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Teresa M. Cloutier

*University of Maine School of Law*

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# CONFLICTS OF INTEREST ON REGIONAL FISHERY MANAGEMENT COUNCILS: CORRUPTION OR COOPERATIVE MANAGEMENT?

*Teresa M. Cloutier\**

## I. INTRODUCTION

When Congress created the Regional Fishery Management Councils under the Magnuson Act, it was felt that user groups with an interest in the resource would act in a manner which would protect that resource and ensure the future health of our fisheries. . . . Now, rightly or wrongly, many people feel the Councils and their members are acting unfairly. If this perception of unfairness is correct, then Congress definitely must take strong action to rectify this problem . . . even if it comes down to only a matter of perception.<sup>1</sup>

Congress, in enacting the Magnuson Fishery Conservation and Management Act of 1976 (MFCMA),<sup>2</sup> created a unique system for the regional management and conservation of U.S. fishery resources.<sup>3</sup> Central to this system are eight Regional Fishery Management Councils.

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\* University of Maine School of Law, Class of 1996.

1. *Conflicts of Interest Within the Regional Fisheries Management Councils: Hearing Before the Subcomm. on Fisheries Management of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 2 (1994) [hereinafter *Conflict Hearing*] (statement of Rep. Thomas S. Manton, N.Y.).

2. Magnuson Fishery, Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1994).

3. Sen. Ted Stevens, Alaska, commented in a 1993 hearing that it was "one of the magnificent experiments of our National Government when we created these fishery management councils . . . because we delegated to those councils a portion of Federal power and insisted that the States likewise accede part of their power to the individual councils." *Reauthorization of the Magnuson Fishery Conservation and Management Act: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. 123 (1993) [hereinafter *August 1993 Hearing*].

Comprised of those most knowledgeable about and interested in the fisheries, the Regional Councils promised to be an innovative solution to the conservation of common fishery resources, potentially incorporating the economies of cooperative management into the U.S. fisheries management scheme.

However, upon implementation of the MFCMA, the problems facing U.S. fisheries changed. Competition among U.S. fishermen replaced concern over foreign fishing. The decisions of the Regional Councils increasingly involved economic allocation. In addition, as the MFCMA was amended over time, certain checks on Council power eroded. The original Congressional delegation of authority to manage fisheries, once carefully balanced between the Secretary of Commerce and the Councils, became heavily concentrated in the Councils. The Regional Councils, comprised of individuals making economic decisions about scarce resources which could benefit them personally, with few checks on their authority and little oversight, were viewed in a new light. The public and user groups not represented on the Councils quickly noted the conflicts of interest inherent in the system and denounced them as improper. Many now perceive the Councils as corrupt. The subject has been a matter of great debate, prompting numerous congressional hearings. Legislative solutions are now before Congress.

Allegations that the interested Councils were making improper management decisions peaked during the battle between the Alaskan onshore processors and Washingtonian factory trawlers in the early 1990s.<sup>4</sup> When the North Pacific Fishery Management Council decided to allocate a percentage of the catch in certain fisheries to vessels serving the onshore processors, the measure was decried as the "Shoreside Preference Amendment" by the factory trawlers. Allegations of improper and interested behavior by Council members were made and eventually resulted in an investigation by the Inspector General into Council behavior. In addition, a congressional hearing was held to look into this investigation and to explore solutions to the Council conflict dilemma.

This Comment will explore the problem now facing Congress and will evaluate the proposed solutions now being debated in the two Houses. Initially, the concept of cooperative management, one possible theoretical justification for the existing Council system, will be discussed. Next, the original management system put in place by the MFCMA will

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4. *See infra* part III(C).

be examined. This section will be followed by an explanation of how the power structure behind that system has evolved over time. The problems created by the present imbalance in the Council power structure will then be illustrated by a case study of the allegations made regarding the Council in the North Pacific. Finally, possible solutions to the problem, contained in two bills currently before Congress, will be evaluated in light of the potential of the MFCMA to create a system of cooperative management of the nation's fisheries.

## II. THEORETICAL BACKGROUND—COOPERATIVE MANAGEMENT OF COMMON FISHERY RESOURCES

As noted above, claims of corruption and conflict of interest surround the fishing industry's involvement on the Regional Councils. As a preface to discussion of these claims and of the legal framework for the industry's participation, the following section presents some of the theoretical arguments that might be put forth to justify giving resource harvesters a direct role in regulating and conserving the resource.

### A. *The "Open Access" Problem*

Fishery managers "have long perceived their role to be that of the defenders of fish populations against depletion by harvesters."<sup>5</sup> Such defense has been considered necessary to protect fisheries from economic incentives to harvest, created by the nature of fisheries as a "common good." "A common good is something of value that cannot be reduced to private ownership, either because individual control is prohibited or because it is prohibitively costly."<sup>6</sup>

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5. R. Bruce Rettig et al., *The Future of Fisheries Co-Management: A Multi-Disciplinary Assessment*, in COOPERATIVE MANAGEMENT OF LOCAL FISHERIES: NEW DIRECTIONS FOR IMPROVED MANAGEMENT & COMMUNITY DEVELOPMENT 273 (Evelyn Pinkerton ed., 1989). The authors note that the most universally accepted goal of fishery management is conservation. In fact, concern over the conservation of natural resources has ancient roots demonstrated by various biblical teachings and "a critical comment by Pliny the Elder on soil erosion in ancient Rome." *Id.*

6. RUSSEL L. BARSH, THE WASHINGTON FISHING RIGHTS CONTROVERSY: AN ECONOMIC CRITIQUE 3-4 (1979). Barsh explains:

Consider a stock of fish that spends their entire lifetimes in the open ocean. The cost of tagging fish to identify their owners while the fish feed and grow would be astronomical. Even if fish could be tagged like cattle, the tags could

The dilemma facing fishery managers attempting to conserve common fish stocks is caused by the incentives of harvesters to deplete the resource. Such incentives were most popularly explained in Garrett Hardin's 1968 article about the "tragedy of the commons."<sup>7</sup> While Hardin's phrase now represents the expected environmental degradation of any scarce, common resource,<sup>8</sup> his conceptual framework can be traced directly to an analysis of the "commons" problem in the fisheries context.<sup>9</sup>

Hardin's tragedy comes about in the following way. There is a pasture, open to all. Rational herders, seeking to maximize their gain, will engage in an economic analysis before adding cattle to the pasture. Each herder will ask: "What is the utility to me of adding one more animal to my herd?"<sup>10</sup> The positive utility will consist of the benefit, accruing solely to the individual herder, of adding one additional animal. The negative utility will be the cost of the additional overgrazing caused by one more animal. Born in part by all users of the common, the cost will always be only a fraction of the benefit to any individual. The incentive for the rational herder along with every other rational herder will always be to add another animal to the commons. Each man is then "locked into a system that compels him to increase his herd without limit—in a world that is limited," and thus, as Hardin concludes, "[r]uin is

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be read only by removing the fish from the water, a process that would injure or destroy many of them and necessitate the duplicative harvesting, release and reharvesting of many fish.

. . . Under these circumstances, it obviously is unreasonable for individuals to invest in producing fish for release into the ocean and later recapture on the model of the nineteenth-century cattle industry. There would be no way of preventing other persons from preying on the maturing fish, except by prohibiting all marine fishing of that species.

*Id.*

7. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1243-1248 (1968). One author notes that Hardin was not the first to describe the tragedy. For example, Aristotle "long ago observed that 'what is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest.'" ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 2 (1990).

8. OSTROM, *supra* note 7, at 2.

9. H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 *J. POL. ECON.* 124 (1954). See ROBERT C. ELLICKSON ET AL., *PERSPECTIVES ON PROPERTY LAW* 141 (1995).

10. Hardin, *supra* note 7, at 1244.

the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.”<sup>11</sup>

The phenomenon represented by Hardin’s “tragedy of the commons” has also been described by other theorists. It has been posed as a “prisoner’s dilemma”<sup>12</sup> and has also been placed in other theoretical frameworks. Models such as these have defined the accepted way of viewing the problems which collective actors face.<sup>13</sup>

In the fisheries context, the “commons” phenomena is referred to as the “open access” problem. Models, such as those described above, have often been seen to establish the framework for dealing with this problem. That the incentive to exploit, characteristic of these models, will lead to overcapitalization and over-exploitation of the resource, tends to be taken for granted by most resource economists and biologists.<sup>14</sup> In

11. *Id.* Hardin’s model has attracted much interest due to the availability of the model to describe varied problems such as the Sahelian famine of the 1970s, the organization of the Mormon Church, and the inability of the U.S. Congress to limit its capacity to overspend. OSTROM, *supra* note 7, at 3.

12. OSTROM, *supra* note 7, at 3. The prisoner’s dilemma model proposes that there are two strategic actors, who may not communicate while planning their strategy, but who could choose to cooperate. If they both cooperate, they will both be better off. If one defects, one will reap great rewards while the other will do much worse than if cooperation had occurred. If they both defect, they will both receive something greater than if one actor had cooperated and the other actor had defected, yet, something not as great as if both actors had cooperated. Because the actors may not communicate and wish to minimize their maximum loss, they will have incentive to defect. Therefore, these individual actors will always both defect and reach a less than optimal outcome. *Id.* at 3-5. See also AVINASH DIXIT AND BARRY NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* 91 (1991) (“This predicament is called the prisoners’ dilemma. Its remarkable feature is that both sides play their dominant strategy, thus maximize their payoff, and yet the outcome is jointly worse than if both followed the strategy of minimizing their payoff.”).

13. OSTROM, *supra* note 7, at 6.

The major obstacle facing such actors is known as the “free-rider” problem: Whenever one person cannot be excluded from the benefits that others provide, each person is motivated not to contribute to the joint effort, but to free-ride on the efforts of others. If all participants choose to free-ride, the collective benefit will not be produced. The temptation to free-ride, however, may dominate the decision process, and thus all will end up where no one wanted to be. Alternatively, some may provide while others free-ride, leading to less than the optimal level of provision of the collective benefit.

*Id.*

14. Evelyn Pinkerton, *Introduction: Attaining Better Fisheries Management Through Co-Management—Prospects, Problems, and Propositions*, in *COOPERATIVE*

other words, these theorists believe that open access will lead to depletion of the fisheries because fishermen are forced to compete against each other for the same fish, not owning them until they are harvested. The fishermen will, therefore, inevitably overinvest in competitive gear and, in doing so, dissipate all potential profits.<sup>15</sup>

### B. Theoretical Solutions

The policy prescriptions following from the dire assessments of individual behavior described above have had an "equally grim character."<sup>16</sup> Hardin, for example, asserts that, however society decides to limit the use of common resources,<sup>17</sup> such a solution must be imposed by a coercive, external force.<sup>18</sup> This type of analysis has led to the conclusion that central governments should control the management of most natural resource systems.<sup>19</sup> Others see privatization of the common resource as the only way to save common resources. As noted by Elinor Ostrom, a leading critic of such exclusive prescriptions: "Both the economic analysis of common property resources and Hardin's treatment of the tragedy of the commons [lead to the conclusion] that the *only* way to avoid the tragedy of the commons in natural resources and wildlife is to end the common-property system. . . ."<sup>20</sup>

Ostrom has argued that there are no exclusive solutions to the problems surrounding common resource management. She notes that both centralization advocates and privatization advocates presume that "optimal institutional solutions can be designed easily and imposed at low cost by external authorities."<sup>21</sup> Questioning the approaches of the above models, Ostrom argues that "'getting the institutions right' is a difficult,

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MANAGEMENT OF LOCAL FISHERIES: NEW DIRECTIONS FOR IMPROVED MANAGEMENT & COMMUNITY DEVELOPMENT 3, 13 (Evelyn Pinkerton ed., 1989).

15. *Id.* at 19.

16. OSTROM, *supra* note 7, at 8.

17. Some of Hardin's suggestions include privatization of common resources, the retention of the commons as public property while allocating use rights, and the use of taxing devices. Hardin, *supra* note 7.

18. OSTROM, *supra* note 7, at 9.

19. *Id.*

20. *Id.* at 12 (quoting Robert J. Smith, *Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife*, 1 CATO J. 439-468 (1981)) [emphasis in original].

21. OSTROM, *supra* note 7, at 14.

time-consuming, conflict-invoking process."<sup>22</sup>

The danger in designing policy solutions using models, such as those described above, lies in the fact that those models make many assumptions about the world which may not accurately reflect real-world circumstances. The constraints on the actors in the models which are "assumed to be fixed for the purpose of analysis are taken on faith as being fixed in empirical settings, unless external authorities change them."<sup>23</sup> By using these models by analogy to describe actual behavior, observers frequently depict common resource users as helpless individuals compelled by circumstance to deplete the resource.<sup>24</sup>

Yet, "[n]ot all users of natural resources are similarly incapable of changing their constraints."<sup>25</sup> "The perception of the fisherman as both the victim and the villain of the relentless Greek tragedy of the commons" has been discarded by those who "know that fishermen are often able to act in ways that help solve an impending problem."<sup>26</sup> Overfishing and overcapitalization are not inevitable in the fisheries context in the absence of a coercive, external force or privatization. There are many institutional arrangements which govern the exploitation of open access resources which are favorable to conservation, and few are purely public or purely private.<sup>27</sup> Many institutions which allow individuals to "achieve productive outcomes in situations where temptations to free ride and shirk are ever present" are a mixture of "public-like" and "private-like" components.<sup>28</sup>

### C. Cooperative Management

Such public/private institutions include what are referred to as cooperative management systems. These systems "set up a game in which the payoffs are greater for cooperation than for opposition and/or competition, a game in which the actors can learn to optimize their

22. *Id.*

23. OSTROM, *supra* note 7, at 6.

24. *Id.*

25. *Id.* at 7. Ostrom is careful to note that the traditional "commons" models are not wrong when the assumptions behind them approximate real world conditions. They are, rather, "special models that utilize extreme assumptions rather than general theories." *Id.* at 183.

26. Rettig et al., *supra* note 5, at 285.

27. OSTROM, *supra* note 7, at 15.

28. *Id.*



mutual good and plan co-operatively with long-term horizons."<sup>29</sup> In public policy terms, these systems represent "appropriate institutional arrangements [which] change the legal structure of incentives and deterrents and allow a community of users to reduce the costs of sharing a common resource, while capturing the benefits which can accrue to wise collective users."<sup>30</sup> In these situations, a balance of power is created so that fishermen do not feel coerced, yet, government is still present and may "act as a check to any local violations which do not conserve fish stocks or fairly share the benefits of fish production."<sup>31</sup> Usually, cooperative fisheries management results in more appropriate, efficient or equitable management than that achieved under centralized control<sup>32</sup> or privatized market action.<sup>33</sup>

Cooperative fishery management agreements between public and private actors are not yet common. Their development is usually prompted by worsening problems such as a crisis caused by rumored or real stock depletion or claims that government's ability to manage the resource is insufficient. However, the creation of these agreements is conducive to the development of the most promising policy solutions to the problems which prompted them.<sup>34</sup> This is due to "the potential of co-management agreements to promote conservation and enhancement of fish stocks, to improve the quality of data and data analysis, to reduce

29. Pinkerton, *supra* note 14, at 5.

30. *Id.*

31. *Id.* at 4. Such a balance of power tempers common perceptions of both fishermen/users and government managers. Government officials often see fishermen as predators prone to destroy the resource without regulation. Fishermen, who have lost faith in the government's ability to solve management problems, point to the government's lack of adequate data and to its tendency to make problems worse through intervention. *Id.*

32. *Id.* at 5.

33. A privatized market solution would be extremely difficult to implement in the case of fisheries. See *supra* note 6 and accompanying text. As Ostrom notes:

[T]he "tragedy of the commons" has proved particularly difficult to counteract in the context of marine fishery resources where the establishment of individual property rights is virtually out of the question. . . . [E]ven when particular rights are utilized, quantified, and salable, the resource system is still likely to be owned in common rather than individually. . . . [C]ommon ownership is the fundamental fact affecting almost every regime of fishery management."

See OSTROM, *supra* note 7, at 13 (quoting Colin Clark, *Restricted Access to Common-Property Fishery Resources: A Game-Theoretic Analysis*, in DYNAMIC OPTIMIZATION AND MATHEMATICAL ECONOMICS 117 (P.T. Liu ed., 1980)).

34. Pinkerton, *supra* note 14, at 4.

excessive investments by fishermen in competitive gear, to make allocation of fishing opportunities more equitable, to promote community economic development, and to reduce conflict between government and fishermen, and conflict among fishermen's groups."<sup>35</sup>

Not all cooperative management schemes are "complete" co-management systems. In "incomplete" systems, not all decisions which could be shared by public and private actors are so shared.<sup>36</sup> However, co-management in the performance of certain, isolated management functions has been seen to improve such functions.<sup>37</sup> For example, co-management of habitat enhancement has increased the benefit of that enhancement at a relatively low cost:

The accomplishments of co-management regimes in which government and users have shared power and responsibility in enhancement or long-range stock recovery planning and habitat protection are especially notable in producing superior and more efficient management. This is accomplished chiefly by linking the efforts of fishermen as local resource users to the interests of fishermen as long-term users of local habitats and/or residents

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35. *Id.*

36. Co-management arrangements take various shapes and forms. These variations include:

[D]ifferences in the parties involved (tribes, sport, commercial, academics), differences in the formality or legality of arrangements or agreements (court-ordered, legislated, claims agreement, locally specific, short-term, ad-hoc), differences in the scale of group covered by the arrangement (local, regional, state-wide), differences in the basis for the organization of the group (local watershed or community, regional ethnic organization, regional licensing category, labour union, gear type association), differences in the species being managed (Pacific salmon, lobster, clams, marine mammals, lake trout, etc.), and differences in the management function undertaken by the fishing group (complete self-regulation or a narrower function).

*Id.* at x.

37. Pinkerton has broken management functions into seven categories: (1) data gathering and analysis; (2) logical harvesting decisions; (3) harvest allocation decisions; (4) protection of habitat and water quality; (5) enforcement; (6) enhancement and long-term planning; and (7) broad policy decision-making. *Id.* at 6.

of a local area in which they have particular fishing interests.<sup>38</sup>

Schemes allowing for co-management have also resulted in improved data collection and cooperation with enforcement measures. The high costs commonly associated with these aspects of management can be traced to policies derived from early economic and biological models which were based on a set of naïve assumptions which made these models unsuitable for effective management.<sup>39</sup> Biological models were based on the concept of maximum sustainable yield. It was presumed that populations below carrying capacity generated a certain harvestable surplus<sup>40</sup> to be determined through data collection. Economic models, as described above, posited that fishermen could only be restrained from exceeding the maximum sustainable yield by the imposition of restrictions by a coercive, outside actor.<sup>41</sup>

These models, however, failed to recognize the costs of the data collection needed to inform the biological model and the enforcement costs involved with the economic model. Determining stock size and developing other biological information is extremely costly. Administration and enforcement of management measures is also costly, especially when fishermen view managers as those who do not sympathize with or understand their views.<sup>42</sup> In addition, centrally-gathered data, costly as

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38. *Id.* at 12. Pinkerton notes certain factors in the success of these co-management schemes. The willingness of the fishermen to contribute financially to management affected the success of their efforts to share management authority with government. This willingness was much stronger when their contributions resulted in the right to co-manage on a regional or watershed basis. Such co-management allowed the fishermen to reap the benefits given. Regional or watershed co-management not only provides incentives for fishermen to contribute, but has a sound biological basis and, arguably, cannot be effectively carried out without the contribution of fishermen. *Id.* at 7-10.

For sound, long-term management benefits to be realized, fishermen may need to be involved on a regional and local basis in the location, size, and species of enhancement. . . . Fishermen may be the only actors who will demand that smaller stocks be protected and/or enhanced because of their long-term importance to local areas, even though in the short term exclusive enhancement of the larger stocks may appear more efficient.

*Id.* at 10-11.

39. Rettig et al., *supra* note 5, at 283.

40. *Id.* at 274.

41. *See supra* notes 16-20 and accompanying text.

42. Pinkerton, *supra* note 14, at 13.

it is to gather, arguably increases the costs of enforcement. This is so because government management decisions based on such data:

tend to have low credibility with fishermen who have alternative sources of data and often more extensive knowledge of local stocks based on years of observation. . . . When fishermen's livelihoods are severely disrupted by decisions based on data they know to be inadequate, they tend to adopt confrontational postures, practise civil disobedience, or engage in outright sabotage.<sup>43</sup>

Such costly outcomes can largely be avoided by properly bringing fishermen into the data-gathering and analysis process.<sup>44</sup>

One example of an arrangement which is thought to have achieved many of the above described efficiencies is a cooperative system devised by inshore fishermen in Alanya, Turkey.<sup>45</sup> Faced with intense conflict over the use of the resource, increased production costs resulting from competition, and uncertainty regarding any one potential harvest, members of a local cooperative have devised a system for allotting fishing sites to local fishers.<sup>46</sup> First, two lists are created. One is of eligible fishers, the other is of all usable fishing locations. At the beginning of the fishing season, the eligible fishers draw lots and are assigned to the various locations. Over the course of the season, the fishermen rotate in such a manner as to give each an equal chance to fish at the prime spots.<sup>47</sup>

This system has succeeded in avoiding several of the problems associated with the management of common resources. The first is overcapitalization. The allotment spaces the fishers so that production at each site is optimized, yet, resources do not have to be wasted searching for or fighting over a site since all fishers have an equal chance at each spot. This factor, observes Ostrom, seems to have resulted in a fishery with no apparent signs of overcapitalization.<sup>48</sup>

43. Pinkerton, *supra* note 14, at 13. The author notes, however, that the most successful co-management occurs when neither government nor fishermen's groups have exclusive control over data gathering and analysis.

44. *Id.*

45. OSTROM, *supra* note 7, at 18-19.

46. *Id.* at 19.

47. *Id.*

48. *Id.*

In addition, the data gathering needed to solve the resource management dilemma in Alanya is facilitated by the cooperative arrangement. As observed by Ostrom, "[c]entral-government officials could not have crafted [the cooperative's] rules without assigning a full-time staff to work (actually fish) in the area for an extended period."<sup>49</sup>

The fishing areas involved would have been impossible to map and divide fairly without the "extensive on-site experience"<sup>50</sup> brought to the task by the resource users.

Finally, the cooperative nature of the system in Alanya results in relative ease in monitoring and enforcement.<sup>51</sup> These functions are performed by the fishermen themselves. Each fisher entitled to a certain spot on any given day is in place to observe and deal with any cheating on the cooperative arrangement. The rights of that individual are reinforced by the others in the system who all have incentive to insure similar protection for themselves in the future.<sup>52</sup> Aiding such enforcement is the fact that rights to the resource and corresponding duties are well-defined.<sup>53</sup> In turn, these rights and duties are legitimized by the fact that national legislation gives the cooperatives jurisdiction over such local arrangements and that local officials sign the cooperative agreement each year.<sup>54</sup>

Elinor Ostrom has distilled, through analyzing certain long-enduring systems, eight "design principles" which characterize successful cooperative management arrangements.<sup>55</sup> First, the users who may withdraw resources from the common pool being managed are clearly defined in these systems.<sup>56</sup> Second, appropriation and provision rules governing the resource are appropriate, given local conditions and needs.<sup>57</sup> Third, most individuals affected by the operational rules of management participate in modifying those rules.<sup>58</sup> Fourth, those who

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49. *Id.* at 20.

50. *Id.*

51. *Id.* at 20 ("The few infractions that have occurred have been handled easily by the fishers at the local coffeehouse.")

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 89-90. For an alternative framework, see Pinkerton, *supra* note 14, at 26-31.

56. *Id.* at 91.

57. *Id.* at 92.

58. *Id.* at 93.

monitor user behavior are accountable to the users or are the users themselves.<sup>59</sup> Fifth, sanctions for violating management rules are graduated, according to the seriousness of the offence, and are assessed by officials who are users, who are accountable to the users, or both.<sup>60</sup> Sixth, users and their officials have rapid access to low-cost local mechanisms to resolve conflicts.<sup>61</sup> Seventh, the rights of the appropriators to devise their own institutions is not challenged by external governmental authorities.<sup>62</sup> Finally, characteristic of more complex systems, appropriation, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises. This includes the creation of local, regional, and national managers where appropriate.<sup>63</sup>

In conclusion, cooperative management systems seem to provide an alternative to resource management based solely on privatization of the resource or on coercive regulation by an outside actor. The Regional Councils created by the MFCMA, comprised as they are of resource users, may potentially be justified as an attempt to incorporate the efficiencies associated with cooperative management into U.S. fisheries management. The validity of such a justification will be explored below. However, first, the next few sections will explore how the Regional Councils were designed to function and how the system which has evolved under the MFCMA has led to claims that a skewed balance of public and private power on the Councils has undermined their legitimacy as management bodies.

### III. THE EVOLUTION OF THE REGIONAL COUNCIL SYSTEM

#### A. *The Origins of the System*

Before 1976, "freedom of fishing was the rule [governing U.S. offshore fisheries] beyond the narrow . . . three-mile territorial sea and . . . adjacent nine-mile contiguous zone."<sup>64</sup> This freedom, along with

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59. *Id.* at 94.

60. *Id.*

61. *Id.* at 100.

62. *Id.* at 101.

63. *Id.* at 101-102.

64. Eldon V.C. Greenberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641 (1982). The three-mile zone was under the jurisdiction of the

the large, efficient and subsidized fleets of other nations which existed by the 1970s,<sup>65</sup> resulted in a foreign fishing effort which came to be perceived as a threat to both the U.S. fishing industry and the resource itself. For example, in 1975, foreign fishermen took 6.4 billion pounds of the 7 billion pound catch from the waters 12-200 miles off the U.S. coast.<sup>66</sup> This foreign fishing effort was noted as the primary cause of the serious depletion of many coastal species at the time.<sup>67</sup>

Concern over such foreign fishing was a major impetus for the MFCMA. The main purpose of the act was to extend the "exclusive fishery management" zone of the United States from 12 to 200 miles offshore.<sup>68</sup> The proponents of the MFCMA felt that any such extension of jurisdiction which might result from the Law of the Sea Treaty, being negotiated at the time, would not go into effect soon enough to save U.S. offshore fisheries.<sup>69</sup> The need for protective measures in the interim

states. Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1994). *See generally* Arthur J. Tassi, Note, *Fishery Conservation and Management Act of 1976: An Accommodation of State, Federal, and International Interests*, 10 CASE W. RES. J. INT'L L. 703, 704 n.5 (1978). The federal role in fishery management was virtually non-existent, even though the federal government possessed broad powers to regulate fisheries under the Constitution. Greenberg & Shapiro, *supra*, at 645 (federal power to regulate interstate and international commerce under U.S. CONST. art. I, § 8, cl. 3 as well as the power to make treaties given under U.S. CONST. art. II, § 2, cl. 2). Any fishery regulation which took place in waters beyond the territorial sea was conducted by the states pursuant to their police powers, and subject to certain constitutional restrictions. John Winn, Comment, *Alaska v. F/V Baranof: State Regulation Beyond the Territorial Sea After the Magnuson Act*, 13 B.C. ENVTL. AFF. L. REV. 281, 282 (1986).

65. H.R. REP. No. 445, 94th Cong., 2d Sess. 35, 43-44 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 607-608, 611-612.

66. COMMITTEE ON COMMERCE, 94TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976 263 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY MFCMA] (statement of Sen. Ernest F. Hollings, S.C.).

According to NMFS data at the time of the passage of the MFCMA, sixteen species were overfished. These species were: yellowfin sole, Alaska pollock, Pacific ocean perch, Pacific halibut, Atlantic halibut, Bering Sea herring, Bering Sea shrimp, haddock, yellowtail flounder, California sardine, Pacific mackerel, Atlantic sea scallop, Northwest Atlantic shrimp, and Atlantic bluefin tuna. Six of these species were depleted by U.S. fisheries, seven by foreign fisheries and one by both. *Id.* at 359.

67. *Id.* at 263.

68. H.R. REP. NO. 445, *supra* note 65, at 22, *reprinted in* 1976 U.S.C.C.A.N. at 594. *See* 16 U.S.C. § 1811-1812 (1994).

69.

[T]he international community does appear ready to adopt a 200-mile limit.

was stressed.<sup>70</sup> In addition, although international agreements regarding fishing existed, these existing agreements were seen as insufficient to save the fish<sup>71</sup> and the negotiation of another, adequate international

The real question is when. Beginning now, it is quite possible that distant water fishing nations which have made large investments in technologically advanced and large fleets will become very uncertain about future access to a coastal nation's 200-mile zone. Consequently, it is possible that such nations will step up their efforts to capture fish on the high seas as long as the limits remain narrow. The Committee [on Merchant Marine and Fisheries] is quite concerned about the effect of delay in the implementation, ratification and effective date of any new convention that may be negotiated in the Law of the Sea Conference which will most likely contain a 200-mile fishery limit provision.

H.R. REP. NO. 445, *supra* note 65, at 28-29, *reprinted in* 1976 U.S.C.C.A.N. at 601; *see also* 16 U.S.C. § 1801(a)(4) (1994).

70. In the words of Senator Mark O. Hatfield, Or.:

This bill will protect our resources until such time as an effective treaty can be negotiated. I hope one is, and I hope passage of the legislation will expedite negotiations at the [Law of the Sea] conference. . . . But we cannot wait forever. . . . Not only is there absolutely no certainty that a treaty can be drafted at the next conference session, there is also the matter of ratification, which will take some time. . . . we cannot wait that long.

LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 259. *See also* H.R. REP. NO. 445, *supra* note 65, at 22, *reprinted in* 1976 U.S.C.C.A.N. at 594-595 (H.R. 200 meant to extend U.S. jurisdiction over fishery resources from 12 to 200 miles offshore in the period until general agreement on fisheries jurisdiction was reached in the U.N. Conference on the Law of the Sea and such agreement came into force and effect for the U.S.).

71. According to the House Report accompanying the bill:

Presently, the United States is party to well over a score of international fishing agreements and periodically engages in bilateral and multilateral negotiations with foreign nations to restructure these treaties and to frame new ones which seek to conserve fish resources. Nearly all of the stocks of fish considered to be depleted or threatened with depletion are subject to these international agreements. . . .

H.R. REP. NO. 445, *supra* note 65, at 42, *reprinted in* 1976 U.S.C.C.A.N. at 610. *See also* LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 263 (statement of Sen. Hollings) (despite international agreement governing the area, "overfishing by foreign fleets in the Northeast is continuing at an embarrassing rate").

At the suggestion that H.R. 200 be amended to provide for negotiation under article 7 of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas before assertion of the 200 mile zone, Sen. Warren G. Magnuson, Wash., stated:

None of the people we are talking about that violate our shores are parties to this agreement, and they are not going to be parties to it. Japan is not going



agreement was considered out of reach.<sup>72</sup>

Although the main purpose of the MFCMA was to limit foreign fishing, Congress also recognized that once the United States had jurisdiction over the newly extended fishery zone, now called the Exclusive Economic Zone (EEZ),<sup>73</sup> "[it was] going to have a conservation problem and [was] going to have to set some standards so [American] fishermen [did] not overfish."<sup>74</sup> Thus, the MFCMA also created a National Fishery Management Program<sup>75</sup> centered around a system of Regional Fishery Management Councils.<sup>76</sup> This program was premised on the conclusion "that fishery resources must be conserved and managed in such a way as to assure that an optimum supply of food and other fish products, and that recreational opportunities involving fishing, are available on a continuing basis and that irreversible or long-term adverse effects on fishery resources are minimized."<sup>77</sup>

to sign this. Russia is not going to sign this, if we revive this whole dead horse . . . [and] [t]he 1958 convention, of course, is only binding on ratifying nations, none of whom fish off our shores.

LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 312. *But see, id.* at 316 (telegram from Arthur Dean saying that the 1958 treaty reflects customary international law).

72. As stated by Sen. John O. Pastore, R.I.:

We want an international agreement. We have been trying to get an international agreement. But the trouble is that those who are invading our waters, destroying our pots, cleaning up our fish, do not want an agreement. . . . We want to give them a fair share. But we want our fisheries to come under some management, some kind of orderly control.

LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 237-238.

73. 16 U.S.C. § 1802(6) (1994). When created, this zone was called the "fishery conservation zone." *See* Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 101, 90 Stat. 331, 336 (1976) (amended 1986). The MFCMA was amended in 1986 and the zone was renamed the "exclusive economic zone." Pub. L. No. 99-659, sec. 101, § 1811, 100 Stat. 3706, 3707 (1986). This amendment partially implemented President Reagan's 1983 Exclusive Economic Zone Proclamation. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

74. LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 240-241 (statement by Sen. Packwood).

75. 16 U.S.C. §§ 1851-1861 (1976) (current version as amended at 16 U.S.C. §§ 1851-1861 (1994)).

76. 16 U.S.C. § 1852 (1976) (current version as amended at 16 U.S.C. § 1852 (1994)).

77. S. CONF. REP. NO. 711, 94th Cong., 2d Sess. 39 (1976), *reprinted in* 1976 U.S.C.C.A.N. 690, 663; *see also* William R. Rogalski, Note, *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*, 9 B.C. ENVTL. AFF. L. REV. 163, 169-170 (1980) (discussing the legislative purposes

The MFCMA created a “two-tiered decision-making mechanism” for management and conservation decisions which “called for basic policy determinations such as optimum yield and management strategies to rest with the Councils while review and rulemaking authority vested in the Secretary [of Commerce].”<sup>78</sup> The main function of each Council was originally, and continues to be, to prepare and submit to the Secretary of Commerce a fishery management plan (FMP) with respect to each fishery within its geographical area of authority.<sup>79</sup> These FMPs are to “achieve and maintain, on a continuing basis, the optimum yield from each fishery.”<sup>80</sup> They are also to be consistent with the other “national standards” for fishery management set out in the MFCMA.<sup>81</sup>

Originally, however, the Councils’ involvement in implementing these plans was quite limited. First, the Secretary was given the right to approve or disapprove all FMPs. Upon receipt of a fishery management plan as developed by a Council, the Secretary was to review the plan, in consultation with the Secretary of State and the Coast Guard, and to determine its consistency with the MFCMA’s national standards as well as with other applicable law.<sup>82</sup> The Secretary was then to notify the

of the MFCMA).

78. Rogalski, *supra* note 77, at 171-172. See also H.R. REP. NO. 445, *supra* note 65, at 24, reprinted in 1976 U.S.C.C.A.N. at 596 (Councils only meant to assist Secretary in regulating fisheries); LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 492 (statement of Sen. Ted Stevens, Alaska, that Councils “recommend regulations” to the Secretary of Commerce).

79. 16 U.S.C. § 1852(h)(1) (1976) (current version as amended at 16 U.S.C. § 1852(h)(1) (1994)).

Theoretically, it is no longer the case that every U.S. fishery must be managed by an FMP. Each Regional Council was originally mandated by the MFCMA to develop an FMP for each fishery within its jurisdiction. 16 U.S.C. § 1852(h)(1) (1976) (current version as amended at 16 U.S.C. § 1852(h)(1) (1994)). However, section 1852 was amended in 1983 to require the Councils to create FMPs for only those species which require conservation and management. See Pub. L. No. 97-453, sec. 5(4), § 1852(h)(1), 96 Stat. 2481, 2484 (1983).

The Secretary may only prepare an independent FMP where 1) the governing Council fails to develop and submit a plan or necessary amendment within a reasonable period of time, or 2) the Secretary disapproved a submitted plan or amendment and the Council involved fails to resubmit a revised version. 16 U.S.C. § 1854(c)(1) (1994).

80. 16 U.S.C. § 1801(b)(4) (1994).

81. 16 U.S.C. § 1851(a) (1994).

82. 16 U.S.C. § 1854(b) (1976) (current version as amended at 16 U.S.C. § 1854(b) (1994)).

relevant Council of either the approval or disapproval of the plan.<sup>83</sup> In the case of disapproval or partial disapproval of the plan, the Secretary was to return the plan, with an explanation, to the Council and request the Council to resubmit a modified plan within forty-five days.<sup>84</sup>

In addition, all regulatory power rested, and continues to rest solely with the Secretary.<sup>85</sup> The Councils could prepare any proposed regulations deemed "necessary and appropriate" to carry out their FMPs.<sup>86</sup> However, they were given no authority to promulgate those regulations. The Councils could only submit them "for action by the Secretary."<sup>87</sup>

The Regional Councils were designed to include both voting and nonvoting members. The voting members of the Councils are: (1) the principal State official with marine fishery management responsibility in each constituent State; (2) the regional director of the National Marine Fisheries Service for the geographic area concerned; and (3) certain members to be appointed by the Secretary from a list of individuals nominated by the Governor of each State who are knowledgeable with regard to the management, conservation, or recreational harvest of the relevant fisheries.<sup>88</sup> The nonvoting members include: (1) the regional or area director of the United States Fish and Wildlife Service for the geographical area concerned; (2) the commander of the relevant Coast Guard district; (3) the executive director of the Marine Fisheries Commission of the concerned area, if any; and (4) a representative of the State Department.<sup>89</sup>

The nonvoting members of the council play an advisory role.<sup>90</sup> However, since Council decisions were, and still are, made by a majority of the voting members,<sup>91</sup> "the composition of the voting group directly

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83. 16 U.S.C. § 1854(a) (1976) (current version as amended at 16 U.S.C. § 1854(a) (1994)).

84. 16 U.S.C. § 1854(a) (1976)(current version as amended at 16 U.S.C. § 1854(a) (1994)).

85. 16 U.S.C. § 1855 (1976) (current version as amended at 16 U.S.C. § 1855 (1994)).

86. 16 U.S.C. § 1853(c) (1976) (current version as amended at 16 U.S.C. § 18543(c) (1994)).

87. 16 U.S.C. § 1853(c) (1976) (current version as amended at 16 U.S.C. § 1853(c) (1994)).

88. 16 U.S.C. § 1852(b) (1994).

89. 16 U.S.C. § 1852(c) (1994).

90. Rogalski, *supra* note 77, at 173 n.55.

91. 16 U.S.C. § 1852(e)(1) (1994).

determines the policy shaped by the councils."<sup>92</sup> This composition "shows a strong state representation among those voting on the plans."<sup>93</sup> In addition, the majority of the voting group of each Council is comprised of those appointed individuals "knowledgeable regarding the conservation and management, or the commercial recreational harvest, of the fishery resources" of the relevant area.<sup>94</sup>

Affording these individuals such a strong voice on the Councils was seen as a way to allow those interested in the fisheries to contribute to the decision-making process.<sup>95</sup> It was felt that recreational and commercial fishermen, "with an interest in the resource would act in a manner which would protect that resource and ensure the future health of our fisheries."<sup>96</sup> Congress believed that "this institutional arrangement [was] the best hope [the United States could] have of obtaining fishery management decisions which in fact protect the fish and which, at the same time, have the support of the fishermen who are regulated."<sup>97</sup> Such justifications for creating the Regional Council system indicate that it was created as an "appropriate institutional arrangement" designed to "change the legal structure of incentives and deterrents" thought to plague the management of common fisheries and to "allow a community of users to reduce the costs of sharing a common resource, while capturing the benefits which can accrue to wise collective users."<sup>98</sup> The policy

92. Rogalski, *supra* note 77, at 172.

93. *Id.* at 173.

94. 16 U.S.C. § 1852(b)(2)(A) (1994). Of the 17 voting members on the New England Council, 11 are appointed according to 16 U.S.C. § 1852(b)(2); of the 19 voting members on the Mid-Atlantic Council, 12 are so appointed; of the 13 voting members on the South Atlantic Council, 8 are so appointed; of the 7 voting members on the Caribbean Council, 4 are so appointed; of the 17 voting members on the Gulf Council, 11 are so appointed; of the 13 members on the Pacific Council, 8 are so appointed; of the 11 voting members on the North Pacific Council, 7 are so appointed (5 from Alaska and 2 from Washington); and of the 13 voting members of the Western Pacific Council, 8 are so appointed. 16 U.S.C. § 1852(a) (1994).

95. *See* 16 U.S.C. § 1801(b)(5) (1976) (current version as amended at 16 U.S.C. § 1801(b)(5) (1994) (purpose of Councils is to "enable the . . . fishing industry, consumer and environmental organizations, and other interested parties to participate in, and advise on" the establishment of FMPs).

96. *Conflict Hearing*, *supra* note 1, at 2 (statement of Rep. Thomas J. Manton, N.Y.).

97. LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 455 (Sen. Warren G. Magnuson, Wash.).

98. Pinkerton, *supra* note 14, at 5. *See also supra* text accompanying note 30 (discussing cooperative management systems generally).

justification for the make-up of the Councils, thus, seems to rest upon principles of cooperative management.

This Congressional decision to allow interested individuals on the Councils may be explained by evidence in the legislative history that the Regional Fishery Management Councils were not originally designed to bear responsibility for economic allocation. In the words of Senator Ted Stevens (Alaska), the MFCMA was meant to:

[S]et up a mechanism by which the people of the region affected can select those whom they think are capable of managing their fisheries. Those managers will comprise the regional council which will hire the experts,<sup>99</sup> utilize the resources of the Federal Government and the affected State governments, and determine what the optimum yield of a particular species should be.

. . . [W]e are not talking about an economic matter. We are talking about a limit on the taking of those species when it is necessary from a biological point of view for their protection. We are talking only about conservation and . . . protection.<sup>100</sup>

In another instance, the Senator emphasized his position by stating that “[i]n effect, I am saying that a regional council could not, for example, say that only vessels over a certain size can fish for one species, and only those under another size for another species. We have no intention to permit the regional council to have economic authority over fisheries resources. They are to have conservation and environmental authority, but not economic.”<sup>101</sup> Therefore, while the original Act did allow FMPs

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99. 16 U.S.C. § 1852 (g) (1976) (current version as amended at 16 U.S.C. § 1852(g) (1994)) (each Council to establish and maintain a scientific and statistical committee and other such advisory panels as necessary or appropriate).

100. LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 368.

101. *Id.* at 345.

This focus on conservation may have stemmed from the fact that, at the time the MFCMA was passed, fishery management centered around the concept of maximum sustainable yield. See Rettig et al., *supra* note 5, at 274; see also 16 U.S.C. § 1801(b)(4) (1976) (current version as amended at 16 U.S.C. § 1801(b)(4) (1994)) (purpose of MFCMA is to provide for fishery management plans “which will achieve and maintain, on a continuing basis, the optimum yield from each fishery”); 16 U.S.C. § 1802(18) (1976) (current version as amended at 16 U.S.C. § 1802(21) (1994)) (optimum yield prescribed on the basis of maximum sustainable yield as modified by relevant

to include allocation measures if necessary,<sup>102</sup> limits on Council authority such as Secretarial review and exclusive Secretarial rulemaking seem to have minimized concern over Council participation in the allocation process.

### B. *Shifting Focus, Eroding Safeguards*

The Magnuson Act succeeded in reducing foreign fishing off the coast of the United States. The foreign catch in the EEZ for 1991 was insignificant and, in 1992, there were no foreign operations in the EEZ.<sup>103</sup> However, as noted by one observer in 1990:

[T]he new law transformed the U.S. fishing industry so rapidly that its conservation objective has not kept pace with the dramatic growth in capital investments. . . . In the past five years, since the Magnuson Act made a clean sweep of foreign-flagged vessels, a new class of boats and at-sea processors, worth more than \$1 billion, has crowded into the Bering Sea and the Gulf of Alaska. Overcapitalization has led to ferocious infighting among American trawlers, crabbers, shore-based

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economic, social, or ecological factors). Most believed that, if fish harvests could just be kept below the surplus production for any given stock size, the harvest would be within sustainable limits. Rettig et al., *supra* note 5, at 274; *see also* 16 U.S.C. § 1801(a)(5) (1976) (current version as amended at 16 U.S.C. § 1801(a)(5) (1994)) (“If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.”). The problem of economically driven overfishing was overlooked by many fishery managers initially. Rettig et al., *supra* note 5, at 274. This naivete characterized the initial debates concerning the MFCMA. Referring to the Council system and national standards calling for the maintenance of an “optimum yield” from the fishery, one senator noted: “There seems to be universal agreement that the management sections of the bill will provide the mechanisms we need to restore our fisheries to desirable levels and maintain them for the future.” LEGISLATIVE HISTORY MFCMA, *supra* note 66, at 331 (statement of Sen. Michael Gravel, Alaska).

102. 16 U.S.C. § 1853(b)(6) (1976) (current version as amended at 16 U.S.C. § 1853(b)(6) (1994)); 16 U.S.C. § 1851(a)(4) (1976) (current version as amended at 16 U.S.C. § 1851(a)(4) (1994)) (any necessary allocation shall be fair and equitable).

103. *Reauthorization of the Magnuson Fishery Conservation and Management Act: Hearings Before the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 1st Sess. 10 (1993) [hereinafter *Senate Hearings 1993*] (statement of Douglas K. Hall, Assistant Secretary of Commerce for Oceans and Atmosphere, National Oceanic and Atmospheric Administration).

processors, and floating factories over the finite harvestable stock. Parochial struggles between these ballooning user groups over ever shrinking slices of the fisheries pie have become the most pressing management within the industry.<sup>104</sup>

As competition between American users has increased, the line between resource allocation and conservation is no longer easily drawn. "Allocation decisions granting a specific share of total harvest to a particular category of fishermen have become an increasingly common mode of resource management by the Councils."<sup>105</sup> It is no longer possible to say that the Councils are to have conservation and environmental authority, but not economic authority. Fishery management plans must define the "optimum yield" of each fishery.<sup>106</sup> "Optimum" is defined as that "which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor."<sup>107</sup> The plans must mix science with politics and social circumstances. The Councils must seek to conserve, to satisfy the economic needs of the fishermen, and to protect consumers.<sup>108</sup> Because of this, management decisions are often driven by industry needs for economic development opportunities.<sup>109</sup> Social

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104. Karen Franklin, *Alaskan Fisheries: The Battle Between Conservation and Resource Allocation*, PAC. NW EXECUTIVE, April 1, 1990, at 3, 3.

105. *Conflict Hearing*, *supra* note 1, at 5 (statement of Rep. Maria Cantwell, Wash.).

The allocative aspects of Council decision-making have been most striking in those fisheries utilizing Individual Transferable Quota (ITQ) systems. An ITQ is an "allocated privilege of landing a specified portion of the total annual fish catch in the form of quota shares." Eugene H. Buck, *Individual Transferable Quotas in Fishery Management*, Congressional Research Service, Summary (September 25, 1995). These shares must be allocated initially among users according to criteria developed by the relevant Regional Councils. Currently, three Federal ITQ programs operate in U.S. waters. See 50 C.F.R. § 652.20-652.21 (1995) (Atlantic surf clam and ocean quahog fishery); 50 C.F.R. § 646.10 (1995) (South Atlantic wreckfish fishery); 50 C.F.R. § 676.10-676.14, § 676.20-676.23 (1995) (Pacific halibut/sablefish fishery).

106. It is important to note here the difference between the concept of maximum sustainable yield and the concept of optimum yield. Maximum sustainable yield is simply a biological concept, focused on determining the surplus production (i.e. allowable harvest) of a certain stock size. The yield determined for the Magnuson Act is the "optimum" yield. 16 U.S.C. § 1802 (1994).

107. 16 U.S.C. § 1802 (1994).

108. Franklin, *supra* note 104, at 3.

109. *Id.* at 4.

concerns, difficult to quantify, are often left to the discretion of fishery managers.<sup>110</sup> Because Councils containing industry representatives must exercise discretion in making such management decisions and because their decisions are viewed as “driven by their bottom line,”<sup>111</sup> the Councils have come to be viewed by some as corrupt and conflicted.

Many critics of the Council system note the erosion of certain safeguards against the improper use of Council power originally in place in 1976.<sup>112</sup> The first to erode was the line drawn by the MFCMA between the policy-making role of the Councils and the law-making role of the Secretary. As described by a representative of the Southeastern Fisheries Association, the original system:

[put the interested members of the Councils] in a “big box” in order for them to dynamically discuss and debate fisheries issues. . . . The one constant control of this system was [that] the Council members couldn’t get out of the box.

. . . Under the original concept, it didn’t matter if a boat captain or processor or marina operator or pleasure boat manufacturer served on the Council because the product of the collective work was to be an FMP RECOMMENDATION to the Secretary of Commerce who has legal responsibility to determine if the RECOMMENDED FMP was legal. After such a determination the Secretary would write and publish the regulations.<sup>113</sup>

Upon reauthorization of the MFCMA in 1983, this system was altered. It was felt by some that a “false dichotomy between plan development and regulation development” was created by the fact that the rulemaking process could only take place after an FMP was approved.<sup>114</sup> Therefore, Congress amended § 1853 of the Act to *require* Councils to promulgate regulations and submit them along with any

110. Rettig et al, *supra* note 5, at 275-276.

111. Franklin, *supra* note 104, at 3.

112. See, e.g., *Conflict Hearing*, *supra* note 1, at 90, 99 (statements by Southeastern Fisheries Association and Marine Fish Conservation Network).

113. *Conflict Hearing*, *supra* note 1, at 91 (emphasis in original).

114. S. REP. No. 519, 97th Cong., 2d Sess. 44 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4320, 4357.



FMP.<sup>115</sup> Before the amendment, such promulgation was permitted but not required.

In addition, there was concern over Secretarial delay in reviewing FMPs.<sup>116</sup> In response to this concern, explicit criteria for Secretarial review were created by Congress.<sup>117</sup> First, the Secretary, upon the simultaneous receipt of the FMP and accompanying regulations from the relevant Council, was required by a 1983 amendment to immediately publish the plan in the Federal Register and request comments. This step was altered in 1986 by another amendment requiring the Secretary to immediately conduct a preliminary evaluation of the FMP and regulations and, upon initial approval, to begin the review process by publishing the proposed plan.<sup>118</sup> Initial disapproval immediately sends the plan back to the Council for revision.<sup>119</sup>

Following the close of a 60-day comment period,<sup>120</sup> the Secretary is required to complete the review of the FMP and the public comments, participate in necessary consultations with the Secretary of State regarding foreign fishing and participate in consultations with the Coast

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115. Pub. L. No. 97-453, sec. 6(2), § 1953(c), 96 Stat. 2481, 2486-2487 (1982).

116. In 1978, 1979 and 1980, the 60-day deadline set for Secretarial review was not met due to a pre-review, informal consultation stage created by NMFS, acting on behalf of the Secretary. This consultation stage was designed to allow ultimate approval of more plans and to allow Councils to modify their FMPs before formal disapproval. H.R. REP. NO. 549, 97th Cong., 2d Sess. 14 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4320, 4327.

117. *See generally* H.R. CONF. REP. NO. 982, 97th Cong., 2d Sess. 19-20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4320, 4368-4369.

Such criteria were missing from the original Act. As noted by one commentator: Though each decision maker was assigned a distinct and autonomous role, the plan implicitly envisioned harmonious interrelationship of the regional councils and the Secretary. The [M]FCMA did not, however, provide a detailed plan of how those two authorities would interact but left the resolution of that to the future.

Rogalski, *supra* note 77, at 178.

118. 16 U.S.C. § 1854 (a)(1) (1994). Within fifteen days after the plan is received by the Secretary, she must (1) make any changes to the Council-created regulations accompanying the plan "as may be necessary for the implementation of the plan," and (2) publish them in the Federal Register with an explanation of any substantive changes made. 16 U.S.C. § 1854(a)(1)(D) (1994).

119. 16 U.S.C. § 1854(a)(1)(A) (1994).

120. The 1983 amendments created a 75-day review period. Sec 7(a), § 1854(a), 96 Stat. at 2487. This period was reduced in 1986. Sec 106, § 1854(a), 100 Stat. at 3742.

Guard regarding enforcement within 35 days. If the Secretary notifies the Council that he does not intend to disapprove the FMP or amendment within this 35-day period, the Council-created FMP becomes effective at that time.<sup>121</sup> If the Secretary disapproves the FMP or amendment, the Council may submit an amended version.<sup>122</sup> The Secretary may only substitute her own management measure for a disapproved one if the Council fails to act.<sup>123</sup> However, the Councils face no explicit deadline for when they must do so.<sup>124</sup>

In contrast, the Secretary must meet strict deadlines. Upon receipt of the Council's revision, the Secretary must act within 60 days, or the revised plan or amendment takes effect and must be implemented.<sup>125</sup> Similarly, if the Secretary either fails to notify the relevant Council of his initial disapproval of the plan upon its receipt or of his disapproval of the plan during the 35-day period following public comment, the plan "shall take effect and be implemented" by the Secretary.<sup>126</sup> In effect, an FMP or amendment to an FMP developed by a Council, instead of being held to a Secretarial review for consistency with the national standards, may be presumed consistent in several instances.<sup>127</sup> Congress thus increased the law-making role of the Councils and diminished Secretarial review of Council decisions.

While Secretarial review of Council decisions has been diminished, any regulations promulgated by the Secretary to carry out those decisions are subject to judicial review to the extent permitted by the Administrative Procedure Act (APA).<sup>128</sup> However, notwithstanding this provision, "[l]awyers for fisheries groups disappointed by the FMP process will have a hard time securing relief from the courts because regulations under the Magnuson Act are essentially impervious to judicial review."<sup>129</sup>

121. 16 U.S.C. § 1854(b)(1)(B) (1994).

122. 16 U.S.C. § 1854(b)(3)(A) (1994).

123. 16 U.S.C. § 1854(c)(1)(B) (1994).

124. Cf. 16 U.S.C. § 1854(c)(1)(A) (1994) (if no Council-created FMP for fishery within reasonable period, Secretary may develop an FMP).

125. 16 U.S.C. § 1854(b)(3)(D) (1994).

126. 16 U.S.C. § 1855(b)(1) (1994).

127. Robert J. McManus, *America's Saltwater Fisheries: So Few Fish, So Many Fishermen*, 9 A.B.A. SEC. NAT. RESOURCES, ENERGY, AND ENVTL L., Spring 1995, at 13.

128. 16 U.S.C. § 1855(b) (1994) (review permitted to extent allowed under 5 U.S.C. § 701-706 (1994)).

129. McManus, *supra* note 127, at 15.

This is largely due to the fact that a court may only set aside regulations which are: 1) arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law; 2) contrary to constitutional right, power, privilege, or immunity; 3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; or 4) without observance of procedure required by law.<sup>130</sup> Unlike those governmental actions generally subject to the APA, MFCMA regulations may not be set aside due to the fact that they are: (1) unsupported by substantial evidence in the administrative record or (2) unwarranted by the facts to the extent that the facts are subject to trial de novo by a reviewing court.<sup>131</sup>

As noted by the court in *Fishermen's Dock Coop. v. Brown*, given the parameters of review set out in the MFCMA, Secretarial decisions to promulgate regulations "are entitled to an almost insurmountable degree of deference."<sup>132</sup> For example, the court in *National Fisheries Institute, Inc. v. Mosbacher* examined "the Secretary's decision to promulgate [billfish] regulations in light of the administrative record before him."<sup>133</sup> The court presumed the Secretary's actions to be valid noting that it could not "simply substitute its own judgment for that of the Secretary."<sup>134</sup> To overcome this presumption, the court would have had to find "that the administrative record [wa]s so devoid of justification for the Secretary's decision that the decision [wa]s arbitrary and capricious."<sup>135</sup> As noted by one commentator: "[s]uch [deference is] hardly unusual in modern administrative procedure, but, as we have

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130. 16 U.S.C. § 1855(b)(1)(B) (1994) (only grounds specified in 5 U.S.C. § 706(2)(A)-(D) that are sufficient to set aside regulations).

In addition, challengers face standing hurdles and limits on possible relief. See *Hanson v. Klutznik*, 506 F. Supp. 582, 586 (D. Alaska 1981) (challenger must have asserted claim before Council to survive motion to dismiss); *Midwater Trawlers Coop. v. Mosbacher*, 727 F. Supp. 12, 16 (D.D.C. 1989) (same); 16 U.S.C. § 1855(b)(1)(A) (1994) (section 705 of the APA-permitting preliminary injunctive relief found inapplicable to challenges of regulations promulgated under the MFCMA); see also *McManus*, *supra* note 127, at 15.

131. 5 U.S.C. § 706(E), (F) (1994).

132. *Fishermen's Dock Coop. v. Brown*, 867 F. Supp. 385, 391 (E.D. Va. 1994); see also *McManus*, *supra* note 127, at 15 ("when challengers get to court, they find that the joint actions of councils and the Secretary command enormous deference").

133. *National Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 218 (D.D.C. 1990).

134. *Id.* at 219.

135. *Fishermen's Dock Coop. v. Brown*, 867 F. Supp. at 391.

seen, the Magnuson Act is hardly usual because it often requires the [Secretary] to defer to decisions that are at least suspect on conflict-of-interest grounds."<sup>136</sup> Illustrating this point is the court's decision in *Alaska Factory Trawlers Ass'n v. Baldrige*.<sup>137</sup> At issue in that case was an amendment to the Gulf of Alaska groundfish FMP. This amendment was designed to implement the North Pacific Fishery Management Council's decision to restrict groundfishing by pot fishermen and trawlers by allocating a large portion of the resource to Alaska longline fishermen thus limiting out-of-state trawler activity.<sup>138</sup> Challengers attacked the Secretary's determination that the amendment was consistent with MFCMA's national standards. National Standard 4, requiring allocations of fishing privileges to be fair and nondiscriminatory, and National Standard 5, mandating that conservation and management measures not have economic allocation as their sole purpose, were said to be violated by the amendment. The Secretary's decision that they did not was, as the challengers argued, arbitrary and capricious.<sup>139</sup> The court, finding that the record indicated that the amendment was not discriminatory and was not solely created because of economic objective, did not agree and upheld the Secretary's decision.<sup>140</sup>

While amendments creating diminished Secretarial review coupled with deferential judicial review weakened the main structural safeguards against self-interested allocation decisions by Council members, other safeguards were arguably in place due to the interaction of the MFCMA with existing Federal law. By 1982, agency consensus was that the Federal Advisory Committee Act (FACA) applied to the Councils and their advisory panels, including their scientific and statistical committees.<sup>141</sup> FACA was enacted to govern the creation, duration and procedure of "such committees, boards, commissions, councils,

136. McManus, *supra* note 127, at 15.

137. 831 F.2d 1456 (9th Cir. 1991).

138. *Id.* at 1463.

139. *Id.* at 1464-1465.

140. *Id.*; see also McManus, *supra* note 127, at 15-16 (deferential standard required courts in *National Fisheries Institute v. Mosbacher*, 732 F.Supp. 210 (D.D.C. 1990) and *C&W Fish Co. v. Fox*, 931 F.2d 1556 (D.D.C. 1991) to allow the Councils and Secretary to "torque" the FMP process in favor of recreational fishermen).

141. H.R. REP. NO. 549, *supra* note 116, at 15, reprinted in 1982 U.S.C.A.N. at 4328. By 1980, the Office of Management and Budget and the General Services Administration had issued legal opinions that FACA applied to the Regional Councils and NOAA was generally in accord with this stance. Rogalski, *supra* note 77, at 196-198.

conferences, panels, task forces, or other similar groups as the Congress, the President, or Federal agencies create in the interest of obtaining advice for the President or for any agency.”<sup>142</sup>

In the opinion of some, the application of FACA to the Councils “*per se*” constricted council authority, reducing it “to a mere advisory function” and undermining the Councils’ intended role as “the primary policy makers under the [M]FCMA.”<sup>143</sup> This view stems from FACA’s directive that: “[A]dvisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.”<sup>144</sup>

However, this directive is not absolute. Advisory committees can take on non-advisory roles if specifically “provided by statute or Presidential directive.”<sup>145</sup> Thus, any argument that the application of this section of FACA itself would have acted as a limit on Council power can be met with explicit language in the MFCMA and its legislative history granting the Councils a policy-making role.

More importantly, application of FACA to the Councils subjected them to FACA’s procedural requirements. Any “advisory committee” governed by FACA must open its meetings to the public,<sup>146</sup> generally publish notice of the meeting in the Federal Register,<sup>147</sup> allow interested persons to appear before it and submit statements to it,<sup>148</sup> and keep minutes of meetings and make them and certain other documents available to the public.<sup>149</sup> In addition, an officer or employee of the Federal Government must chair or attend each meeting of a FACA-governed advisory committee.<sup>150</sup> All meetings and agendas of an advisory committee must be approved by such an employee.<sup>151</sup> By 1982, the Councils were all “unanimous in their view” that these procedural

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142. H.R. REP. NO. 1017, 92d Cong., 2d Sess. 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491.

143. Rogalski, *supra* note 77, at 194.

144. 5 U.S.C. app. § 9(b) (1994).

145. 5 U.S.C. app. § 9(b) (1994).

146. 5 U.S.C. app. § 10(a)(1) (1994).

147. 5 U.S.C. app. § 10(a)(2) (1994).

148. 5 U.S.C. app. § 10(a)(3) (1994).

149. 5 U.S.C. app. § 10(b) (1994).

150. 5 U.S.C. app. § 10(e) (1994).

151. 5 U.S.C. app. § 10(f) (1994).

requirements should not apply to their advisory panels.<sup>152</sup> In addition, while not generally objecting to the application of these requirements to regular Council meetings, the Councils were concerned that the specific procedures laid out in FACA effectively precluded emergency meetings or agenda changes.<sup>153</sup>

The 1983 amendments to the MFCMA, discussed above, which increased the operative,<sup>154</sup> law-making role of the Councils also addressed these concerns regarding FACA. In the House Report of the legislation eventually enacted, the Committee on Merchant Marine and Fisheries disagreed with the agency consensus that FACA applied to the Regional Councils.<sup>155</sup> According to the Committee, it was Congress' intent "that the public be made fully aware of the meetings and proposed agenda of the Councils and their subsidiary organs . . . [but that] [i]t was not intended for FACA[']s procedural requirements] to be rigidly applied."<sup>156</sup> In addition, the Committee, faced with required federal presence at advisory panel meetings under FACA, found that it was likely to be the case that advisory panels would meet in the absence of a federal employee and that the possible invalidation of decisions reached at such meetings was not intended by Congress.<sup>157</sup> It was also felt that this requirement should not be applied because "the level of direct Federal control and oversight contemplated by this provision of FACA" was inappropriate in the context of the Regional Councils.<sup>158</sup> Prerequisite federal approval of meetings and agendas under FACA was similarly thought to be inappropriate.<sup>159</sup>

152. It was felt that deadlines under FACA, deadlines under the MFCMA and publication deadlines for the Federal Register all conflicted in such a way as to preclude Councils from getting the advice of their advisory panels in certain circumstances. H.R. REP. NO. 549, *supra* note 116, at 16, *reprinted in* 1982 U.S.C.C.A.N. at 4329.

153. *Id.*

154. This action alone could be interpreted as taking the Councils out of the purview of FACA's definition of "advisory committee." See H.R. REP. NO. 1017, *supra* note 142, at 4, *reprinted in* 1972 U.S.C.C.A.N. at 3494.

155. H.R. REP. NO. 549, *supra* note 116, at 16, *reprinted in* 1982 U.S.C.C.A.N. at 4329 (language in Conference Report on MFCMA which indicated that FACA is to apply has been misinterpreted).

156. *Id.*

157. *Id.*

158. *Id.* at 16-17, *reprinted in* 1982 U.S.C.C.A.N. at 4329-4330; *see also*, Rogalski, *supra* note 77, at 195-196.

159. H.R. REP. NO. 549, *supra* note 116, at 17, *reprinted in* 1982 U.S.C.C.A.N. at 4330.

Thus, the 1983 Amendments to MFCMA expressly made FACA inapplicable to the Councils or to the scientific and statistical committees or advisory panels of the Councils.<sup>160</sup> However, “[t]o carry out the original intent of the Congress,” the amendments established “simplified public notification procedures in [FACA’s] place.”<sup>161</sup> These procedures are substantially the same as the FACA requirements.<sup>162</sup> Any checks on the Councils which would have resulted from public scrutiny and input under FACA are still intact. The major change caused by the exemption was the removal of the direct federal oversight which would have resulted from FACA-required federal approval of and attendance at all meetings.

Agency consensus in 1982 was also that Council members and their staffs were subject to federal criminal statutes<sup>163</sup> covering bribery and conflict of interest.<sup>164</sup> The Committee on Merchant Marine and Fisheries noted “justifiable anxiety on the part of Council members and their administrative staffs about the legal responsibilities they have assumed.”<sup>165</sup> However, nothing was done regarding the status of Council members under the criminal statutes at that time. In 1986, the Committee again noted “a considerable amount of confusion over the status of the Councils with respect to conflict of interest statutes.”<sup>166</sup>

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160. Pub. L. No. 97-453, sec. 5(5), § 1852, 96 Stat. 2481, 2485 (1982).

161. H.R. REP. NO. 549, *supra* note 116, at 17, *reprinted in* 1982 U.S.C.C.A.N. at 4330; *see* Pub. L. No. 97-453, sec 5(5), § 1852, 96 Stat. 2481, 2485 (1982) (codified as amended at 16 U.S.C. § 1852(j) (1994)).

162. Most council and committee meetings must be open to the public; timely public notice of the meetings must generally be given in local newspapers of the major relevant fishing ports and in the Federal Register; interested persons must generally be permitted to present statements regarding subjects on the agenda; minutes of most meetings must be kept; and the administrative record of the meetings must generally be available to the public. 16 U.S.C. § 1852(j)(2) (1994). In addition, in 1990, Congress required the Councils to allow interested members of the public to respond to new data submitted by a State or Federal agency or from a Council advisory body at any time a Council decides to consider such new information. 16 U.S.C. § 1852(j)(6) (1994).

163. 18 U.S.C. § 208 (1994).

164. H.R. REP. NO. 549, *supra* note 116, at 15, *reprinted in* 1982 U.S.C.C.A.N. at 4328. In 1978, “the NOAA Office of General Counsel determined that Council staff members were covered by the Federal conflict of interest laws. The Department of Justice and the Office of Government Ethics of the Office of Personnel Management concurred in that opinion.” 54 Fed. Reg. 1701-1702 (1989).

165. H.R. REP. NO. 549, *supra* note 116, at 15, *reprinted in* 1982 U.S.C.C.A.N. at 4328.

166. H.R. REP. NO. 165, 99th Cong., 2d Sess. 14 (1986), *reprinted in* 1986

This time, because "Congress intended that citizens, such as fishermen who obviously have a direct financial interest in fisheries, play a role in the operation of the Councils—either as Council members, or as members of advisory panels,"<sup>167</sup> Council members were exempted from the federal statute governing conflict with regard to financial interest<sup>168</sup> on the condition that they fully disclose their financial connections.<sup>169</sup>

The exemption of Council members from this federal criminal statute greatly eroded the safeguard against financial conflicts in its provisions. If governed by the federal statute, a Council member would generally be criminally liable for participating in any decision in which he has a financial interest.<sup>170</sup> Disclosure of a financial interest by a Council member would allow that member to continue to participate with impunity only if (1) the Government official responsible for the member's appointment determined that the interest "is not so substantial as to be deemed likely to affect the integrity" of her service;<sup>171</sup> (2) the financial interest has been exempted from the statute's requirements by regulation because it is too remote to affect the integrity of the member's service;<sup>172</sup> or (3) if the interest results solely from birth rights in certain Indian tribes, allotments or claims.<sup>173</sup> Under the MFCMA as now written, a Council member may participate in decisions upon mere disclosure, with no requirement that any determination be made regarding the threat of the member's interest to the integrity of the Council decision-making process.

In sum, various amendments to the MFCMA have removed protections originally in place to protect the integrity of the Council decision-making process. While Council members are bound to follow

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U.S.C.C.A.N. 6249, 6254.

167. *Id.*

168. 18 U.S.C. § 208 (1994).

169. 16 U.S.C. § 1852(k) (1994); 50 C.F.R. § 601.37 (1995); *see also* H.R. REP. No. 165, *supra* note 166, at 14, *reprinted in* 1986 U.S.C.C.A.N. 6249, 6254-6255.

170. 18 U.S.C. § 208(a) (1994).

171. 18 U.S.C. § 208(b)(1) (1994).

172. 18 U.S.C. § 208(b)(2) (1994).

173. 18 U.S.C. § 208 b)(4) (1994).

Individuals serving on advisory committees governed by FACA may be exempted from the section's provisions if the relevant government official determines that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved. 18 U.S.C. § 208(b)(3) (1994). As discussed above, FACA does not apply to the Regional Fishery Management Councils.



the National Standards in developing and amending their FMPs,<sup>174</sup> Secretarial review of the consistency of Council decisions with those National Standards has been diminished. Council activity has been removed from the direct federal scrutiny required of advisory councils governed by FACA.<sup>175</sup> Council members are now allowed to participate in decisions in which they have financial interests upon mere disclosure of that interest. Finally, judicial review of Council and Secretarial decisions has been extremely deferential.

There still exist some checks on Council members which serve to protect the FMP process. Although, in some cases, Council-made FMPs or amendments are presumed consistent with national standards, and although Councils play a large part in drafting proposed regulations to accompany those FMPs or amendments, the Secretary still has a final federal say.<sup>176</sup> Also, the substance of FACA's public notice requirements are still applicable to the Councils by the very terms of the MFCMA. Public scrutiny, thus, still serves as a check on Council activities. Third, while the conflict of interest statute governing financial interests has been made inapplicable to Council members making full disclosure, the rest of the battery of federal criminal conflict and bribery

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174. The fact that the Councils are required to follow the National Standards has been said to be an ineffectual check on the Councils in and of itself given the fact that the standards are "vague and bromidic," their "meaning . . . usually hard to pin down." McManus, *supra* note 127, at 14.

175. Arguably, such oversight was never intended to apply to the Councils in any event. See *supra* notes 157-159 and accompanying text; see also Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils, Off. Legal Counsel, available in LEXIS, 1993 OLC LEXIS 14 at 11-12 [hereinafter Office of Legal Counsel Opinion] (detailing two features of the Magnuson Act which demonstrate that Congress did not intend appointed Council members to be subject to the supervision of the Secretary).

176. As noted by the Office of Legal Counsel:

However independent the Councils may be in their day-to-day operations, ultimate authority over a majority of their membership, budgets, and their major area of concern — the fishery management plans — remains with the Secretary or other federal agencies. The Councils perform the basic research, hold hearings, draft the plan for their area, and propose regulations. It is the Secretary, however, to whom drafts and proposals are submitted and it is the Secretary who either approves the management plan or amends it to his satisfaction. It is also the Secretary who reviews the regulations to insure their legality and who implements them.

Office of Legal Counsel Opinion, *supra* note 175, at 17.

statutes do apply to the councils.<sup>177</sup> The Secretary has also promulgated regulations defining certain standards of conduct expected of Council members and employees.<sup>178</sup>

In addition, in response to complaints that imbalances in Council membership have "skewed decisions made by the Councils on regulatory and allocation matters,"<sup>179</sup> Congress took steps to ensure that Council membership is fairly apportioned. While the power of the Secretary to remove Council members is quite limited,<sup>180</sup> the 1986 amendments increased his authority with regard to appointments. Now, the Secretary must "in making appointments . . . to the extent practicable, ensure a fair and balanced apportionment . . . of the active participants . . . in the commercial and recreational fisheries under the jurisdiction of the Council."<sup>181</sup> Since 1990, the Secretary has also been required to annually report actions taken to ensure fair apportionment to Congress.<sup>182</sup> Steps have also been taken to ensure that only those qualified for

177. 50 C.F.R. § 601.35(a) (1995).

178. 50 C.F.R. § 601.35(b) (1995).

179. S. REP. NO 414, 101st Cong., 2d Sess. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6276, 6283.

180. 16 U.S.C. § 1852(b)(5) (1994). The Secretary may only remove a member for cause upon the recommendation of two-thirds of the voting members of the relevant Council. This provision was designed to "constrain narrowly the Secretary's ability to supervise and control the Council members he appoints." Office of Legal Counsel Opinion, *supra* note 175, at 3. While "the case law clearly supports the view that 'for cause' limitations on removal power can be compatible with the continuing power and duty to supervise," the statutory scheme of the MFCMA not only limits the removal power but it "vests that power jointly in the Secretary and the Councils themselves. . . . As a result, the Councils possess greater autonomy than that enjoyed, for example, by typical 'independent' agencies." *Id.* at 16.

181. 16 U.S.C. § 1852(b)(2)(B) (1994); *see also* 50 C.F.R. § 601.33(h) (1995).

Council members are appointed for a term of three years and may be reappointed to serve no more three consecutive terms. However, the Secretary may "designate a term of appointment shorter than the normal three years if necessary to provide for balanced expiration of terms of office." 50 C.F.R. § 601.32 (1995).

Creating another possible solution to the problem of fair representation among user groups, the 1990 amendments to the MFCMA require each Council to create a fishing advisory committee with membership fairly apportioned among commercial fishing interests in the relevant region. 16 U.S.C. § 1852(g)(3) (1994). As noted in an NMFS response to a public comment: "Considering the limited number of appointments to any one Council, representation could not be provided for all major fishing gear types. The FIAC is one appropriate mechanism to allow Councils to provide representation for all gear types in the Council process." 57 Fed. Reg. 375, 376 (1994).

182. 16 U.S.C. § 1852(b)(2)(B) (1994).

Council membership be appointed.<sup>183</sup> However, in the face of the increasing need to allocate fishery privileges among user groups, all of the above described checks on the Council system, even coupled with measures designed to create fair apportionment, are not enough to ward off the perception of conflict on the Councils and to ensure fair decisions which properly balance short-term need against the long-term health of the nation's fisheries.

### C. Case Study: The North Pacific Council

An examination of the controversy surrounding a recent allocation decision of the North Pacific Fishery Management Council (NPFMC) will illustrate the current criticisms of the existing checks on the Councils. In 1991, following precedent set by the Pacific Fishery Management Council,<sup>184</sup> the NPFMC decided, by a 9-2 vote, to divide pollock and cod allocations between the shore-based processors and

183. The 1990 amendments to the MFCMA clarify the knowledge and experience requirements of 16 U.S.C. § 1852(b)(2)(A) (1994). They also require the Secretary to develop regulations establishing criteria for assessing whether an individual satisfies these requirements. 16 U.S.C. § 1852(b)(2)(A) (1994); see 50 C.F.R. § 601.33(b) (1994). These criteria are to be used by Governors in nominating Council members. S. REP. NO. 414, *supra* note 179, at 12, *reprinted in* 1990 U.S.C.C.A.N. at 6287. In addition, Governors must now accompany their nominations with statements explaining how each individual meets the requirements set out in the MFCMA. 16 U.S.C. § 1852(b)(2)(C) (1994).

184. In March 1991, the Pacific Fishery Management Council decided to divide the West Coast whiting catch between coastal processors and factory trawlers. *Trawler Fleet Makes Waves Down Coast*, ANCHORAGE DAILY NEWS, Mar. 16, 1991, at G1. This decision was attacked on the grounds that "[a]t-sea processing interests were not adequately represented on the [PFMC] or its subcommittees," and that "[t]he Council members who supported th[e] rule ha[d] a conflict of interest." Pacific Coast Groundfish Fishery, 56 Fed. Reg. 43,718, 43723 (1991). NMFS responded by saying that:

Representatives [of at-sea processors] have been welcome at, and participated, in Council and subcommittee meetings at which this allocation was derived. . .

. . . Due to the number and diversity of issues facing the Council, not all interest groups can be represented on the Council at one time.

. . . [T]he Council is made up at least partly of representatives of various fisheries. Their participation in . . . management actions, after proper disclosure, is anticipated . . . and does not constitute a conflict of interest. . . .

NMFS is aware of the composition of the Council and performs its own review of the record for fishery regulations.

*Id.*

factory trawlers operating in the areas.<sup>185</sup> The shore-based processors were allocated thirty-five percent of the Bering Sea and Aleutian Island pollock quotas in 1992 and forty percent in 1993. The Gulf pollock was entirely allocated to the onshore processors as well as ninety percent of the Gulf cod take.

Dubbed the "Shoreside Preference Amendment" by one commentator, this allocation was widely criticized by the Seattle-based trawlers and their supporters.<sup>186</sup> There were allegations that the Council decision mainly benefitted Alaska shoreside processing plants owned by the Japanese companies responsible for overfishing in the international waters of the Central Bering Sea and penalized the "U.S. factory trawler fleet that Americanized the domestic pollock fishery."<sup>187</sup> Critics of the decision also pointed to the fact that Washington stood to lose over 1,000 jobs as a result of the allocation<sup>188</sup> and that the decision could mean higher prices for fish by curbing the free market.<sup>189</sup>

185. T.A. Badger, *Council's Cod, Pollock Allocations Irk Some Processors*, ANCHORAGE DAILY NEWS, June 29, 1991, at B1; John Iani, *Facts Omitted, Motives Unquestioned in Fishery Articles*, SEATTLE TIMES, Dec. 18, 1991, at A7. Despite written opinions by the Commerce Department's Inspector General and the antitrust section of the Justice Department that the allocation program was unjustified, it was eventually approved in part by NMFS. NMFS rejected the post-1992 increases of the inshore allocation. *Groundfish of the Gulf of Alaska; Groundfish Fishery of the Bering Sea and Aleutian Islands*, 57 Fed. Reg. 23321 (1992). See David Whitney, *Justice Department Puts Another Nail Into Pollock Plans*, ANCHORAGE DAILY NEWS, Feb. 7, 1992, at C2; David Schaefer, *U.S. Urged to Reject Proposal to Split Alaska Pollock Catch*, SEATTLE TIMES, Feb. 22, 1992. On June 14, 1995, the NPFMC voted to extend the allocation plan for three years. The AFTA said that it would support the extension. *Fish Council OKs Quota Extension*, ANCHORAGE DAILY NEWS, June 15, 1995, at F1.

186. Robert F. Morgan, *Compass Decision Favors Foreign Trawlers, Snubs U.S. Fleet*, ANCHORAGE DAILY NEWS, Oct. 29, 1991, at B5 (author is president of American Factory Trawler Association).

187. *Id.*; see also Duff Wilson, *A Fishy Situation*, SEATTLE TIMES, Nov. 10, 1991, at A1, A18 reprinted in *Conflict Hearing*, *supra* note 1, at 35. (\$250 million of annual fish product shifted from Seattle-based floating factory fleet to a largely Japanese-owned processing industry on the Alaska shore).

188. Wilson, *supra* note 187, at A18.

189. *Id.*

When the allocation decision was made, Joseph Blum, then Director of Washington's Department of Fisheries, noted that: "[t]he numbers adopted . . . will basically make a major economic allocation to one segment of the industry . . . that isn't the free market system." Badger, *supra* note 185, at B1. Blum later became the executive director of AFTA. See Tom Brown, *Pollock Allocation Plan Extended*, SEATTLE TIMES, Aug. 6, 1992, at D1.

Supporters of the Council's decision countered the trawlers' attack. In one editorial, John Iani, president of the Pacific Seafood Processors Association, questioned the motives of the trawlers.<sup>190</sup> He accused them of "Japan-bashing" and pointed out that the allocation made was between the offshore trawlers and, not the inshore processors, but the vessels servicing them, mostly American-owned vessels based in Washington.<sup>191</sup> He argued that jobs lost by the allocation measure would be offset by jobs created in the inshore-sector,<sup>192</sup> and that the allocation need not result in higher fish prices.<sup>193</sup> Iani pointed out the conservation-minded motives behind the allocation,<sup>194</sup> for example, the fact that trawler-processing tends to produce more waste than onshore processing. He argued that the Council spent two and one-half years studying the resource and came to the conclusion that, in the absence of some sort of allocation, factory trawlers "would take all the available fish . . . and move on, resulting in the collapse of entire fishing ports."<sup>195</sup> He

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A free market system would benefit the factory trawlers: "[T]he factory trawlers, which are able to catch and process the fish on the fishing grounds while the catch is freshest, were likely to win a competitive battle with onshore plants that must rely on catch brought to them over often considerable distances by catcher boats." Tom Brown, *Fishing for Answers: Pollock Season at Hand, but Factory-Trawler Fleet is Facing Stormy Seas*, SEATTLE TIMES, May 31, 1992, at C1.

190. Iani, *supra* note 185, at A7.

191. *Id.*; see also Christopher Connell, *Bush Campaign Aide Wades Into Lobbying Battle Over Fish Processing*, Associated Press, Jan. 9, 1992, reprinted in *Conflict Hearing*, *supra* note 1, at 63 (inshore processors' representative argues that there is foreign investment in both the onshore and factory trawler industry); Tom Kenworthy, *Bush Campaign Aide Seeks Break for Japanese*, WASH. POST, Jan. 9, 1992, at A12 reprinted in *Conflict Hearing*, *supra* note 1, at 56 (in opinion of Washington state official, it was "phony argument" to characterize the dispute as one between U.S. and foreign interests. "It's a tossup. . . . There's foreign investment in both places.")

192. *But see* Connell, *supra* note 191, at 63 (trawler representative argues that the jobs in the onshore sector would be lower-paying jobs).

193. *Id.* (Trawler representative argues that the proposed allocations would cut revenues by 30 percent).

194. In fact, as reported during the controversy: "The Council does get high marks for conservation. The panel routinely votes for a lower cap on fishing than scientists say they need to preserve the stock in the Gulf of Alaska and Bering Sea. Other Councils, notably in New England, have allowed overfishing to the point of depletion." Wilson, *supra* note 187, at A19.

195. Iani, *supra* note 185, at A7. The effectiveness of the allocation measure from the standpoint of conservation has been questioned. For example, the Justice Department, in written comments to the Commerce Department, agreed that "there are problems with the present 'Olympic system' under which the council sets a total harvest

accused the factory trawlers, “[w]ith a fleet large enough to harvest more than three times the existing pollock quota,” of wanting “all the fish.”<sup>196</sup>

Such claims by the measure’s supporters that it was soundly grounded did not prevent allegations of conflict of interest on the Council from being central to the debate. By and large, the factory trawlers charged that the MFCMA had inadequately insulated the allocation decision from the financial conflicts of its members. First, the provisions of the MFCMA providing for fair apportionment were seen as having failed. The NPFMC was charged with being “dominated by Alaskans and by members who work for fish-processing companies.”<sup>197</sup> The general view of the factory trawlers was summarized thus: “[p]eople talk about the fox guarding the hen house . . . what we’ve got here is a few roosters divvying up the hens.”<sup>198</sup> Second, they felt that Secretarial review would not be effective, noting that, although the Secretary nominally makes the final decision, “the [S]ecretary . . . almost never overrules a Council decision and is not expected to do so in this case.”<sup>199</sup> Finally, they were not confident that the safeguards against Council members acting to benefit their own financial self-interest were adequate to make the decision-making process fair. As one commentator pointed out:

Four of the 11 Council members own fishing businesses. Two are industry group employees. One is a consultant who makes

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volume benefiting those who can catch the most fish the fastest. . . . [C]ompanies competing in that system, whether they operate factory ships or shore-based plant, are encouraged to spend more . . . so that they can take a greater share of the quota.” David Whitney, *Justice Department Puts Another Nail Into Pollock Plans*, ANCHORAGE DAILY NEWS, Feb. 7, 1992, at C2. However, the comments went on to say that “[a]ll the Council’s allocation plan would do . . . is create a two-class Olympic system where the same inefficiencies persist” and to recommend Individual Transferable Quotas (ITQs) as the solution. *Id.*

196. Iani, *supra* note 185, at A7.

197. Ross Anderson, *Fishy Business: Seattle Fishermen Urge Using Market to Allocate Resource*, SEATTLE TIMES, Nov. 10, 1991, at E1.

As noted later, the issue of council reform in the North Pacific became somewhat of a geographic war between Alaska and Washington. *North Pacific Fishery Council Conflicts of Interest Should be Eliminated*, SEATTLE TIMES, Mar. 5, 1993, at A6; *see also Fishery Panel Overhaul Sought*, ANCHORAGE DAILY NEWS, Mar. 4, 1993, at D1.

198. Anderson, *supra* note 197, at E1.

199. Wilson, *supra* note 187, at A18; *see also* Kenworthy, *supra*, note 191 at A12 (Secretary rarely rejects the decisions of the eight regional councils).

no secret of the fact he hopes to make money off his inside expertise. . . . [Although Council members] are required to file financial disclosure statements and take an oath to vote in the national interest . . . some . . . say the national interest is often equivalent to their own business interest.<sup>200</sup>

In November 1991, the American Factory Trawlers Association (AFTA) approached the Department of Justice and the Department of Commerce Inspector General "to try to have conflict-of-interest charges investigated."<sup>201</sup> These charges focused mainly on three individuals. One Council member was charged with changing his vote on a measure opposed by crab operators shortly after taking a consulting job from that group.<sup>202</sup> One was charged with voting "to allow Japanese fishing companies to take 10 million pounds of cod from the U.S. fishing zone after he struck a private deal for his company to sell them a million pounds of cod fillets."<sup>203</sup> The latter was said to have benefitted from the Council's definition of "inshore" facility. Allegedly, another member voted in favor of defining such facilities in a manner tailor-made to permit his three boats to fish the resources allocated to the inshore industry.<sup>204</sup> In addition, several former Council staff members were accused of conflicts.<sup>205</sup> An investigation was conducted.<sup>206</sup>

The legal interpretation of the case by the Inspector General's General Counsel centered on the federal regulations exempting Council members from the federal conflict of interest statutes if they disclose that the financial interests they hold may come within the jurisdiction of the Council.<sup>207</sup> Council employees are generally prohibited by those regulations from maintaining financial interests that conflict with the fair

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200. Wilson, *supra* note 187, at A1, A18.

201. *Id.* at A18.

202. *Id.*

203. *Id.* This member, Oscar Dyson, was also accused of supporting onshore allocation due to his status as a shareholder in a Kodiak onshore plant. *Id.* at A19.

204. *Id.* at A18, A19 (Council member Ron Hogge approved a plan that included trawlers less than 125 feet as part of the in-shore fleet while excluding larger competing trawlers. Hegge's trawlers are under 80 feet in length).

205. Wilson, *supra* note 187, at A19; *Conflict Hearing*, *supra* note 1, at 78.

206. See Memorandum dated June 30, 1992 from Inspector General Frank DeGeorge to General Counsel, reprinted in *Conflict Hearing*, *supra* note 1, at 77. *Government to Investigate North Pacific Fish Council*, SEATTLE TIMES, Nov. 17, 1991, at A13.

207. *Conflict Hearing*, *supra* note 1, at 79.

and impartial conduct of their duties.<sup>208</sup> Also, Council members are prohibited from participating in:

- 1) particular matters primarily of individual concern in which they have a financial interest, and
- 2) matters of general public concern that are likely to have a direct and predictable effect on their financial interests, unless that interest is in harvesting, processing, or marketing activities and has been disclosed. . . .<sup>209</sup>

The Inspector General found no violation of law in the North Pacific because the members in question disclosed their interests.<sup>210</sup> In addition, although each member had benefitted from the allocation, since the vote affected a large class of boat owners,<sup>211</sup> the matter was not a “particular matter of individual concern.”<sup>212</sup> Nor was the matter involved found to be a matter that had a “direct and predictable effect” on the members’ financial interests.<sup>213</sup>

The General Counsel noted that “[a]lthough we uncovered abuses, our investigation did not substantiate any violations of criminal laws.”<sup>214</sup> That was because “conduct that is forbidden under criminal conflict of interest laws in other contexts is permitted under the laws establishing the NPFMC and the other Regional Councils. The legal framework governing NPFMC operations makes this possible: it anticipates conflicts of interest but establishes an exempting mechanism for the Council’s voting members and Executive Director.”<sup>215</sup>

The Inspector General’s conclusion that nothing sanctionable had occurred was seen by the trawlers as masking the underlying inequity in the MFCMA’s provisions. As noted by the AFTA, “[the investigation] confirms what we were saying . . . except for the cover the Magnuson

208. 50 C.F.R. § 601.35(b)(4) (1995).

209. 50 C.F.R. § 601.35(b)(8) (1995).

210. *Conflict Hearing*, *supra* note 1, at 67.

211. NMFS records indicated that there were 95 boats of 125 feet or less engaged in the groundfish business. *Conflict Hearing*, *supra* note 1, at 81. Two of the members investigated owned such boats, defined as “inshore vessels” by the vote in question. *Id.* at 81, 83.

212. *Id.* at 67, 78-89.

213. *Id.* at 67.

214. *Id.* at 79.

215. *Id.*



Act gives these people, [their behavior] would be a serious violation."<sup>216</sup> The General Counsel for the Department of Commerce noted that its report "exposes some fundamental problems with the operations of the Fishery Management Councils."<sup>217</sup>

#### IV. RETHINKING THE REGIONAL COUNCIL SYSTEM

##### A. *The Need for Change*

As revealed by the North Pacific controversy, under the current legal structure, it is almost impossible for a Council member to have a sanctionable conflict of interest unless the individual in question personally benefits financially as a direct result of any one vote. Even in such a case, if the vote pertains to the member's interest in harvesting, processing or marketing activities and it has been disclosed, the member will still be immune from penalties for participating in the vote.<sup>218</sup>

Also revealed by the North Pacific experience is the fact that the absence of a legal violation does not equal the absence of a perceived conflict of interest. As pointed out by the Inspector General before the House Subcommittee on Fisheries Management, in spite of his finding that no legal violation had occurred, "clearly there was a perception that certain members were controlling Council actions to maximize their personal financial interests."<sup>219</sup> Thus, the problem revealed centers around the discrepancy between the public perception of the Regional Councils and the legal framework within which they work. The public defines an impermissible conflict more broadly than does the legal regime.<sup>220</sup> Thus, the integrity of that regime is called into question when

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216. Duff Wilson, *Federal Conflict-of-Interest Probe Clears Fishery Council Members: Report Cites Abuses, But Not Illegal Acts*, SEATTLE TIMES, Oct. 16, 1993, at A8.

217. *Conflict Hearing*, *supra* note 1, at 77.

218. *Id.* at 19.

219. *Conflict Hearing*, *supra* note 1, at 7.

220. For example, when studying the alleged conflicts on the Councils, the World Wildlife Fund defined an impermissible conflict as "any outside interest that impedes a council member's ability to act as a responsible steward of fishery resources and make management decisions that will result in the greatest overall benefit to the nation." MANAGING U.S. MARINE FISHERIES: PUBLIC INTEREST OR CONFLICT OF INTEREST 4 (World Wildlife Fund, 1995).

a member acts in a manner which falls into the gap between the two definitions.

In addition, there is evidence that this public skepticism regarding Council-member behavior is not unfounded. It may be based on a valid concern that the make-up of the Councils is threatening the long-term health of the nation's fisheries. A 1995 report by the World Wildlife Fund documents several instances where Council members with direct, financial interests in certain fisheries have voted in such a way as to directly undermine the long-term conservation of the resource.<sup>221</sup> Such behavior by Council members reflects an improper public/private power balance on the Councils, as free-riding by the users charged with managing the resource goes unchecked by any external force.<sup>222</sup>

Even in the face of these problems, few have suggested dismantling the Council system in favor of pure privatization or purely centralized management by the federal government. The suggestions offered to Congress as it has contemplated the reauthorization of the MFCMA consist of "a broad range of options . . . ranging from greater financial disclosure to stricter rules dictating when a member must abstain from Council activities due to his or her financial interests."<sup>223</sup> However, few have suggested that the Regional Council system itself must be abolished or even fundamentally changed.<sup>224</sup> The justification given for retaining the current system is commonly based on the supposed merits of allowing experienced and knowledgeable users a role in management.<sup>225</sup>

Allowing interested and, incidentally, knowledgeable and experienced people to make management decisions is valuable in that such a cooperative strategy may yield the economies associated with cooperative management. These include a reduction in the transactions costs associated with enforcement and enhanced data gathering.<sup>226</sup> However, when there is a widespread perception that unfair or self-serving behavior is occurring, those economies diminish.

For example, enforcement of fisheries regulations in the absence of cooperative management can be costly. "The inherent vulnerability of stocks, especially the mobile ones, to overexploitation, and the impossi-

221. World Wildlife Fund, *supra* note 220, at 25.

222. *See supra* note 13.

223. *Conflict Hearing*, *supra* note 1, at 67.

224. *Id.*

225. *Id.*

226. *See supra* notes 34-44 and accompanying text.

bility of policing large areas adequately means that government cannot manage alone even at the best of times.<sup>227</sup> Yet, the economies in enforcement gained from cooperative management<sup>228</sup> will only occur as long as the management system including users is perceived to be just. In order to gain the cooperation of fishermen, managers must maintain credibility. When that credibility is in question, the whole management system is placed in jeopardy.<sup>229</sup>

The need for such credibility has been recognized in the discussion surrounding the Regional Councils: "[I]n order to have faith in the decisions being made, the public must perceive that those in charge of approving and implementing [an FMP] are free of direct financial benefits that would influence them to favor individual benefit over the general good."<sup>230</sup> For the Council system to yield the efficiencies associated with cooperative management, public faith in the councils, especially the faith of the users of the resource,<sup>231</sup> must be restored and free-riding must be prevented. These objectives can only be accomplished by a congressional redelegation of fishery management authority. A new balance of power between the Councils and the coercive actors designed to check their authority must be created to ensure the integrity of the system.

### B. Current Legislation

There are currently two bills before Congress which attempt to deal with the fact that, despite the existence of federal management plans for most important U.S. fisheries, most of them have still become over-fished.<sup>232</sup> The two bills, H.R. 39<sup>233</sup> and S. 39,<sup>234</sup> deal with many of the

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227. Pinkerton, *supra* note 14, at 23.

228. See *supra* notes 39-44 and accompanying text.

229. Pinkerton, *supra* note 14, at 23-24.

230. *Conflict Hearing*, *supra* note 1, at 9 (statement of Frank DeGeorge, Inspector General, U.S. Dept. of Commerce).

231. "If the Council process is to be effective, public confidence in that process must be restored." *Id.* at 6 (statement of Rep. Maria Cantwell, Wash.).

232. *Reauthorization of the Magnuson Fishery, Conservation, and Management Act: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. 10 (1993) (statement of Douglas K. Hall, Asst. Secretary of Commerce for Oceans and Atmosphere, NOAA).

233. H.R. 39, 104th Cong., 1st Sess. (1995) (passed in House on October 18, 1995, referred to the Senate Commerce, Science and Transportation Committee on October 19, 1995).

problems, apart from the make-up of the Councils, thought to plague management under the MFCMA.<sup>235</sup> They both attempt to address the problems of bycatch,<sup>236</sup> overfishing,<sup>237</sup> and fishery habitat destruction.<sup>238</sup> Both bills seek to address the problems facing fishing communities and their local fleets.<sup>239</sup> They both address Individual Transferable Quota

234. S. 39, 104th Cong., 1st Sess. (1995) (reported out of committee on March 28, 1996).

235. *See generally* 141 CONG. REC. H9116-9118 (daily ed. Sept. 18, 1995) (statement of H.R. 39 sponsor Rep. Don Young, Alaska); 141 CONG. REC. S233-235 (daily ed. Jan. 4, 1995) (statement of Sen. Ted Stevens, Alaska, regarding S. 39).

236. *See* H.R. 39, *supra* note 233, § 3(c) (makes it the policy of MFCMA to encourage development of measures which minimize bycatch), § 7 (amends national standards to include minimization of bycatch), § 9 (measures to reduce bycatch must be included in FMPs to maximum extent practicable); S. 39, *supra* note 234, § 102 (purpose of management system is to encourage development in a non-wasteful manner), § 111 (FMP must assess the level of bycatch in the fishery).

237. *See e.g.* H.R. 39, *supra* note 233, § 4(b) (optimum yield redefined as number of fish necessary, in case of an overfished fishery, to rebuild the resource), § 9(a) (FMPs must include objective determinations of what constitutes overfishing in the fishery and a rebuilding program if that point is reached), § 10(e) (Secretary shall notify relevant Council of overfishing and if Council fails to develop rebuilding plan within one year, the Secretary shall take necessary action); S. 39, *supra* note 234, § 103 (redefines optimum yield in manner similar to H.R. 39), § 109 (conservation measures shall prevent overfishing and rebuild overfished resources), § 111 (FMPs must specify criteria for determining whether a fishery is overfished).

238. *See e.g.* H.R. 39, *supra* note 233, § 3(a) (amends findings of Congress to acknowledge importance of habitat loss), § 3(b) (amends purposes of the act to include the promotion of fishery habitat conservation), § 8(e) (requires increased communication with federal agencies regarding essential and other fishery habitat), § 9(a) (FMPs must include description of the essential fishery habitat for the fishery and measures to minimize adverse impacts on it), § 10 (Secretary must establish guidelines to aid Councils in describing and identifying essential fishery habitat); S. 39, *supra* note 234, § 102 (amends findings to acknowledge the damage to fish populations due to habitat loss, to recognize that national management should facilitate the protection of essential fish habitat and to recognize that one of the greatest long-term threats to fisheries is habitat loss), § 102 (amends purposes to include the protection of essential fish habitat in reviewing federal projects), § 111 (FMPs must facilitate the protection of essential fish habitat).

239. *See, e.g.,* H.R. 39, *supra* note 233, § 4(b) (redefines optimum yield to include the level of fishing that provides employment through participation of local fleets and coastal communities), § 4(b) (redefines "efficiency" to mean a level of fishing which will maximize local participation), § 9 (FMPs shall take into account the welfare of local communities), § 10 (Secretary, in performing economic analysis of plans, must consider the costs/benefits to local fleets and communities); S. 39, *supra* note 233, § 109 (amends national standards to require measures to take into account the importance of the harvest

programs,<sup>240</sup> and contain vessel buy-out programs to deal with over-capitalization.<sup>241</sup>

In addition, the bills deal with Council power and procedure. The wisdom of these proposed changes to the Council system may be the key to the success of other new measures. This is so because any new provision designed to improve fishery conservation depends for its efficacy on proper implementation by the Council system. Whether the amendments to the MFCMA will be effective, then, is arguably contingent on whether the proposed changes to the Councils, found in the bills, can bring the Council system closer to a true cooperative management system with incentives balanced so as to prevent free-riding behavior.

### 1. *Nonuser Members*

The House bill attempts to alter the character of the Councils so that all of the voting members do not have direct financial interests in the relevant fisheries.<sup>242</sup> It strengthens the language of the Act, making it a purpose of the MFCMA to "ensure that conservation and management decisions with respect to the nation's fishery resources are made in a fair and equitable manner."<sup>243</sup> It then revises the definition of a "fair and balanced apportionment" of voting seats on the Councils by directing the Secretary, to the extent practicable, to include "individuals selected for their fisheries expertise as demonstrated by their academic training,

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to fishery dependent communities).

240. H.R. 39, *supra* note 233, § 16; S. 39, *supra* note 234, § 111.

241. H.R. 39, *supra* note 233, § 17; S. 39, *supra* note 234, §§ 119, 301-305.

242. Some congressional witnesses advocated barring all members with direct financial interests from participating on the Councils. *August 1993 Hearing, supra* note 3, at 171, 178-179 (statements of Peter Foley, representing the American Fishing Tackle Manufacturers Association and the Sport Fishing Institute and Carl Safina, representing the Marine Fish Conservation Network). It was felt that participation should be left to biologists knowledgeable about the stewardship of marine resources, with very heavy advisory input from the industry. *Id.* at 179. The House provision seems to adopt the position of others who, although not willing to sever the industry from the Councils, argued that Council membership at least be explicitly balanced by the MFCMA so that the "lion's share" of people on the Council do not have a direct financial interest in Council decisions. *Conflict Hearing, supra* note 1, at 13 (statement of Frank DeGeorge, Inspector General, U.S. Dept. Of Commerce).

243. H.R. 39, *supra* note 233, at § 3(b).

marine conservation advocacy, consumer advocacy, or other affiliation with nonuser groups," when choosing the voting members.<sup>244</sup>

Currently, the FMP process provides a mechanism for the user groups represented on the Councils to develop management measures governing their own behavior and that of other users of the resource. The addition of nonusers to the Councils may serve to dispel some fears that the users on the Council are engaging in self-serving behavior to the detriment of the resource. However, the fewer users involved in creating management measures which are to be imposed on the use of a common resource, the further the management system is from an ideal cooperative management system.<sup>245</sup> Users may not see nonusers as worthy to impose restrictions on them.<sup>246</sup> For example, when the required inclusion of academics and environmentalists on the Councils was proposed by various groups during the debate over reauthorization, commercial industry representatives charged that non-industry participants would not necessarily be disinterested decision-makers, neutrally monitoring the behavior of the user members, and consistently making wise management decisions.<sup>247</sup> However, such a reaction among the users could be theoretically counterbalanced. To accomplish this, the placement of

244. H.R. 39, *supra* note 233, at § 8(b).

245. *See supra* notes 55-63 and accompanying text. In fact, it has been suggested that any change in Council membership should involve the inclusion of more active, working fishermen. *August 1993 Hearing, supra* note 3, at 229 (prepared statement of the Seafarers International Union of North America, AFL-CIO).

246. *See supra* notes 42-44 and accompanying text.

247. For example, one group argued:

[I]n addition to the commercial industry, there is a large industry that supports the sports fishermen, and there is also an environmental industry in this country, which is gaining from these issues. . . . [W]hen you talk about conflict of interest, let us make sure we talk about all of the conflicts of interest that exist, not just those for commercial fishermen.

*August 1993 Hearing, supra* note 3, at 163 (statement of Lee Weddig, representative of the National Fisheries Institute); *see also id.* at 199 (prepared statement of the Oregon Trawl Commission); *Magnuson Fishery Conservation and Management Act—Part II: Hearing Before the Subcomm. on Fisheries Management of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 52 (September 29, 1993) [hereinafter *September 1993 Hearing*] (prepared statement of Pacific Coast Federation of Fishermen's Association); *id.* at 109 (Seafood Consumers and Producers Association); *Reauthorization of the Magnuson Fishery, Conservation and Management Act: Hearings Before the Committee on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. 121 (August 19, 20, 21) [hereinafter *Alaska Hearing*] (statement of Chris Blackburn, director of Alaska Groundfish Data Bank).

nonusers on the Councils to "check" the exercise of power by the users would need to be coupled with a mechanism for user input.

One way user input could still reach the newly-composed Councils would be through an advisory panel. Each Council is currently required to maintain a fishing industry advisory committee.<sup>248</sup> These committees are to make recommendations regarding FMPs and amendments to them.<sup>249</sup> However, all of these recommendations are only to be considered advisory in nature.<sup>250</sup> Thus, while the advisory panels give the fishers input, they do not give them, under the statute, any power.

S. 39 contains a provision which would slightly alter this situation. The Senate bill would amend the MFCMA to provide for the creation of "negotiated conservation and management measures."<sup>251</sup> Whenever (1) a finite number of identifiable interests will be significantly affected by a management measure; (2) there is a reasonable likelihood that a negotiation panel can be convened with a balanced representation of persons willing to represent those interests and act in good faith to reach consensus regarding the management measure; (3) there is a reasonable likelihood that a negotiation panel will contribute to the development of the measure within a fixed period of time; and 4) the negotiation process will not unreasonably delay the development of the measure, the relevant Council may establish such a negotiation panel.<sup>252</sup> If this is done, the Council must "to the maximum extent possible consistent with its legal obligations and the best scientific information available," use any consensus reached as the basis of the management measure to be submitted to the Secretary.<sup>253</sup>

While the creation of the negotiation panels under S.39's proposed provision would be discretionary, when utilized, they would provide a mechanism for nonuser Councils, or Councils only partly comprised of users, to allow users meaningful and significant input, and to capture some of the economies associated with cooperative management. Once the panels are convened, and consensus is reached, the decisions reached by the users would have to be utilized to the "maximum extent practicable," given the duties of the Councils under the MFCMA. Such

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248. 16 U.S.C. § 1852(g)(3)(A) (1994).

249. 16 U.S.C. § 1852(g)(3)(A) (1994).

250. 16 U.S.C. § 1852(g)(4) (1994).

251. S. 39, *supra* note 234, § 110(f).

252. *Id.*

253. *Id.*

user input will likely lead to more appropriate conservation measures<sup>254</sup> and would give the individuals affected a mechanism to participate in the development of those measures.<sup>255</sup> Such a mechanism is needed in those cases where the inclusion of nonusers on the Councils would serve to decrease the credibility of Council-made management choices rather than to increase it.

Even assuming that the inclusion of nonusers on the Councils would, in some cases, help to restore their legitimacy, the amendment now proposed to achieve that end will likely fail. While the Secretary would be required, by the proposed provision, to strive to include nonuser members on the Councils, the Secretary would still be limited to choosing Council members from lists of candidates selected by the Governor of each relevant state.<sup>256</sup> These lists might be comprised solely, or mostly, of users. This would be possible under the amended act because H.R. 39 would not require Governors to nominate nonusers for Council positions. It is also probable, given that the Governors would still be required to consult with commercial and recreational fishing interests when creating the list of nominees.<sup>257</sup>

The Secretary, in the above situation, would be able to do little when faced with a list of nominees consisting solely of users. The Secretary could review the qualifications of the individuals on the list, ensuring that they were, "by reason of their occupational or other experience, scientific expertise, or training," knowledgeable about the relevant fishery resources.<sup>258</sup> However, the Secretary would not have the power, given the changes now contained in H.R. 39, to reject the list because of the absence of a "fair and balanced apportionment" among users and nonusers. In turn, a court challenge based on the proposed provision would likely fail in such a case on the basis that it was not "practicable" for the Secretary to include such members on the Council under the circumstances. Therefore, without a provision requiring Governors to nominate nonusers for Council membership, any provision requiring the Secretary to appoint such individuals may be largely ineffective.

254. See *supra* note 57 and accompanying text.

255. See *supra* note 58 and accompanying text.

256. 16 U.S.C. § 1852(b)(2)(C) (1994).

257. 16 U.S.C. § 1852(b)(2)(C) (1994).

258. See 16 U.S.C. § 1852(b)(2)(C) (1994) (the Secretary may review the list to ensure that the nominees meet the requirements of § 1852(b)(2)(A)); H.R. 39, *supra* note 333, § 8 (amends §1852(b)(2)(B) to define "fair and balanced apportionment" as including environmental/academic members).



## 2. *Recusal and Secretarial Authority*

Besides altering the Secretary's directive regarding apportionment of seats on the Councils, H.R. 39 also revises the disclosure requirements of the MFCMA and contains recusal provisions. The Senate bill contains similar provisions. Under the proposed schemes, "affected individuals" would still be able to exempt themselves from 18 U.S.C. § 208 by disclosing their financial interests according to the requirements of the MFCMA.<sup>259</sup> However, both bills narrow the definition of "affected individual" to exclude the Executive Directors of the Councils, placing them back within the reach of the federal criminal conflict statute regardless of disclosure.<sup>260</sup>

Furthermore, those Council members still qualifying as "affected individuals" would face a recusal requirement under both the House and Senate schemes. The House bill directs the Secretary and the Councils to create rules prohibiting an individual from voting on any matter in which that individual has "an interest that would be significantly affected."<sup>261</sup> Such an interest is defined as "a personal financial interest that would be augmented by voting on the matter and which would only be shared by a minority of other persons within the same industry sector or gear group whose activity would be directly affected by a Council's action."<sup>262</sup> The "interest" requiring recusal under the Senate amendments is substantially the same.<sup>263</sup>

Under H.R. 39, a voting member will be required to recuse himself or herself from voting if voting would violate the recusal rules or if the General Counsel of the National Oceanic and Atmospheric Administration or a designee determines that voting would violate those rules.<sup>264</sup> Such a determination must be made at the request of any voting member of the relevant Council.<sup>265</sup> The Senate scheme also provides for a conflict determination by an independent party. Instead of NOAA's

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259. See *supra* notes 168-169 and accompanying text.

260. H.R. 39, *supra* note 233, at § 8(i); S. 39, *supra* note 234, at § 110(g).

261. H.R. 39, *supra* note 233, at § 8(i).

262. *Id.*

263. Under S. 39, an affected individual would have to refrain from voting if a Council decision was to directly cause "an expected and disproportionate benefit, shared only by a minority of persons within the same industry sector or gear group," to a financial interest of the individual. S. 39, *supra* note 234, § 110(g).

264. H.R. 39, *supra* note 233, at § 8(i).

265. *Id.*

General Counsel, S. 39 allows for the decision to be made by a “designated official”. . . with expertise in Federal conflict-of-interest requirements.” The affected individual or the “designated official” may commence this determination.<sup>266</sup> However, S. 39 also explicitly allows a recused individual to participate in Council deliberations relating to the vote after full disclosure, including disclosure of how the member would have voted.<sup>267</sup> Therefore, while the recused individual may not vote, he or she may still potentially affect the outcome of the vote.

Under H.R. 39, those “affected individuals” who knowingly fail to disclose a financial interest or who fail to abide by the recusal rules are subject to the civil penalties set out in 16 U.S.C. § 1857.<sup>268</sup> The Secretary would also be required by H.R. 39 to remove such individuals.<sup>269</sup> S. 39 does not impose a civil penalty or removal mandate for either failure to disclose or failure to comply with the recusal requirements. However, those affected individuals who fail to disclose in accordance with the act would lose their exemption from 18 U.S.C. § 208 under both schemes and thus, be subject to criminal penalties.<sup>270</sup> In addition, under current law, while removal from the Council is not mandatory when the conflict rules are violated, as it is in H.R. 39, it is permitted when recommended by two-thirds of the Council in question.<sup>271</sup> Presumably, the Secretary would still have the discretion to remove violators of the disclosure/ recusal rules in these circumstances under S. 39.

The recusal provisions delineated in the existing bills would probably not have prevented the votes in controversy in the North Pacific. Because the allocations in question in the North Pacific affected a large class of boat owners and had no “direct and predictable effect” on the members’ financial interests,<sup>272</sup> voting would probably not have violated the recusal requirements of either H.R. 39 or S. 39. Due to the limited definitions of the “interest” that prompt recusal, the recusal requirements of both bills would only seem to affect those individuals violating the legal standards which already exist. They, therefore, do not deal with the gap between these standards and the public perception of the

266. S. 39, *supra* note 234, at § 110(g).

267. *Id.*

268. H.R. 39, *supra* note 233, § 13(b).

269. *Id.* at § 8(b).

270. 16 U.S.C. § 1852(k)(7) (1994).

271. 50 C.F.R. § 601.36 (1995).

272. *See supra* notes 210-213 and accompanying text.

Councils.<sup>273</sup> Confronting this gap, however, is crucial to restoring the credibility of the Councils in the eyes of a public that sees the existing standards as inadequate and whose faith is necessary if the Council scheme is to achieve any of the benefits from cooperative management.

While the new recusal provisions alone seem inadequate to sufficiently check the Councils, the Senate bill contains a solution with greater potential. S. 39 would redraw the line between the policy-making role of the Councils and the law-making role of the Secretary of Commerce. It fully amends § 1854, dealing with FMP review and implementation.<sup>274</sup> It simplifies the review procedure, eliminating the preliminary Secretarial evaluation required by the 1986 amendments to this section.<sup>275</sup> It then proceeds to set out a review procedure which would eliminate the presumptive validity of Council-made FMPs in the absence of prompt Secretarial action. In other words, S. 39 includes no language in § 1854 which mandates that a proposed FMP or amendment "shall go into effect" if the Secretary fails to act within the prescribed time period.<sup>276</sup> In addition, each FMP need not be accompanied by Council-created regulations. Under S. 39, Councils would be allowed, but not required, to submit regulations with each FMP.<sup>277</sup> It is also explicitly reemphasized in S. 39 that the *Secretary* has "general responsibility to carry out" the provisions of the MFCMA.<sup>278</sup>

These provisions would place the Secretary squarely back into the law-making role in the FMP process, responsible for reviewing the plans and implementing them through the creation of regulations. The Councils, as originally intended, would theoretically resume their advisory role. Therefore, whether or not interested individuals vote to further their personal interests or participate in the discussion surrounding such a vote, any Council decision which is not in keeping with the National Standards can be rejected by the Secretary and will not have a chance to presumptively take effect. Thus, S. 39 would rebalance public/private control over fishery management under the MFCMA.

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273. *Prepared Testimony of Rolland A. Schmiten, Assistant Administrator for Fisheries, NMFS, Before the House Subcommittee on Fisheries, Wildlife and Oceans, 104th Cong. (February 23, 1995), available in LEXIS, News Library, Curnws File (definition of interest requiring recusal too narrow).*

274. S. 39, *supra* note 234, § 112.

275. *Id.*

276. *Id.*

277. S. 39, *supra* note 234, § 111(c).

278. S. 39, *supra* note 234, § 112.

Such a change would be an important first step in rebuilding the integrity of the Council system in the eyes of the users and the public in general.

### 3. *Council Procedure*

Both H.R. 39 and S. 39 also seek to strengthen public access to the Council process by revising Council procedures. The House bill makes the procedural guidelines set out in § 1852 of the MFCMA, modeled after the procedures applicable under FACA,<sup>279</sup> mandatory.<sup>280</sup> It also amends the public notice requirement to require that notice of meetings be given in time to allow for meaningful public participation.<sup>281</sup> S. 39 would permit interested persons to propose to modify the agenda of Council meetings.<sup>282</sup> Both bills require interested persons submitting written or oral statements to the Councils to include a description of their backgrounds and interests in the subject of the testimony.<sup>283</sup> Both bills also increase the responsibility of the Councils to keep accurate minutes of all meetings.<sup>284</sup> Insofar as these provisions seek to aid public scrutiny of the Councils, they take important steps toward repairing their integrity.

## V. CONCLUSION

The Regional Fishery Management Council system is a unique management system with the potential to govern the nation's fishery resources, to overcome the economic incentives created by the nature of the common good being managed, and to realize the economies of the cooperative management of that resource. Originally designed to balance public and private power, the Regional Council system has evolved to a point where various checks on the private actors involved in the system have eroded, causing many in the public sphere to call for

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279. *See supra* notes 141-153 and accompanying text.

280. H.R. 39, *supra* note 233, at § 8(h).

281. *Id.*

282. S. 39, *supra* note 234, at § 110.

283. H.R. 39, *supra* note 233, at § 8(h); S. 39, *supra* note 234, at § 110.

284. H.R. 39, *supra* note 233, § 8(h); S. 39, *supra* note 234, § 110. In addition, under both bills, these minutes are to be made available to "any court of competent jurisdiction." While Council decisions are not reviewable under the MFCMA, this provision may aid a court challenge to Secretarial action on an FMP or FMP amendment.

reform.

For those checks to be reestablished, real power must be shifted away from the Councils. Recusal of those with direct, personal financial interests alone is not enough. The user-comprised Councils themselves must face increased scrutiny. A rebalance of power between the Secretary and the Councils is one way to accomplish this. Another would be to alter the membership of the Councils to include nonusers, while providing users with another mechanism through which to affect the process.

As the debate over the MFCMA reveals, the correct balance of power, where users do not feel coerced by the management system but where government is still present to check user behavior which is not in the best interest of the resource, is not obvious. Congress must strive to create such a balance if user participation in the management system is to achieve its potential. Although getting the institutions needed for cooperative management "right" is a difficult, time-consuming and conflict-invoking process, the survival of the U.S. fishing industry is well worth the effort needed to strike the correct balance.