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Cover Page Footnote
Charles T. Jordan obtained his Juris Doctor from Pace University School of Law. At Pace, he focused his studies on environmental law and was the Acquisitions and Development Editor for Pace Environmental Law Review. Charles would like to thank his family and friends for their endless support.

How *Chevron* Deference is Inappropriate in U.S. Fishery Management and Conservation

Charles T. Jordan[†]

The real fight ahead will be over the health and integrity of the ecosystems upon which their livelihood subsists. This is, in the end, a fight for all Americans. A struggle for biologically vital coasts, economically viable waterfront communities, and good, healthful food.

-Paul Greenberg, American Catch

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INTRODUCTION

Fish serve as an incredible natural resource; possibly their most important function is as food. Seafood, in general, has been an essential part of our plates for centuries. Fish provide essential nutrients that many people are deficient in; such as, vitamin D and omega-3 fatty acids. On average, Americans eat about 16 pounds of seafood a year, which is approximately five ounces a week. The Food and Drug Administration (FDA) recommends that we should eat twelve ounces (about two normal meals) of fish a week. This means that Americans are eating less than half the amount of recommended seafood. Eating more seafood also has significant environmental benefits compared to land-based diets. In general, fish can be consumed in extremely sustainable ways; unlike livestock. When comparing the carbon footprint of fish production to livestock production, fish have a much lower impact, and thus a smaller carbon footprint. Eating fish is a more environmentally friendly choice when looking at carbon emissions, clean water use, pollution, and chemicals such as pesticides. While fish represent an essential food source to our society, fisheries are in jeopardy. Fish

stocks are being overfished; therefore, they are not sustainable. To prevent overfishing, there needs to be effective management of fisheries to ensure a sustainable resource.

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA or Act) governs United States (U.S.) fisheries.[2] A Fishery is one or more stocks of fish that are treated as a unit for conservation and fishing.[3] The statute creates broad goals to conserve the nation's fishery resources while also preserving the fishing industry.[4] In doing so, MSFCMA delegates substantial authority first to the National Oceanic and Atmospheric Administration (NOAA), then to National Marine Fisheries Service (NMFS), and then to eight regional councils (and in some instances the states).[5] Ultimately MSFCMA charges these regional councils with the responsibility to achieve the Act's goals.[6] This sets up an

[2] 16 U.S.C. §§ 1801-1891(d) (2006).

[3] Id. § 1802(13).

[4] *Id.* § 1801(b).

[5] *Id.* § 1852(a)(1).

[6] *Id.* § 1852(h).

exciting relationship amongst the various parties regarding fisheries. With such an elaborate regulatory scheme, many interests have to be balanced; which often result in compromises that ultimately affect a party that has no voice, the fish.

Though MSFCMA does create a robust framework for fishery conservation, U.S. marine fisheries remain in crisis. Currently, about a quarter of world fisheries are being fished passed sustainable levels. The fisheries surrounding the U.S. are more sustainable than most, but more needs to be done to protect such a valuable resource.[7] Because the MSFCMA's goals are not merely aspirational, there is a strong framework to promote the sustainable operation of fisheries; despite this strong framework, many fisheries are not being managed sustainably.

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[7] *The State of World Fisheries and Aquaculture*, Food and Aquaculture Organization of the United Nations, 40 (2018), *available at* http://www.fao.org/3/I9540EN/i9540en.pdf (last visited Dec. 10, 2018). See also, *Marine Life Decline*, Thankyouocean.org, http://thankyouocean.org/threats/marine-life-decline/ (last visited Nov. 1, 2018); Thin Lei Win, *World's Fish Consumption Unsustainable, U.N. Warns*, https://www.reuters.com/article/us-global-fisheries-hunger/worlds-fish-consumption-unsustainable-u-n-warns-idUSKBN1JZ0YA (last visited Nov. 1, 2018).

If there is any flaw in the act, it is how authority is delegated and thus how the courts review decisions. In general, the courts defer to reasonable agency decisions as per *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*).[8] *Chevron* is the landmark case that establishes the test for how courts should defer to government agency actions.[9] However, under MSFCMA, it is the industry influenced regional councils that are making the decisions regarding fishery management. Since the regional councils perform much of MSFCMA's regulatory action and the agency (NMFS) only has minimal final approval or disproval power; it can be argued that the agency is not the acting entity. Therefore, *Chevron* deference is misplaced as the decisions being challenged are merely the regional council's recommendations and not the agency's determinations.

The purpose of this paper is to focus on how, under the MSFCMA, the plans and regulations made by the regional councils should not be entitled to *Chevron* deference as they are not agency

[8] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

[9] *Id.* at 865.

decisions. Currently, the courts are using *Chevron* to defer to agency decisions; however, a pre-*Chevron* (step zero like approach) may be more appropriate. Part I will provide a brief overview of fish and their importance to both the food system and the environment. Part II will provide an overview of the MSFCMA and the procedural framework of regulation. Part III will discuss some of the problems with the MSFCMA and U.S. fisheries in general (overfishing, "capture," and bycatch). Part IV will conclude with why *Chevron* deference is misplaced and how the decisions made by the regional councils are at risk of industry influence and not always in the best interest of U.S. fisheries. Part V will propose that the courts utilize a *Mead* Step Zero approach and look closer at the entity that is making the decisions and the power that entity has before imploring *Chevron*. Part VI will focus on amendments currently in the Congress that could weaken the MSFCMA.

PART I: OVERVIEW OF THE IMPORTANCE OF FISH TO THE FOOD SYSTEM AND ENVIRONMENT

Fish represent an essential natural resource for both the food system and the environment in general. Humans have been eating fish for centuries, and even today fish make up a large portion of the

population's diet.[10] Despite fishing's deep roots in food culture, modern commercial fishing is a relatively new development. Advances in modern commercial fishing, such as improved fishing fleets, more effective catching practices, and trends in international trade, have significantly expanded to the point where it is a multibillion-dollar industry.[11] Since the 20th century, governments have encouraged people to eat more fish for their health.[12] Nutritionists have determined that seafood is a low-fat and high protein source of food.[13] Studies have even shown that eating seafood can decrease your risk of heart attack, stroke, obesity, and hypertension.[14] The reason for these health benefits can be attributed

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[10] *Fish as Food*, World Ocean Review, http://worldoceanreview.com/en/wor-2/fish-and-folk/fish-as-food/ (last visited Apr. 25, 2016).

[11] James H. Tidwell & Geoff L. Allan, *Fish as Food: Aquaculture's Contribution*, 2 EMBO, 958-963 (2001).

[12] *A Framework for Assessing Effects of the Food System*, Food and Nutrition Board, National Research Council (2015), *available at* https://www.ncbi.nlm.nih.gov/books/NBK305180/ (last visited Nov. 1, 2018).

[13] *Id.*

[14] Dariush Mozaffarian, *Fish Intake, Contaminants, and Human Health: Evaluating the Risks and Benefits* (Oct. 18, 2006), available at https://jamanetwork.com/journals/jama/fullarticle/203640. See also, Cyrus A Raji, *Regular Fish Consumption and Age-Related Brain Grey*

to the presence of omega-3 fatty acids in fish.[15]Governments have published guidelines on how much fish people should eat. The recommended weekly consumption of seafood, according to the United States Food and Drug Administration, is about twelve ounces of seafood a week (approximately two meals a week).[16] However, Americans fall short of this recommendation only eating about five ounces of seafood a week.[17] Since seafood is an important food source, it deserves proper regulation to ensure its sustainable future.

Matter Loss (Jul. 29, 2014), available at https://www.ajpmonline.org/article/S0749-3797(14)00257-8/fulltext (last visited Dec. 10, 2018); Albert CM, *Dietary Alpha-Linolenic Acid Intake and Risks of Sudden Cardiac Death and Coronary Heart Disease* (2005), available at https://www.ncbi.nlm.nih.gov/pubmed/16301356?dopt=Citation (last visited Dec 10, 2018).

[15] National Institutes of Health, Omega-3 Fatty Acids and Health, https://ods.od.nih.gov/factsheets/Omega3FattyAcidsandHealth-HealthProfessional/.

[16] F.D.A., What You Need to Know About Mercury in Fish and Shellfish, *available at* https://www.epa.gov/fish-tech/2017-epa-fda-advice-about-eating-fish-and-shellfish (last visited Nov. 3, 2018).

[17] Linda Kantor, *Americans' Seafood Consumption Below Recommendations*, United States Department of Agriculture (Oct. 3, 2016), available at https://www.ers.usda.gov/amber-waves/2016/october/americans-seafood-consumption-below-recommendations/ (last visited Dec. 10, 2018).

In addition to the health benefits and importance of seafood to the food system, there is an environmental benefit to eating more seafood. When compared to livestock production (which includes beef, pork, and chicken), fisheries have a much lower carbon footprint because fisheries require fewer resources like land, energy usage, and feed.[18] Livestock production requires vast amounts of fresh water, antibiotics, fertilizers, and pesticides, unlike fisheries which only need sound management practices.[19] A further concern is the damage to the underlying ecosystem. Sustainable fishery practices leave the primary food sources (phytoplankton and other photosynthetic organisms) intact; unlike in livestock and agricultural practices which replace the underlying ecosystem with a profitable one. By leaving the underlying ecosystem intact, fisheries can be managed in a completely sustainable manner, unlike livestock. In general, the ecosystem in a well-managed fishery is

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[18] *Eco-impact of Wild Seafood Less Than That of Poultry, Beef,* Eartheasy, (Feb. 10, 2011), *available at* http://learn.eartheasy.com/2011/02/eco-impact-of-wild-seafood-less-than-that-of-poultry-beef/.

[19] Ray Hilbron & Ulkrine Hilborn, *Overfishing: What Everyone Needs to Know*, 128 (2012).

much less resource intensive and maintains more of the native flora and fauna than areas converted to agriculture. Given the benefits of seafood to the food system and the environment, it is crucial to have clear regulations in place that protect fisheries in a way benefits both the environment and the industry. That regulatory framework comes from the MSFCMA.

PART II: OVERVIEW OF THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

The MSFCMA passed in 1976 is the federal law that governs the management of U.S. fisheries.[20] This law gives the federal government jurisdiction over all fisheries in the American Exclusive Economic Zone (EEZ) which extends 200 miles out from all shorelines of the U.S.[21] The Act grants the Secretary of Commerce (Secretary) regulatory power over fisheries of the U.S.[22]

In the MSFCMA, Congress made many findings which became the motivation and set the goals for the Act.[23] These findings

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[20] 16 U.S.C. §§ 1801-1891(d) (2006).

[21] *Id.* § 1811.

[22] *Id.* §§ 1802(39), 1811(a).

[23] *Id.* § 1801(a).

included that the fish in American waters constituted a "valuable and renewable natural resources"[24] which contributed to the "food supply, economy, and health of the Nation and provided recreational opportunities."[25] Secondly, that particular fish stocks have declined to the point that their survival is threatened as a consequence of overfishing, inadequate resource conservation and management practices, and habitat loss.[26] Congress noted that commercial and recreational fishing constitutes a significant source of employment when identifying major players in fishery management.[27] Importantly, Congress recognized that while fishery resources are finite, they are also renewable by using "sound management before overfishing has caused irreversible effects."[28] Congress also recognized that one of the greatest threats to the viability of fisheries was habitat loss.[29] These findings illustrate what Congress intended

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[24] *Id.* § 1801(a)(1).

[25] *Id.*

[26] 16 U.S.C. § 1801(a)(2) (2006).

[27] *Id.* § 1801(a)(3).

[28] *Id.* § 1801(a)(5).

[29] *Id.* § 1801(a)(9).

the MSFCMA to accomplish and therefore recognized the importance of fisheries as a natural resource and an economic stimulator. Thus, becoming the foundation for an act focused on scientifically derived conservation techniques, support of fishing communities, and accountability measures to rebuild overfished stocks.

The explicit purposes illustrated in the Act shows that Congress intended "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States."[30] The goal was to "achieve and maintain… the optimum yield from each fishery."[31] The Act aims to "promote domestic commercial and recreational fishing under sound conservation and management principles."[32] To accomplish these goals the MSFCMA created eight quasi-legislative bodies known as the regional fishery management councils.[33] These councils were tasked

[30] *Id.* § 1801(b)(1).

[31] *Id.* § 1801(b)(4).

[32] 16 U.S.C. § 1801(b)(3) (2006).

[33] 16 U.S.C. §1852 (a)(1) (1976).

with the responsibility to respond to the findings of Congress by preparing a fishery management plan (FMP) to end overfishing and rebuild affected fish stocks.[34] It is through these regional councils that the regulation of fisheries and the methods to achieve Congress's stated goals can be accomplished. Through these FMPS the regional councils create a plan to achieve the various national standards as prescribed by Congress.[35]

In the original MSFCMA enacted in 1976, there were seven national standards which essentially lay out the goals for the Act.[36] However, unlike the objectives of most statutes, the national standards under the MSFCMA are not merely aspirational. The national standards are incorporated into the act in such a way that gives them real weight in the regulation of fisheries.

National Standard 1 mandated that an FMP must prevent overfishing while allowing the optimum yield to be taken for the

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[34] 16 U.S.C. §1854(e)(3) (2007).

[35] *Id.* § 1854(a)(1).

[36] *Id.* § 1851(a).

benefit of the fishing communities.[37] National Standard 2 required this be accomplished using the best scientific information available.[38] National Standard 3 stated that fish stocks and similar fish species should be managed as broadly as possible.[39] National Standard 4 balanced the conservation and management interests of residents of different states; allocation between various fishermen should be fair and equitable, reasonably promote conservation, and carried out in such a manner that no particular individual benefits excessively.[40] National Standard 5 required the council to "consider efficiency in utilization of fishery resources."[41] National Standard 6 required that each plan is tailored to the specific needs of each fishery.[42] Finally, plans should minimize costs and avoid duplications per National Standard 7.[43]

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[37] *Id.* § 1851(a)(1).

[38] *Id.* § 1851(a)(2).

[39] 16 U.S.C. §1851(a)(3) (2007).

[40] *Id.* § 1851(a)(4).

[41] *Id.* § 1851(a)(5).

[42] *Id.* § 1851(a)(6).

[43] *Id.* § 1851(a)(7).

In 1996, Congress enacted the Sustainable Fisheries Act which added three new national standards meant to clarify and balance all these standards.[44] These three new national standards required plans to consider the importance of fishery resources in fishing communities, avoid bycatch (fish caught in addition to the targeted species), and to take into account human safety at sea.[45] These national standards were meant to guide the regional councils to balance conservation in accordance with social and economic effects.[46]

In 2007, Congress reauthorized the MSFCMA.[47] A significant change under the reauthorization was that the Act now requires annual catch limits for all managed fisheries, "establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual

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[44] 16 U.S.C § 1801.

[45] 16 U.S.C. § 1851(a)(8-10).

[46] *Id.* § 1853(a)(14).

[47] Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 (2007).

specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability, where previously there were none."[48] Based on these standards, it is clear that the MSFCMA places a lot of responsibility for the regional councils to properly manage the nation's fisheries. The purpose of these national standards is to protect the viability of the fisheries, and the act places this authority not in an administrative agency but in the regional councils.

Through the establishment of the eight regional councils, the MSFCMA grants considerable authority to the councils to develop a FMP for each fishery under the council's jurisdiction.[49] Under the Act's framework, a FMP and the related regulations are interdependent; the FMP serves as the foundational policy document while the regulations give those policies the force of law.[50] While the Act does not grant the councils actual authority to promulgate regulations, the councils are only restricted by very limited agency

[48] 16 U.S.C. § 1853(a)(15) (2006).

[49] *Id.* § 1852(h)(1).

[50] *Id.* § 1854(b).

oversight.[51] The Secretary of Commerce and NMFS is the agency that promulgates the FMPs and related management regulations, but they utilize the council's recommendations heavily and generally must rely on those recommendations.[52] NMFS's review authority is limited to ensuring that each council made regulation is "consistent with the fishery management plan, plan amendment… and other applicable law."[53] If it is determined that the regulation is consistent with the plan and applicable law, NMFS only has the power to make "technical changes as may be necessary for clarity… for a public comment period."[54] It is important to note that a strict reading of this section shows that the public comment period is only to address the technical changes, like wording or formatting, to the regulations, and not the regulations themselves.

If NMFS finds that the regulations are inconsistent with the FMP and other applicable law, the agency "shall notify the Council

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[51] *Id.*

[52] *Id.* § 1854(a)-(c).

[53] *Id.* § 1854(b)(1).

[54] *Id.* § 1854(b)(1)(A).

in writing of the inconsistencies and provide recommendations on revisions."[55] NMFS has no authority to revise a council's FMP, amendment, or proposed regulation; except when they conflict with applicable law, but even here NMFS may only make recommendations on how to change the proposal to be compliant.[56] If NMFS does provide recommendations, the Councils can basically ignore those recommendations and follow their original proposal. Already it is evident that the agency has very little oversight over the regional councils.

Since the regional councils hold such powerful authority to affect the nation's fisheries, it is essential to know who makes up these councils. Under the MSFCMA, the councils should "reflect the expertise and interest of the several constituent States."[57] The councils are made up of voting and non-voting members.[58] The voting members are the principal State official with marine fishery

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[55] 16 U.S.C. § 1854(b)(1)(B) (2006).

[56] *Id.* § 1854(a)(2)(A).

[57] *Id.* § 1852(a)(2).

[58] *Id.* § 1852(b)-(c).

management responsibility and expertise in each State, the regional director of NMFS, and several members appointed by the Secretary.[59] These members are generally nominated by the Governor of the constituent State and selected by the Secretary.[60] The number of members appointed by the Secretary depends on the region and includes one representative each from commercial, recreational, and charter fishing sectors,[61] at least one member who is knowledgeable of conservation and management of fisheries resources,[62] and in some regions (mainly the Pacific region) "one representative of an Indian tribe with Federally recognized fishing rights."[63] The Secretary is required to "ensure a fair and balanced apportionment… of the active participants in the commercial and recreational fisheries."[64] When making nominations, the Governor

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[59] *Id.* § 1852(b).

[60] For a list of nominations, *see* NOAA Fisheries, Council Nominations & Appointments, https://www.fisheries.noaa.gov/national/partners/council-nominations-and-appointments (last visited Dec. 10, 2018).

[61] 16 U.S.C. § 1852(b)(2)(D)(I).

[62] *Id.* § 1852(b)(2)(D)(II).

[63] *Id.* § 1852(b)(5).

[64] 16 U.S.C. § 1852(b)(2)(B) (2006).

of each applicable state may not submit nominees unless "the Governor has determined that each such individual is qualified."[65]

From a cursory reading of these qualifications, it would appear very industry biased because the Act only looks for members from the fishing community. Additionally, there are no requirements to have a representative from local environmental interest or political groups. What often results is a council being made up of members that generally have the industries' economic interests in mind over the sustainability interests of the fisheries themselves. Each voting member serves a term of three years for no more than three consecutive terms and may be removed for just cause.[66] Non-voting members include the regional or area director of the United States Fish and Wildlife Service, the Commander of the Coast Guard of the concerned region, the regional Executive Director of

[65] *Id.* § 1852(b)(2)(C).

[66] *Id.* § 1852(b)(6).

the Marine Fisheries Commission, and one representative from the Department of State.[67]

New members are required to undergo training regarding various topics related to their duties.[68] This training under the statute may include: fishery science and stock assessment methods, fishery management techniques and council procedures, social science and fishery economics, tribal treaty rights, legal requirements under MSFCMA, other relevant legal requirements such as the National Environmental Policy Act, public participation process, and recreational and commercial fishing information.[69] Essentially, members only get a crash course in the various statutes and interests, which they now have the responsibility and power to affect and are not necessarily versed in conservation practices related to fisheries. The members of the councils seemingly have the technical knowledge and experience to conserve and manage fisheries;

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[67] *Id.* § 1852(c).

[68] *Council Training*, NOAA Fisheries, https://www.fisheries.noaa.gov/national/partners/council-training (last visited Nov. 3, 2018).

[69] 16 U.S.C. § 1852(k)(A-I) (2006).

however, the structure and nomination process is prone to "capture" or be influenced by industry interests, which undermines the ability of the councils to make sound judgment for effective fishery conservation and management. Many of these members are subject to political bias and are without the proper expertise to implement the Act because they arrive via gubernatorial appointment. Studies show that industrial fishing interests are more overrepresented than any other stake holder.[70]

The regional councils are allowed to make their own internal procedures (such as how plans and regulations are developed, how advisory committees are established and used, or how comment periods are conducted), but statutory procedures are required for creating and amending the FMP's and implementing regulations.[71] More importantly, NFMS or the Secretary have little oversight over

[70] Thomas A. Okey, *Membership in the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?*, 27 MARINE POL'Y 193, 194 (2003).

[71] 16 U.S.C. § 1852(f)(6) (2006).

the councils.[72] The MSFCMA does not grant the Secretary the primary policy making role, instead the Secretary's power to implements plans may only be invoked if the Councils do not act.[73] As stated earlier, the regional councils are tasked with creating and amending the FMP's for their respective fisheries.[74] The councils submit their draft FMP's to NMFS, which then begins reviewing the documents.[75] This review triggers a sixty-day public comment period followed by agency approval or disapproval of the plans within another thirty days.[76] It is important to note that the Secretary has very little discretion to disapprove a plan if it is consistent with the MSFCMA or other law; this means that FMPs from the regional councils are adopted without meaningful oversight.[77]

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[72] William R. Rogalski, *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*, 9 B.C. ENVTL. AFF. L. REV. 163, 175-187 (1980).

[73] *Id.* at 176.

[74] 16 U.S.C. § 1852(h)(1).

[75] *Id.* § 1854(a)(1)(B).

[76] *Id.* § 1854(a).

[77] *Id.* § 1854(a)(1)(A); see H. Rep. No. 97-549, at 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 4320, 4341 ("The Secretary can

Under the MSFCMA the Secretary can only approve or disapprove the proposed plan or amendment.[78] Moreover, the regional councils are not even required to review public comments. This means the comment period equates to mere formality, which has no effect on the actual plan or amendment. The public comment period is not a traditional one where comments are responded to by the agency.[79] When the agency does disapprove of a proposed FMP or regulation, the regional councils can just ignore the agency's recommendations.[80] What can result is the agency evaluating the situation as an instance where some plan is better than no plan and allow the regional councils plan or regulation to go into effect. In traditional notice and comment processes the drafter of the proposal (in this case the councils) would have to review and respond to comments.[81] Traditional notice and comment procedures ensure

disapprove a plan only if it is found to be in clear violation of the national standards or a clear violation of law.").

[78] 16 U.S.C § 1854(a)(3) (2006).

[79] William R. Rogalski, *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*, 9 B.C. ENVTL. AFF. L. REV. 163, 175-187 (1980).

[80] 16 U.S.C. § 1854(a)(2)(A) (2006).

[81] 5 U.S.C. § 553.

public input from a wide range of perspectives which allows the regulating body more adequately regulate the subject matter. However, under the MSFCMA the councils only need to take recommendations from NMFS when the plan is inconsistent with law.[82] NMFS also has a no "pocket veto" power, where if they do not act in response to the proposed plan or amendment within thirty days of the comment period, the plan or amendment takes effect as if NMFS had approved it.[83] Furthermore, NMFS cannot revoke an FMP without three-quarters approval from the relevant council, meaning that the agency still has no real power once the plan is enacted.[84]

Much like the procedures for creating FMP's, the procedures to create regulations have a lack of oversight.[85] Once a council

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[82] William R. Rogalski, *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*, 9 B.C. ENVTL. AFF. L. REV. 163, 175-187 (1980).

[83] 16 U.S.C. § 1854 (2006).

[84] *Id.* § 1854(h).

[85] *See generally*, H.R. Rep. No. 97-438, at 8 (1992); William R. Rogalski, *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*, 9 B.C. ENVTL. AFF. L. REV. 163, 175-187 (1980).

submits proposed regulations, NMFS has fifteen days to approve them, unless it is inconsistent with the underlying FMP or applicable law.[86] If NMFS approves, the regulations are published and opened for comment for sixty days.[87] Importantly, NMFS may not change the council's proposed regulation or amendment except for "technical changes necessary for clarity."[88] Even after the comment period, NMFS may only change the proposed amendment with council approval.[89] What results is a practice that the agency is giving deference to council determinations and proposals. Essentially the agency is only placing its stamp of approval once the work of the councils is done. In this case, the regional councils hold the power to regulate and manage U.S. fisheries when under the MSFCMA, it was meant to be the agency.

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[86] 16 U.S.C. § 1854(b)(1) (2006).

[87] *Id.* § 1854(b)(1)(A).

[88] *Id.*

[89] *Id.* § 1854(b)(3).

PART III: EFFECTS OF THE MSFCMA ON FISHERIES TODAY

While the MSFCMA does set up a strong statutory framework to conserve and manage U.S. fisheries, many fisheries and their stocks have been on the decline. This is in most part due to overfishing and bycatch.[90] First, NOAA measures the effectiveness of overfishing regulations using three categories: overfishing, overfished, and rebuilt.[91] Overfishing means the annual rate of catch is too high for a particular fish stock population that is too small.[92] Rebuilding happens when a previously overfished stock has increased in abundance to the target population size that supports its maximum sustainable yield.[93] The second effect that the MSFCMA has on fisheries today is through bycatch regulation. Bycatch is when fishermen catch and discard species they did not want, cannot

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[90] *Marine Life Decline*, thankyouocean.org, http://thankyouocean.org/threats/marine-life-decline (last visited Apr. 25, 2016).

[91] *Fishery Stock Status Updates*, NOAA Fisheries

https://www.fisheries.noaa.gov/national/population-assessments/fishery-stock-status-updates (last visited Nov. 3, 2018).

[92] *2017 Report to Congress on the Status of U.S. Fisheries*, NOAA FISHERIES, https://www.fisheries.noaa.gov/national/2017-report-congress-status-us-fisheries#the-year-in-review (last visited Nov. 1, 2018).

[93] *Id.*

sell, or are not allowed to keep.[94] The species caught by accident, which include animals like sea turtles, whales, and seabirds, often die after release, which results in the species vulnerability and effects their rebuilding process.[95] In general, the MSFCMA has been effective in reducing issues of overfishing and bycatch, but more must be done.[96]

First, overfishing occurs when a species' stock is reduced below its maximum sustainable yield.[97] NOAA uses the Fish Stock Sustainability Index (FSSI) to measure overfishing in U.S.

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[94] *What is Bycatch*, NOAA Fisheries, https://www.fisheries.noaa.gov/node/251 (last visited Apr. 25, 2016).

[95] *U.S. National Bycatch Report First Edition Update 2*, (2016), *available at* https://www.st.nmfs.noaa.gov/Assets/Observer-Program/bycatch-report-update-2/NBR%20First%20Edition%20Update%202_Final.pdf.

[96] NOAA *Fisheries, 2017 Report to Congress on the Status of U.S. Fisheries*, available at https://www.fisheries.noaa.gov/national/2017-report-congress-status-us-fisheries (last visited Dec. 10, 2018).

[97] *2017 Report to Congress on the Status of U.S. Fisheries*, NOAA FISHERIES, https://www.fisheries.noaa.gov/national/2017-report-congress-status-us-fisheries#the-year-in-review (last visited Nov. 1, 2018).

fisheries.[98] This quarterly index looks at 199 fish stocks (which represents 85% of total catch) and measures populations and catch rates to determine the species' viability.[99] The index uses an algorithm to determine a score for sustainably managing U.S. fisheries using a possible score of 1000. In 2014, the index measured the stocks at 748.5 (higher number represent when a stock's status has improved).[100] NOAA also publishes stock status updates quarterly and yearly publishes an overview of overfishing in effective stocks. In 2014, 26 stocks (8%) were on the overfishing list, 37 stocks (16%) were on the overfished list, and 37 stocks were rebuilt.[101] This report tracked the status of 469 managed stocks.[102] In general, the figures only represent marginal increases in overfishing from 2013 (only removed two stocks from overfishing

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[98] *Status of U.S. Fisheries*, NOAA Fisheries https://www.fisheries.noaa.gov/national/population-assessments/status-us-fisheries (last visited Nov. 3, 2018).

[99] *Id.*

[100] *Id.*

[101] Fisheries of the United States, NOAA, (2014), *available at* https://www.st.nmfs.noaa.gov/Assets/commercial/fus/fus14/documents/FUS2014.pdf.

[102] *Id.*

list, three stocks from overfished list, and added three stocks to the rebuilt list in 2014).[103] For the overfishing list, six stocks were removed, but four were added, which suggests that the management methods are more effective for some stocks than they are for others. The end of 2015 quarterly report detailed 19 stocks subject to overfishing and 29 stocks as overfished.[104] The general trend of stocks from 2007 (when annual catch limits were enacted) has managed to reduce stocks on the overfishing list from about 18% to 8%, stocks on the over fished list dropping from about 25% to 16%.[105] Most recently, the 2017 report shows again only marginal changes to the rebuilding of stocks.[106] In 2017, three fish stocks were added to the rebuilt list making a total of 44 stocks rebuilt.[107] However, 30 fish stocks remain on the overfishing list (same as in

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[103] *Id.*

[104] NOAA Fisheries, 2015 Quarter 4 Update through December 31, 2015, *available at* https://www.fisheries.noaa.gov/national/population-assessments/fishery-stock-status-updates (last visited Dec. 10 2018).

[105] *Id.*

[106] *2017 Report to Congress on the Status of U.S. Fisheries*, NOAA FISHERIES, https://www.fisheries.noaa.gov/national/2017-report-congress-status-us-fisheries#the-year-in-review (last visited Nov. 1, 2018).

[107] *Id.*

2016) and 35 fish stocks are on the overfished list (only one less than in 2016).[108] This minimal change is due to the fact that even as fish stocks are being rebuilt, just as many stocks are being overfished due to poor management plans.[109] These results fail to meet the goals of MSFCMA to conserve and sustain U.S. fisheries and rebuild overfished stocks. Since it is the responsibility of the regional councils to adopt management and enforcement places to end overfishing, the failures to do so can be directly attributed to the councils.

Subsequently, bycatch poses additional problems for U.S. fisheries. First, bycatch is hard to measure because it depends on self-reporting and observers to calculate the quantities and the species that are being caught accidently.[110] Bycatch occurs because fishing methods are not perfectly selective, meaning species other than those targeted are often caught (whether that is in traps, nets, or

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[108] *Id.*

[109] *Id.*

[110] *Understanding Bycatch*, NOAA Fisheries (June 19, 2017), *available at* https://www.fisheries.noaa.gov/insight/understanding-bycatch.

on lines).[111] Bycatch measurements depend on fishery observer programs.[112] These observers are trained biologists who collect data on fishing activities onboard commercial vessels.[113] It is up to the councils to establish regulations on how these observers are used and the methods they implore.[114] Since the observation of bycatch is so difficult, the resulting numbers are limited in scope to about 42% of U.S. fisheries.[115] The data is formulated into a bycatch ratio, which estimates the ratio between bycaught fish and the targeted fish.[116] For U.S. fisheries the bycatch ratio ranged from zero to 0.76 (with a ratio of greater than 0.17 as an indicator of concern).[117] These estimates were based on a total of 480 fish species, 54 marine mammal stocks, all U.S. sea turtle populations, and 28 seabird

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[111] *Id.*

[112] *Id.*

[113] NOAA Fisheries, U.S. National Bycatch Report First Edition Update 2 (2018), *available at* https://www.st.nmfs.noaa.gov/observer-home/first-edition-update-2 (last visited Dec. 10, 2018).

[114] 16 U.S.C. 1853(a)(11) (2006).

[115] NOAA Fisheries, U.S. National Bycatch Report First Edition Update 2 (2018), *available at* https://www.st.nmfs.noaa.gov/observer-home/first-edition-update-2 (last visited Dec. 10, 2018).

[116] *Id.*

[117] *Id.*

populations.[118] These figures illustrate that bycatch is a problem for more than just the U.S. fisheries' stocks, as it also affects species under other protections. What results is more than a billion pounds of fish bycatch, 1,887 individual marine mammal bycatches, 11,772 sea turtle bycatches, and 7,769 seabird bycatches.[119] Due to limitations in the observer program, these figures only represent data from less than half of U.S. fisheries.[120]

A final issue with the MSFCMA is what is referred to as "capture." Capture is collusion between the regulatory agency and the industry.[121] In this case, the collusion would be between the members of the regional councils and the commercial fishing industry.[122] While there is no evidence that council members are

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[118] *Id.*

[119] *Id.*

[120] Monica Medina, *Time for a Sea Change in Monitorying Fisheries*, (2018), *available at* https://fishingnetgains.com/2018/06/21/time-for-a-sea-change-in-monitoring-fisheries/ (last visited Nov. 5, 2018).

[121] Thomas Okey, *Membership in the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?*, 27 MARINE POL'Y 193 (2003).

[122] *Id.*

actually being influenced by the fishing industry, there have been studies that raise concerns of who the regional council members actually have at interest.[123] These studies show that council members representing commercial fishing interests out-number those representing recreational fishing interests and far out-number those representing the scientific and conservation communities.[124] The concern here is that profits today will be prioritized over conservation efforts resulting in the depletion of sustainable fishery stocks. Specifically, one study found that council membership consisted of "only 18 percent of the appointed council members in 2001 did not directly work in or represent the fishing industry."[125] This means there may be instances where a quasi-conflict of interest arise which threaten the decision-making processes of the regional councils and ultimately the status of U.S. fisheries. These industry-influenced interests go against the Secretary's responsibility under

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[123] *Id.*

[124] *Id.* at 197-99.

[125] Josh Eagle, et al., *Taking Stock of the Regional Fishery Management Councils*, Pew Science Series on Conservation and the Environment, 5 (2003).

MSFCMA to ensure a "fair and balanced" representation of fishing interests on the councils. The capture of council members potentially results in industry preferred plans and regulations, which do not specifically violate the Act, but also do not further achieve the Act's goals.

PART IV: THE COURTS SHOULD NOT DEFER TO THE COUNCIL MADE PLANS AND REGULATIONS

Under administrative law, reasonable agency determinations and regulations are upheld under *Chevron* deference.[126] In *Chevron v. NRDC*, the Supreme Court looked at how courts should review agency decisions and regulations.[127] Specifically in *Chevron*, the Environmental Protection Agency promulgated a regulation for the Clean Air Act (CAA) that defined "statutory source" which allowed states to treat pollution-emitting sources from an industrial group as one "bubble" source.[128] Under

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[126] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

[127] *Id.*

[128] Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of

this definition the states were allowed to treat all pollution-emitting sources at a single plant as one single source, instead of as the number of individual emitting stacks.[129] This allows for a permitted source to install a new stack without having to seek new source permits under the CAA.[130] In Justice Stevens' opinion he examined when courts should defer to a federal agency's interpretation of a statute it has the authority and obligation to administer.[131] The test that resulted from this opinion is now known as the *Chevron* Doctrine.132 The *Chevron* Doctrine implores a two-step formula to determine the validity of agency actions.[133] First, the court examines whether Congress has directly spoken to the issue at hand; and if they have, Congress' judgment applies.[134] Then, if Congress has not spoken directly to issue, the

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Implementation Plans, 46 Fed. Reg. 50766 (Envt'l Protection Agency, Oct. 14, 1981).

[129] *Id, see also, Chevron* at 840.

[130] *Chevron* at 840.

[131] *Id.* at 842.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 842.

court then examines the reasonableness of the agency's interpretation and will defer to a reasonable determination.[135]

The issue when attempting to apply *Chevron* to the MSFCMA is that the agency determinations are not effectively their own, but are in fact the determinations of the regional councils.136 While on paper the Secretary drafts and promulgates fishery management plans and regulations, in reality it is the regional council that plays the role of the determining agency.137 In instances where the courts have granted *Chevron* deference in MSFCMA cases, the court was deferring to a council determination and not an agency's reasoning.138

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[135] *Id.* at 843.

[136] 16 U.S.C. § 1854(a)(3) (2006).

[137] *Id.*

[138] *See e.g., Ocean Trollers Association v. Gutierrez*, 452 F.3d 1104 (9th Cir. 2006) (Court deferred to the Pacific Fishery Management Council's determination that the relevant FMP did not permit hatchery salmon to count for escapement goals); *Oceana v. Evans*, 2005 WL 555416 (D.D.C. Mar. 9, 2005) (New England Fishery Management Council's amendment to FMP which did not end overfishing was upheld under *Chevron* step 1); *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747 (D.C. Cir. 2000) (Court found NMFS's refusal to adopt the Mid-Atlantic Fisher Management Council's quota determination which had a 3% chance of obtaining optimum yield for summer flounder unreasonable); *Western Sea Fishing, Co., Inc. v. Locke*, 722 F. Supp. 2d 126 (D. Mass. 2010) (Secretary was not allowed to

There have been a few instances where the courts have used *Chevron* deference in reviewing FMP's created by the regional councils. The most relevant cases are from Oc*ean Trollers Association v. Gutierrez,*139 *Natural Resources Defense Council v. Daley,*140 and *Western Sea Fishing, Co., Inc. v. Locke.*141 First, in *Ocean Trollers,* the Ninth Circuit applied *Chevron* and deferred to an interpretation by the Pacific Fishery Management Council on escapement goals for spawning salmon in the stock's FMP.[142] As part of the management plan for salmon in the Klamath Management Zone off the coasts of Oregon and California, recreational and commercial fishing was substantially curtailed.[143] The FMP did not permit hatchery spawning salmon to count towards

require New England Fishery Management Council to consider future optimum yield of fishery that was not yet subject to overfishing).

[139] *Ocean Trollers Ass'n v. Gutierrez,* 452 F.3d 1104 (9th Cir. 2006).

[140] *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).

[141] *Western Sea Fishing, Co., Inc. v. Locke*, 722 F. Supp. 2d 126 (D. Mass. 2010).

[142] *Ocean Trollers* at 1109-1110.

[143] *Id.,* Ocean Salmon Fisheries off the Coasts of Washington, Oregon, and California, 54 Fed. Reg. 19, 194 (U.S. Dep't of Commerce May 4, 1989).

escapement (uncaught salmon returning to spawning areas) goals, which meant that a significant portion of salmon population was not factored into the council's decision.[144] This determination was challenged by fishermen, claiming that the interpretation was inconsistent with the Act's definition of "stock of fish" under 16 U.S.C. § 1802(37).[145] Additionally the plaintiffs argued that the regulation was inconsistent with National Standards 2 and 3 ("based upon best scientific information available;"[146] and "an individual stock of fish shall be managed as a unit"[147]).[148] The Court applied *Chevron* and deferred to the interpretation.[149] The Court described the ambiguity in the statute and noted that the language did not preclude the council's interpretation in the FMP.[150] In doing so, the Court upheld the council's determination to treat naturally spawning salmon and hatchery spawning salmon as different stocks despite

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[144] *Id.*

[145] *Ocean Trollers* at 1117.

[146] 16 U.S.C. § 1851(a)(2) (2006).

[147] 16 U.S.C. § 1851(a)(3) (2006).

[148] *Ocean Trollers* at 1117.

[149] *Id.* at 1118-19.

[150] *Id.*

them being the same fish.[151] The Court did not analyze whether the interpretation carried the force of law or look to what entity actually made the decision; skipping a *Chevron* Step Zero analysis.

A similar approach was taken by the D.C. Circuit in *NRDC v. Daley*. Here, the Court reviewed a rebuilding quota issued pursuant to a summer flounder FMP issued by the Mid-Atlantic Fishery Management Council.[152] The quota, limiting how much fish could be caught, had less than a 18% chance of rebuilding the summer flounder stock.[153] The record showed that NMFS did not adopt the Council's recommendation, which had only a 3% chance of obtaining the optimum yield of summer flounder; nor did it accept a second recommendation which had a 50% chance of obtaining the optimum yield.[154] The plaintiffs claimed that this decision violated National Standard 1.[155] The Court found that the settled quota was

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[151] Salmon of the West, U.S. Fish & Wildlife Service, https://www.fws.gov/salmonofthewest/Wild.htm.

[152] *NRDC* at 750.

[153] *Id.*

[154] *Id.*

[155] *Id.*

too far removed from the purposes of the MSFCMA, because it was unreasonable and ineligible for deference under *Chevron* Step Two.[156] A finding of silence in the statute does not mandate a precise quota figure or require a specific likelihood of obtaining the optimum yield.[157] Ultimately, the D.C. Circuit would remand the quota and state that all future quotas should meet levels of success of at least 50%.[158]

Western Sea Fishing, Co., Inc. v. Locke utilized a *Chevron* analysis for fishery management.[159] *Chevron* was utilized to determine the permissibility of an amendment to the Atlantic herring FMP issued by the New England Fishery Management Council.[160] The amendment restricted how commercial fishing permits could be transferred in order to prevent permit splitting from increasing

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[156] *Id.* at 753.

[157] *Id.* at 754.

[158] *Id.* at 756.

[159] *Western Sea Fishing, Co., Inc. v. Locke*, 722 F. Supp. 2d 126 (D. Mass. 2010).

[160] *Id.* at 136.

fishing efforts.[161] The Court explored whether the MSFCMA permits the Secretary to enact measures to protect future optimum yield of a fishery that is not currently subject to overfishing.[162] Stopping at *Chevron's* Step One, the court determined National Standard 1 prioritizes prevention of overfishing while assuring continued achievement of the optimum yield in its absence.[163] The Court invalidated the amendment, finding that it contravened the clear intent of Congress.[164] The Court found that since herring had not been subjected to overfishing and that the amendment would not further reduce fishing efforts, it did not meet the statutory requirement to achieve optimal yield.[165]

These three cases show how courts have utilized *Chevron* to defer and invalidate decisions as if they were made by the agency themselves. In fact, the underlying decision was made by the

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[161] *Id.* at 135.

[162] *Id.*

[163] *Id.* at 139.

[164] *Id.*

[165] *Id.*

relevant regional council. None of these courts utilized a *Chevron* Step Zero approach nor do they consider the actual entity that is making the decision.[166] If the courts did look at the actual acting entity, there would be appropriate accountability that is not afforded in a typical *Chevron* Two Step approach.

The procedures for creating and amending the FMPs and regulations under the MSFCMA do not conform to those of traditional agency actions. These procedures and regulations differ from traditional agency actions particularly in the notice and comment situation. Under traditional notice and comment, the agency is required to review and respond to public comments before promulgating final regulations.[167] However, under MSFCMA, neither NMFS nor the regional councils are required to respond to comments before promulgation.[168] Public opinion and criticism of proposed plans, amendments, and regulations fall on deaf ears and

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[166] *Western Sea Fishing* at 139; *NRDC* at 755; *Ocean Trollers* at 1118.

[167] Administrative Procedure Act, 5 U.S.C. § 553 (1966).

[168] 16 U.S.C. § 1854(a) (1976).

have little effect on the action. Furthermore, the drafters and the adopters under the MSFCMA are not the same.[169] Under MSFCMA, the drafters of proposed plans and regulations are the regional councils; but the entity that ultimately adopts those plans and regulations are NMFS.[170] This puts responsibility for the effects of the plans and regulations on NMFS, who, under the statute, has very limited oversight over these proposals. Therefore, resulting in a court deferring to an agency decision that was hardly the agency's own.

PART V: THE COURTS SHOULD UTILIZE A *MEAD* STEP ZERO APPROACH IN REVIEWING ACTIONS MADE UNDER THE MAGNUSON-STEVENS ACT

Instead of using *Chevron* deference in response to council made decisions, the courts should first look at who is actually making the decision. This method follows from the suggestions made by then-Professor Elena Kagan and Professor David J. Barron.[171] Kagan and Barron recognize that through delegation,

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[169] 16 U.S.C. § 1854(a)(3), § 1854(b)(1)(A) (1976).

[170] *Id.*

[171] David Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001).

decision making and accountability for decisions had become very attenuated.[172] They suggest courts look at who makes the decision and apply *Chevron* if when the statutory designee made the interpretation in question.[173] The courts are urged to look to whether the decision "bears the name of the statutory delegatee."[174] When applying this method to MSFCMA, the statutory delegatee would be NMFS or the Secretary, and not the regional councils. Therefore, council-developed interpretations would not receive *Chevron* deference. Although the Act designates the councils as the entities responsible for developing FMPs and regulations, the statute designates the Secretary and NMFS as the enforcer and regulator.[175] Furthermore, Kagan and Barron highlight factors that make designees ineligible as superior decision makers by focusing on accountability.[176] Regional council members lack political

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[172] *Id.* at 206.

[173] *Id.* at 238-39.

[174] *Id.* at 239.

[175] 16 U.S.C. § 1851(b) (1976).

[176] David Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 243 (2001).

accountability, are not appointed by the President or Senate as agency officials are, and are unlikely to confer with Congress on policy.[177] Political accountability is vital to keep agencies in check. With political accountability, the agency would be more motivated to properly carry out the applicable law. Overall, council members lack political accountability because council members are appointed and can only be removed for cause; therefore, they are more easily influenced by individual or industry interests.

United States v. Mead Corp. further addresses the scope of *Chevron*.[178] This case honed in on what is often referred to as, "*Chevron* Step Zero." *Mead* presents a way to determine when courts should use *Chevron*. Here, the Court focused on prior decisions to determine whether *Chevron* deference applied to a tariff classification rule made by the United States Customs Service regarding notebooks.[179] The Court in *Mead* held that *Chevron* only

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[177] *Id.* at 243.

[178] *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164 (2001).

[179] *Id.* at 222.

applies when Congress intends for an agency to speak with the "force of law" in interpreting a particular statute.[180] This intent exists when the statute confers upon the agency rulemaking authority or the power to engage in adjudication.[181] If the agency has this authority, and develops a statutory interpretation, that interpretation falls under the *Mead* "safe harbor" and is entitled to receive *Chevron* deference. The Court noted that Congress likely intended an agency to act with the force of law when the statute requires the agency to make decisions adhering to traditional administrative procedures that foster fairness and deliberation.[182] Under this approach, it is questionable whether challenges to FMPs and regulations made under the MSFCMA would survive *Mead's Chevron* Step Zero.

The structure and administration of the MSFCMA suggests that council created FMPs and regulations would not meet the

[180] *Id.* at 226-27.

[181] *Id.* at 227.

[182] *Id.* at 230.

requirements for *Mead* safe harbor.[183] The notice and comment process under the MSFCMA lacks several features of traditional notice and comment rulemaking. Under traditional rulemaking, the agency or administrator may revise proposed rules to take into account issues raised during the comment period.[184] This is not the case under the MSFCMA where the Secretary may only approve or disapprove.[185] This means that comments have little effect on the final plans or regulations. Additionally, the councils are not required to review or respond to comments.[186] Given the limited role of the Secretary, and by extension the agency, council developed rules should not fall under the *Mead* safe harbor because the agency does not have true authority under the MSFCMA.

If rules developed by council are evaluated outside the *Mead* safe harbor, the structure still may lack the requisite formal procedures necessary for council regulations to carry the force of

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[183] *Id.* at 227.

[184] 5 U.S.C. § 553(b)(1)-(3) (1966).

[185] 16 U.S.C. § 1854(a)(3) (1976).

[186] *Id.*

law. One requirement from *Mead* is to determine whether an interpretation is to carry the force of law is that the decisions making entity should follow formal procedures.[187] Given the divergence of council procedures from traditional rulemaking procedures and protections, it should be understood that the council's interpretations do not carry the force of law, and thus should not receive *Chevron* deference.

PART VI: MODERN LEGISLATIVE CONCERNS WITH THE MAGNUSON-STEVENS ACT

In 2017, Representative Don Young (R-AK) introduced a bill to amend and reauthorize the Magnuson-Stevens Act.[188] Rep. Young is the U.S. Representative for Alaska's at-large congressional district.[189] He has become the longest serving representative and the longest currently serving representative in the House.[190] Representative Young was an author of the original

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[187] *Mead*, 533 U.S. at 228.

[188] Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act, H.R. 200, 115th Cong. (2017).

[189] *Congressional Delegation*, STATE OF ALASKA, http://alaska.gov/CongressDelegation.html (last visited Nov. 1, 2018).

[190] *Don Young Biography*, HOUSE OF REPRESENTATIVES, https://donyoung.house.gov/biography/ (last visited Oct. 18, 2018).

Magnuson-Stevens Act. The bill will reauthorize the MSFCMA through fiscal year 2022 but will also revise a number of important fishery issues including the requirements for fishery management plans for over fishing and catch limit requirements.[191] Critically, the amendments remove much of the MSFCMA's scientific requirements in protecting fisheries. While the reauthorization of the MSFCMA is an important step in the continued protection of fisheries, the amendments this bill includes creates a number of ambiguities to an otherwise strong and specific statute. The effect of making the MSFCMA ambiguous is risky because the regional councils already have such broad power. Without clear legislative instruction, the regional councils are much freer to create biased regulations for fishery management. On July 11, 2018, the House

[191] Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act, H.R. 200, 115th Cong. (2017).

passed H.R. 200 with a 222-193 vote.[192] The bill currently sits in the Senate Committee on Commerce, Science, and Transportation.[193]

The Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act will change the definition of overfished and overfishing to "depleted."[194] Since the definitions of overfished and overfishing are important in the overall scheme of fishery management, even such a minor change in wording has drastic effects on the creation of effective FMPs. The original language defined overfishing and overfished to mean "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis."[195] The new definition for depleted means "with respect to a stock of fish or stock complex, that the stock or stock complex has a biomass

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[192] *H.R. 200: Strengthening Fishing Communities and Increasing Flexibility in Fisheries Managemt Act*, GOVTRACK, https://www.govtrack.us/congress/votes/115-2018/h321 (last visited Oct. 18, 2018).

[193] Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act, H.R. 200, 115th Cong. (2017).

[194] Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act, H.R. 200, 115th Cong. § 102(a)(2) (2017).

[195] 16 U.S.C. § 1802(34) (2006).

that has declined below a level that jeopardizes the capacity of the stock or stock complex to produce maximum sustainable yield on a continuing basis."[196] By a plain reading of these two definitions, it is clear that the new definition strips the original definition of much of its weight. Also, removing words like "rate" and "mortality" the language becomes very non-specific. The original language is written in a way that leaves little to interpretation. The inclusion of the word "rate" in the original language has scientific and mathematical meanings; this means that there is something that can specifically be measured, the rate at which a particular stock is being overfished. Removing the word "rate" from the new definition the method of measuring the mortality of a fishery stock becomes vague and nondescript resulting in the question of how the agency is to measure whether a stock is depleted. The effect of this is that it will be easier for the regional councils to classify stocks as non-depleted much easier because the new language takes away any specific scientific measurement. The original language puts in place a

[196] Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act, H.R. 200, 115th Cong. § 102(a)(3) (2017).

method to measure mortality in a way that the new definition of depleted does not.

Combining the definition of overfishing and overfished into the definition of depleted has larger impacts on fishery management other than just scientific measurements. As previously mentioned, overfishing means that the annual rate of catch is too high for a particular fish stock.[197] Whereas overfished means that the population size is too small.[198] Again these definitions inherently carry methods of measurement that the new definition of depleted does not. In order to rebuild a fishery stock, NOAA uses the terms overfishing and overfished to report on the status of fisheries quarterly and annually.[199] These two definitions allow NOAA to track how stocks are being affected by the management plan in order

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[197] *2017 Report to Congress on the Status of U.S. Fisheries*, NOAA FISHERIES, https://www.fisheries.noaa.gov/national/2017-report-congress-status-us-fisheries#the-year-in-review (last visited Nov. 1, 2018).

[198] *Status of U.S. Fisheries*, NOAA FISHERIES, https://www.fisheries.noaa.gov/national/population-assessments/fishery-stock-status-updates (last visited Oct. 18, 2018).

[199] *Id.*

to determine if a stock has been successfully rebuilt.[200] Since according to the National Standards the entire purpose of the MSFCMA was to use scientific practices to end overfishing, removing this type of language from such an important definition weakens fishery protections.[201]

The second big change that H.R. 200 makes to the MSFCMA is to annual catch limits and timelines for rebuilding overfished stocks. Under the current language of the MSFCMA, when a fish population falls below a certain level, it is classified as overfished.[202] This classification triggers the regional councils to create a management plan to rebuild that stock. While creating a rebuilding plan a timeline for recovery is required.[203] This timeline is to be based on scientific and environmental conditions that influence the rebuilding process.[204] In general, a management plan

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[200] *Id.*

[201] 16 U.S.C. § 1851(a) (2006).

[202] *Id.*

[203] *Id.* § 1854(a); *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

[204] Id § 1852(h)(6).

to rebuild a stock needs to be accomplished within a time "as short as possible" with a default deadline of 10 years.[205] However, H.R. 200 section 303 would change the timeline from "as short as possible" to "as short as practical."[206] The length of the rebuilding process remains the minimum time to rebuild the stock with no fishing occurring plus mean generation of the species, which is expressed as "$T_{min} + 1$"; however the new bill eliminates the ten year default deadline and allows for more excuses as to why T_{min} should be larger (take longer to rebuild a stock). The new language allows T_{min} to be increased for a number of reasons including if the "Secretary determines that the cause of the stock is outside the jurisdiction of the Council or the rebuilding program cannot be effective only by limiting fishing activities,"[207] if the "Secretary determines that one or more components of a mixed-stock fishery is

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[205] Magnuson-Stevens Act Provision: National Standard Guidelines–Final Rule, 81 Fed. Reg. 201, 71879 (Oct. 8, 2016) (to be codified at 50 C.F.R. pt. 600).

[206] Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act, H.R. 200, 115th Cong. § 303(a)(1)(A) (2017).

[207] *Id.* § 303(a)(1)(B)(II).

depleted, but cannot be rebuilt within that time frame without significant economic harm to the fishery, or cannot be rebuilt without causing another component of the mixed-stock fishery to approach a depleted status,"[208] and if the Secretary "determines that the stock has been affected by unusual events that make rebuilding within the specified time period improbable without significant economic harm to fishing communities."[209]

Because no hard deadline is required under the amended language, there is a lot of discretion for the Secretary and the Regional Councils to extend the length of time in planning to rebuild an overfished stock. Additionally, the definition of T_{min} is changed to eliminate the no fishing requirements from the calculation.[210] In its place, H.R. 200 allows the fishery management plan to use "alternative rebuilding strategies, including harvest control rules and fishing mortality-rate targets."[211] This means that an overfished stock can continued to be fished during the rebuilding of the stock,

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[208] *Id.* § 303(a)(1)(B)(III).

[209] *Id.* § 303(a)(1)(B)(V).

[210] *Id.*

[211] *Id.* § 303(a)(2).

which will greatly lengthen the time it takes for a stock to be rebuilt. The reason the original T_{min} +1 calculation works so well in rebuilding stocks so quickly is that by not allowing the stock to be fished during the process, it gives the stock the best possible chance to be rebuilt as quickly as possible. By taking out the no fishing requirement and defining the timeline as "quickly as practical" the act will greatly lengthen rebuilding plans to the point where a stock may never be able to get rebuilt. This new language attempts to carry out the MSFCMA, an act specifically intended to rebuild overfished stocks, by allowing the regulatory body to lengthen the time it takes to rebuild overfished stocks to infeasible lengths of time.

It is for these reasons that numerous organizations are in opposition to the amendments of H.R. 200 including Pew Charitable Trusts and the Marine Fish Conservation Network. Pew describes H.R. 200 as "a bill that would weaken the nation's primary fishery management law."[212] Pew highlights the issues and risks involved

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[212] Ted Morton, *Congress Don't Be Fooled: H.R. 200 Would Roll Back Magnuson-Stevens Act*, PEW CHARITABLE TRUSTS (July 9, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/07/09/congress-dont-be-fooled-hr-200-would-roll-back-magnusonstevens-act.

with removing scientific measurements in rebuilding fish stocks concluding that "to improve how we manage fisheries, we need more science, not less. Weakening the role of science in annual catch limits is a gamble not worth taking."[213] Robert Vandermark, the executive director of the Marine Fish Conservation Network, echoes these concerns by stating the H.R. 200 "[r]epresents a significant step backward by promoting greater uncertainty in the future management of our fisheries."[214] Vandermark also highlights an important issue related to the bill's possible effects, "it introduces the economic temptation to put short-term revenues on equal footing with long-term biological needs."[215] The concept of putting short-

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[213] *Id.*

[214] *H.R. 200 is the Wrong Foundation for Reauthorizing the Magnuson-Stevens Act*, MARINE FISH CONSERVATION NETWORK, http://conservefish.org/on-capitol-hill/network-opposes-h-r-200-strengthening-fishing-communities-increasing-flexibility-fisheries-management-act-2017/ (last visited Oct. 18, 2018).

[215] Robert Vandermark, *Federal fisheries law re-authorization off course*, https://thehill.com/blogs/congress-blog/energy-environment/393892-federal-fisheries-law-re-authorization-off-course (last visited Oct. 18, 2018).

term revenues ahead of conservation needs is specifically contrary to the stated National Standards under the MSFCMA.[216]

These potential changes to the MSFCMA highlight the many risks that arise because of the improper delegation of the Act's responsibility to the regional councils. The changes give even broader power to the regional councils with even vaguer enforcement requirements. The ambiguity in the amended language risks opening the door for political and other considerations to influence the recovery and management of U.S. fisheries. H.R. 200 allows for political influence of the regional councils, a governing body already at risk of political influence, in creating management plans for fishery stocks. This issue was specifically addressed by the ranking member in the House Committee on Natural Resources, Raul Grijalva (D-AZ) in the review of H.R. 200, noting that previous reauthorizations of the MSFCMA helped to "insulate the Councils from pressure to make politically-driven management decisions that hurt fishing communities in the long run."[217] Increasing ambiguity

[216] 16 U.S.C. § 1851(a) (2006).

[217] H.R. Rep. No. 115-758, at 134 (2017).

in the rules that the regional councils must follow opens the door to outside influence, whether that comes from political motivations or industry desires. With the added risks of political influence, it is even more important to have judicial protections that focus on the actual body making the decisions. The judicial review process of MSFCMA regulations are not adequate under C*hevron* because it fails to look at the actual acting body. By weakening the scientific requirements in carrying out the MSFCMA and increasing the discretion of the regional councils, it becomes even more important to have something like a *Chevron* Step-Zero style approach in reviewing regional council decisions.

CONCLUSION

The MSFCMA creates a strong statutory framework to protect U.S. fisheries. The goals of the Act have always been to provide a balance between recreational, conservation, and industry interests. Overall, MSFCMA has been successful at working towards these goals, but there is still room for improvement. One major issue with the Act is how it delegates authority to regional fishery councils. These councils are tasked with the responsibility of

creating the management plans and relevant regulation for the conservation of their respective fisheries. These councils are only quasi-legislative and ultimate ultimately lack political accountability.

While the councils have the technical knowledge to make good regulations, they lack accountability and are prone to capture and influenced by industry. The Act attempts to give oversight authority to NMFS, but ultimately restricts their actual powers to make effective changes to the council's interpretations and plans. The Act's notice and comment requirements also diverge from traditional procedures that do not provide effective oversight or accountability of the regional councils. Ultimately, it is NMFS that is responsible for the work done by the regional councils. When challenged, the courts have used *Chevron* deference to defer to interpretations as if they were made by the agency, when in fact they were made by the regional councils. The results of these decisions have heavily exploited fisheries with about 25% of its stocks being

overfished.[218] Furthermore, it allows for plans and regulations to do very little to prevent bycatch, harming the rebuilding process of overfished stocks and other species that may be protected under other legislation.

Before granting *Chevron* deference, the courts should first look at who is determining the outcomes. A *Chevron* Step Zero approach, as in *Mead*, or the advice of then-Professor Elena Kagan and Professor David Barron, a *Chevron* deference should only be applied when the designated agency made the interpretation at issue. Under this approach, the members of the regional councils would be less susceptible to influence from industry. With more accountability, the regional councils are more likely to create plans and regulations that end overfishing, per the MSFCMA, and do more to prevent bycatch. In doing so, the goals of the MSFCMA are more likely to be met.

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[218] *2017 Report to Congress on the Status of U.S. Fisheries*, NOAA FISHERIES, https://www.fisheries.noaa.gov/national/2017-report-congress-status-us-fisheries#the-year-in-review (last visited Nov. 1, 2018).

The U.S. controls more than four million square miles of the world's water, which contains fish, one of the most important natural resources.[219] Despite what many believe, fish are not inexhaustible natural resources. However, with proper sustainable practices, such as scientifically created annual catch limits, fisheries can remain viable for future generations. Given seafood's importance to both the food system and the environment, there is a need to ensure sustainable management of fisheries. The MSFCMA required overfishing cease and stocks rebuilt. It recognized the importance of fisheries as a natural resource and took steps to avoid its destruction. As Paul Greenberg posits in American Catch "there is no more intimate relationship we can have with our environment than to eat from it. Over the course of the last hundred years that intimacy has been lost, and with it our pathway to the most healthful of American foods."[220] While more can be done to protect fish

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[219] *U.S. Maritime Limits & Boundaries*, OFFICE OF COAST SURVEY, https://nauticalcharts.noaa.gov/data/us-maritime-limits-and-boundaries.html#general-information (last visited Dec. 10, 2018).

[220] PAUL GREENBERG, AMERICAN CATCH 16 (2014).

through a strong regulatory scheme, the solution also requires intelligent consumer behavior towards our natural resources.