguous Zone."<sup>74</sup> The Submerged Lands Act gives control over the water and submerged land resources within three miles of the baseline to each individual coastal state.<sup>75</sup> Taken together, the Submerged Lands Act grants states territorial waters extending three nautical miles, the baseline for which depends on the interpretation of the 1958 Convention.

The 1958 Convention contains both a subjective and objective test for juridical bays. The objective test provides a straightforward mathematical formula while the subjective test requires a determination of whether the indentation in the coast is sufficiently bay-like. This subjective determination acts as a roadblock to most claims raised by states, as the Supreme Court and its special masters confront complex geography deemed insufficiently bay-like, resulting in a growing body of factors used to determine whether an indentation that otherwise meets the objective test is actually a bay.<sup>76</sup> In the matter of Rhode Island's Block Island Sound, the Supreme Court held that despite meeting the objective requirement of Article 7, Block Island could not be treated as an "extension of the mainland" and thus could not be as headlands of a juridical bay.<sup>77</sup> The holding remains fundamentally at odds with Article 7, which accounts for the geography of Rhode Island and New York.

Article 7 of the 1958 Convention requires a bay to be a "well marked indentation." Here, the coastline of the mainland of Rhode Island, Connecticut and New York would otherwise fail Article 7's requirement. However, the drafters of the 1958 convention intended to include indentations created in part by islands to be included as juridical bays under Article 7, which includes an "indentation which, if it had no islands at its mouth, would not fulfill the necessary conditions, is to be recognized as a bay. Given this allowance for bays formed in part by islands, Long Island and Block Island create a well-marked indentation that when taken together with the mainland, forms a well-marked indentation.

Contrary to the 1958 Convention, the Supreme Court held in the U.S. v. Maine that "the Convention addresses the problems created by islands located at the mouth of a

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<sup>70</sup> Id. at 60-66.

<sup>71</sup> Supra note 3 at 516.

<sup>72</sup> Id.

<sup>73</sup> United States v. California, 381 U.S. 139 (1965).

<sup>74</sup> Id. at 161.

<sup>75</sup> 43 U.S.C.S. § 1301 (LexisNexis 2013).

<sup>76</sup> See Gayl S. Westerman, When Good Courts Go Wrong: A Critique of the Supreme Court's Domestic Maritime Boundary Jurisprudence, 8 Loy. Mar. L.J. 1.

<sup>77</sup> Supra note 3 at 526.

bay, but does not address the analytically different problem whether islands may be treated as part of the mainland to form an indentation.”<sup>78</sup> Instead, an island or group of islands may be considered part of the mainland if they are so integrally related to the mainland that they are realistically parts of the "coast" within the meaning of the 1958 Convention.<sup>79</sup> Applying this standard, the Court deemed Long Island so integrally related to the coast that it could be “assimilated to the mainland.”<sup>80</sup> In doing so, the Court cited the proximity of Long Island to the mainland at its western-most tip, the shallowness and inutility of the intervening waters, the fact that the East River is not an opening to the sea, [as well as] common geological history, formed by deposits of sediment and rocks brought from the mainland by retreating glaciers.<sup>81</sup> In contrast, Block Island lacked proximity to the mainland and lay outside what was otherwise a proper closing line running north from Montauk Point.

Despite the Court’s disregard of Article 7, Block Island should have succeeded under the “assimilation of the islands to the mainland test.” Like Long Island, Block Island shares a common geological history with the mainland. Both islands formed what was once a continuous piece of land that contained a large freshwater lake.<sup>82</sup> As glaciers retreated, a major water gap formed between Long Island and Block Island and flowed toward the sea.<sup>83</sup> Later, sea currents widened the gap between the islands as sea levels rose, resulting in the current geological formations.<sup>84</sup> Additionally, commercial vessels rarely go between Montauk Point and Block Island because of the hazardous underwater conditions there and often use Block Island Sound as a refuge because of the calmer waters there.<sup>85</sup> Despite these conditions and despite what appears to be an allowance by the drafters of the 1958 Convention, it seems that solely due to Block Island’s greater distance from the mainland, Block Island Sound did not pass the Court’s subjective interpretation of a “well marked indentation.”

Article 7 also requires a bay to be “as large or greater than the area semi-circle with a diameter equal to the closing lines across the mouths of the bay.” Here, the first closing line measures from Montauk Point to a point near Southwest point on Block Island. The second closing line measures from Sandy Point on Block Island to Point Judith on the Rhode Island Mainland. The total distance is approximately 22 miles.<sup>86</sup> A semi-circle with a diameter of 22 miles has an area of approximately 190 miles. Long Island Sound measures 1,320 sq. miles and Block Island Sound measures 250 sq. miles.<sup>87</sup>

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<sup>78</sup> Id.

<sup>79</sup> U.S. v. Louisiana, 394 U.S. at 67.

<sup>80</sup> *Supra* note 3 at 527.

<sup>81</sup> Id.

<sup>82</sup> See S. Needell & R. Lewis, Geology of Block Island Sound, Rhode Island and New York, U.S. Geological Survey (1984).

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> *Supra* note 3 at 521.

<sup>86</sup> Id.

<sup>87</sup> U.S Dept. Interior, Bureau of Land Management, New York OCS Office, Final Environmental Impact Statement: Proposed 1979 OCS Oil and Gas Lease, Volume 1, 115. 1978.

The bay constituting the two sounds measures 1,570 sq. miles, which is greater than the required 190 miles and so satisfies the Article 7 test. Here, the Supreme Court acknowledged that under this test alone, Block Island Sound constitutes a juridical bay.<sup>88</sup> The issue therefore came down to the proper application of the more subjective requirements of Article 7, noted above.

The drafters of Article 7 also intended to account for the presence of islands across the mouth of the indentation, even though the closing line would, without the island, exceed the distance requirements laid out above. The drafters note that “Here, the Commission's intention was to indicate that the presence of islands at the entrance to an indentation links it [the indentation] more closely with the territory, which may justify some alteration of the proportion between the length and depth of the indentation.”<sup>89</sup> Despite this, the Supreme Court claimed, “such a treatment of islands beyond the natural entrance points of an indentation finds no support in the Convention or in any of the scholarly treatises.”<sup>90</sup> In discounting such islands, the Court held that the island should be “close enough at all points to provide [a seaman] with shelter from all but that one direction.”<sup>91</sup> In this way Block Island Sound fails the test for a juridical bay on the Supreme Court’s theory that it will not treat islands deemed well beyond the natural entrance points of an indentation as creating multiple mouths to that indentation.<sup>92</sup>

The Supreme Court’s sentiment that Block Island is too far removed from the coast to constitute the headlands of a bay does not seem related to the statutory requirements for designating a state’s internal and territorial waters. By the Court’s own admission, the interplay between the Submerged Lands Act and the 1958 convention should define a state’s territorial waters. Allowing for the enclosure of Long Island Sound while forbidding the same for Block Island Sound, regardless of the fact that both bodies of water satisfy the requirements, needlessly complicates fisheries regulatory compliance and enforcement both for Rhode Island and the federal government.

## Conclusion

Rhode Island’s issue of excessively intervening federal waters within Block Island Sound remains while neighboring bodies of water display a variety of solutions that have resolved the very same fisheries jurisdictional issues arising from complex territorial waters. Past efforts to assert state sovereignty over intervening federal waters have failed and more recent efforts to assert at least some state fisheries jurisdiction over federal waters never got off the ground. As a result, the current state of affairs remains a maze of competing and superseding federal and state fisheries regulations. Vessels operating under federal permits must either abide by more restrictive state regulations or may challenge the state regulation under the Rhode Island Supreme Court’s outlying

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<sup>88</sup> *Supra* note 3 at 521.

<sup>89</sup> *U.S. v. Louisiana*, 394 U.S. at 56, *quoting* Commentary of the International Law Commission 2 Y.B. Int. L. Comm’n 296 (1956)

<sup>90</sup> *Supra* note 3 at 524-25.

<sup>91</sup> *Id.* at 525 *quoting* P. Beasley, *Maritime Limits and Baselines: A Guide to Their Delineation*, The Hydrographic Society, Special Publication No. 2, 13 (1978).

<sup>92</sup> *Id.* at 526.

preemption jurisprudence. State permitted recreational fishing vessels may transit the federal waters of Block Island Sound provided that the catch on board satisfies federal regulations more restrictive than those of the state or is exempted from federal regulation. Commercial vessels wishing to do the same are left out in the cold. While seemingly unique to Rhode Island, the same competition between federal and state regulation exists wherever islands sit greater than six miles offshore.