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COMMENT

JUDICIAL REVIEW OF FISHERY MANAGEMENT REGULATIONS UNDER THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

I. INTRODUCTION

On April 13, 1976, President Ford signed into law the Fishery Conservation and Management Act of 1976¹ (FCMA) establishing a comprehensive program to manage marine fisheries within 200 nautical miles of the United States coasts. The administrative structure established to manage these resources is unique among governmental institutions.² It is composed of eight Regional Fishery Management Councils, which are responsible for formulating management plans for each fishery, and the Secretary of Commerce, who must review and approve every management proposal from each Council. From this framework will emerge fishery management schemes affecting all persons who have an interest in the fishing industry—foreign fishermen, American fishermen (whether commercial or recreational), canners, conservationists, consumers, and others.

There are many issues under the Act which may come before the courts, including the effect of the National Environmental Policy Act³ on management schemes and whether there may be judicial review of the executive branch's decisions on applications from foreign nations to fish within the 200-mile zone.⁴ But of paramount importance to

1. Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C.A. §§ 1801-1882 (West Supp. 1977)) [hereinafter cited as FCMA].

2. See Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 436 (1977).

3. 42 U.S.C. §§ 4321-4347 (1970). The preparation of environmental impact statements will require the Regional Councils and the Secretary to consider factors in management schemes that the FCMA does not require. For example, an impact statement on a management plan would be required to consider the incidental catch of a non-target species, whereas the FCMA does not require such a factor to be considered in making management decisions.

4. FCMA § 204, 16 U.S.C.A. § 1824 (West Supp. 1977). The Secretary of Commerce falls within the definition of "agency" under the Administrative Procedure Act (APA). 5 U.S.C. § 701(b)(1) (1970). Thus, because no statute precludes review of the Secretary's determinations as to foreign permits, the judicial review provisions of the APA would apply unless such action is committed to agency discretion by law,

those with a stake in the outcome of the management schemes is section 305(d) of the Act, which governs judicial review of fishery management regulations.⁵ Unfortunately, congressional discussion of this section is virtually non-existent,⁶ as the provision was a last minute addition to the Act.⁷ It is the purpose of this comment to analyze the scope of this section and to suggest some guidelines for its interpretation, recognizing, however, that such an attempt in the absence of any judicial precedent under the Act may be perilous.

II. STATUTORY PROVISIONS FOR ESTABLISHMENT OF FISHERY MANAGEMENT PROGRAMS

The legislative objective—establishing a national fishery management program—is to be implemented chiefly through the eight Regional Fishery Management Councils.⁸ Each Council is responsible for preparing and submitting to the Secretary of Commerce a fishery

id. § 701(a)(2), or is a political question. The paramount case construing the "committed to agency discretion" exception is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), where the Court stated: "the exception for action 'committed to agency discretion' . . . is a very narrow exception The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410. There clearly is law to apply under § 204 of the FCMA, and therefore the issue is whether foreign permits are in the realm of foreign relations and political questions which courts should avoid deciding. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Jensen v. National Marine Fisheries Serv. (NOAA)*, 512 F.2d 1189 (9th Cir. 1975). *See generally*, Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

5. FCMA § 305(d), 16 U.S.C.A. § 1855(d) (West Supp. 1977).

6. Only one sentence of legislative explanation exists regarding this section. *See* S. REP. NO. 94-711, 94th Cong., 2d Sess. 54 (1976). *Reprinted in* SENATE COMM. ON COMMERCE & NAT'L OCEAN POLICY STUDY, 94TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 37, 90 (Comm. Print 1976) [hereinafter cited as LEGISLATIVE HISTORY] *quoted at* note 61 *infra*.

7. The present section 305(e) regarding the Secretary's authority to promulgate emergency regulations was labelled as section 305(d) throughout the legislative proceedings. The present section 305(d) did not exist until March 24, 1976, when it was inserted by the Conference Committee Report. *See* S. REP. NO. 94-711, 94th Cong., 2d Sess. 27, 54 (1976), *reprinted in* LEGISLATIVE HISTORY, *supra* note 6, at 37, 63, 90.

The Senate version of the FCMA originally provided for the establishment of a "Fishery-Management Review Board," with exclusive and original jurisdiction over appeals from the Secretary's fishery management determinations. Appeals from this quasi-judicial body were then to be brought in the federal court of appeals for the circuit nearest the fishery involved. S. 961, 94th Cong., 1st Sess. § 204 (1975), *discussed in* S. REP. NO. 94-416, 94th Cong., 1st Sess. 38-40 (1975).

8. FCMA § 302(a), 16 U.S.C.A. § 1852(a) (West Supp. 1977).

management plan for each fishery within its geographical area of authority.⁹ The plans are required to contain a complete description of the fishery, including, *inter alia*, the fishing effort, the costs incurred in management, the revenues from the fishery, and the recreational, foreign, and Indian treaty interests involved.¹⁰ The Councils must assess and specify the present and future condition of the fishery and the optimum yield,¹¹ the capacity and extent to which American vessels will harvest the optimum yield,¹² and the portion of the optimum yield that will not be harvested and can be made available for foreign fishing.¹³ The management plans are also required to contain conservation and management measures which the Regional Council determines to be necessary and appropriate for application to foreign and domestic fishing.¹⁴ In making such determinations, the Councils must conduct regional public hearings “so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this Act.”¹⁵

After a fishery management plan is prepared by a Regional Council, it is submitted to the Secretary of Commerce (the Secretary), who reviews such plans,¹⁶ and either approves, disapproves, or partially disapproves them.¹⁷ If a Council fails to develop and submit a management plan, or fails to change a plan that has been partially or

9. *Id.* § 302(h)(1), 16 U.S.C.A. § 1852(h)(1).

10. *Id.* § 303(a)(2), (5), 16 U.S.C.A. § 1853(a)(2), (5).

11. *Id.* § 303(a)(3), 16 U.S.C.A. § 1853(a)(3). The optimum yield from a fishery is defined as:

the amount of fish—

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) 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.

Id. § 3(18), 16 U.S.C.A. § 1802(18). The Act also requires that the plans contain the specification of what the maximum sustainable yield (MSY) was determined to be, and a summary of the information used by the Council in modifying the MSY to arrive at the optimum yield. *Id.* § 303(a)(3), 16 U.S.C.A. § 1853(a)(3).

12. *Id.* § 303(a)(4)(A), 16 U.S.C.A. § 1853(a)(4)(A).

13. *Id.* § 303(a)(4)(B), 16 U.S.C.A. § 1853(a)(4)(B).

14. *Id.* § 303(a)(1)(A), 16 U.S.C.A. § 1853(a)(1)(A). Section 303(b), 16 U.S.C.A. § 1853(b) (West Supp. 1977), contains discretionary provisions which any Council may include in a fishery management plan. These provisions include, *inter alia*, limited entry programs, year and equipment limitations, zone regulations, permit and fee requirements, and incorporation of coastal state management measures.

15. *Id.* § 302(h)(3), 16 U.S.C.A. § 1852(h)(3).

16. *Id.* § 304(a),(b), 16 U.S.C.A. § 1854 (a), (b).

17. *Id.* § 304(a)(2), 16 U.S.C.A. § 1854(a)(2).

completely disapproved by the Secretary, that region's fishery management plan may be prepared by the Secretary.¹⁸ Once a management plan has been approved or prepared by the Secretary, s/he must publish the plan and any proposed implementing regulations in the *Federal Register*; interested persons will have not less than forty-five days to submit written comments.¹⁹ In addition, the Act provides that prior to promulgation the Secretary *may* schedule a hearing on the management plans or any proposed regulations.²⁰

III. LIMITATIONS ON JUDICIAL REVIEW

Generally, both Congress²¹ and the courts²² encourage and provide for broad judicial review of administrative action as an essential element of our governmental system. Congress has the power to limit judicial review,²³ but such limitation is not lightly presumed.²⁴ Section 305(d) of the Fishery Conservation and Management Act provides for a restricted review of regulations promulgated by the Secretary.²⁵

18. *Id.* § 304(c), 16 U.S.C.A. § 1854(c). Management plans prepared by the Secretary must be transmitted to the appropriate Council "for consideration and comment." The Council has 45 days within which to recommend changes; after the expiration of this period, the Secretary may implement the plan. *Id.* § 304(c)(2), 16 U.S.C.A. § 1854(c)(2). However, no limited entry system can be included in a plan without the approval of the Council. *Id.* § 304(c)(3), 16 U.S.C.A. § 1854(c)(3).

19. *Id.* § 305(a), 16 U.S.C.A. § 1855(a).

20. *Id.* § 305(b), 16 U.S.C.A. § 1855(b). Congress did not anticipate, however, that hearings would be held on management plans at this stage, as the Councils are required to hold public hearings in drawing up the plans. Similarly Congress did not seem to anticipate frequent hearings on the regulations. See S. REP. No. 94-711, 94th Cong., 2d Sess. 54 (1976), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 37, 90, quoted at note 61 *infra*.

21. The Administrative Procedure Act (APA) establishes a presumption of judicial review of agency action, "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1970).

22. See, e.g., *Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Association of Data Processing Serv. Org., Inc., v. Camp*, 397 U.S. 150, 156-57 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

23. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944). The Supreme Court has on occasion indicated that Congress could preclude any judicial review. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

24. See cases cited in note 22 *supra*. See also Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769, 791 (1958).

25. Section 305(d) of the Act (FCMA), 16 U.S.C.A. § 1855(d) (West Supp. 1977) provides:

Regulations promulgated by the Secretary under this Act shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5 [United States Code], if a petition for such review is filed within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside

Judicial Review

The limitations imposed by Congress include a narrow scope of review, a requirement that petitions for review be filed within thirty days of a regulation's promulgation, and denial of the reviewing court's authority to enjoin the implementation of the regulations pending review. Although none of these restrictions is novel by itself, and each has a supporting policy, the FCMA's combination of these restrictions is atypical.

A. *Petition for Review Must Be Filed Within Thirty Days*

Section 305(d) provides that “[r]egulations promulgated by the Secretary under this Act shall be subject to judicial review . . . if a petition for such review is filed within 30 days after the date on which the regulations are promulgated.”²⁶ Congressional imposition of time restrictions upon review is not a new concept,²⁷ and it generally has been accepted by the courts.²⁸ The rationale is that such time limits promptly resolve issues of the regulations' validity and thereby prevent delay in implementing important management programs.²⁹ It does not follow, however, that a person who fails to petition for review within thirty days of promulgation will necessarily be forever barred from contesting the validity of the regulation. The following discussion illustrates several limited instances, based on the Constitution, the FCMA, and judicial policy, when a court would not be deprived of jurisdiction even though the thirty-day period for review had run.³⁰

any such regulation on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

26. *Id.* § 305(d), 16 U.S.C.A. § 1855(d).

27. Recent statutes limiting review of agency regulations in a similar manner are the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1369(b)(1) (Supp. III 1973) and the Clean Air Amendments of 1970, 42 U.S.C. § 1857h-5(b)(1) (1970). For other statutes similarly limiting judicial review of agency orders, see Federal Trade Commission Act, 15 U.S.C. § 45(c) (1970); Securities Act of 1933, *id.* § 77(i); Securities Exchange Act of 1934, *id.* § 78(y); Public Utilities Holding Company Act, *id.* § 79(x); Natural Gas Act, *id.* § 717r(b); Federal Power Act, 16 U.S.C. § 825(1)(b) (1970); Fair Labor Standards Act, 29 U.S.C. § 210 (1970); Social Security Act, 42 U.S.C. § 405(g) (1970); Communications Act, 47 U.S.C. § 402(b) (1970).

28. *See, e.g.,* *Yakus v. United States*, 321 U.S. 414, 435 (1944) (upholding 60-day period for protest of administrator's regulations under the Emergency Price Control Act of 1942); cases cited in note 33 *infra*.

29. *See, e.g.,* *Peabody Coal Co. v. Train*, 518 F.2d 940, 943 (6th Cir. 1975) (upholding 90 day limit of FWPCA); *Granite City Steel Co. v. EPA*, 501 F.2d 925, 926 (7th Cir. 1974) (upholding the 30-day review limit of the Clean Air Act).

30. Once the 30-day period has run and deprived a court of jurisdiction, neither

1. *The requirement of adequate notice*

The regulations promulgated by the Secretary must be published in the *Federal Register*.³¹ The thirty-day time period is measured from the time the regulation is filed for publication with the office of the *Federal Register*, not from the time the regulation is actually published.³² This limited time in which an adversely affected person must file a petition for review raises the constitutional issue of adequate notice.

If a party has actual notice of a regulation, there seems to be nothing unreasonable about the thirty-day requirement.³³ The more difficult question is whether publication in the *Federal Register* alone is sufficient notice to all persons to preclude any direct challenge of the regulation after thirty days. The Supreme Court has stated that publication of regulations in the *Federal Register* gives legal notice of their contents to everyone "regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance."³⁴ There is reason to believe, however, that this statement may be too broad to apply to the FCMA's statutory provisions precluding

the Declaratory Judgment Act, 28 U.S.C. § 2201 (1970), nor the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1970) will serve as an independent jurisdictional base, as neither act confers jurisdiction on the federal courts by itself. *See, e.g.,* West Penn Power Co. v. Train, 522 F.2d 302 (3rd Cir. 1975); Getty Oil Co. (Eastern Operations) v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972).

31. FCMA § 305(a), 16 U.S.C.A. § 1855(a) (West Supp. 1977).

32. *See* Federal Register Act, 44 U.S.C. § 1507 (1970); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.10, at 399 (1958). Failure to publish as required by the Federal Register Act and § 3 of the APA are without consequence against a person having actual knowledge of a regulation. *See, e.g.,* United States v. Aarons, 310 F.2d 341 (2nd Cir. 1962); K. DAVIS, *supra* at 395-96. The Ninth Circuit Court does not follow this rule, *Hotch v. United States*, 212 F.2d 280 (9th Cir. 1954), although this holding has recently been questioned. *United States v. Monroe*, 408 F. Supp. 270, 276 (N.D. Cal. 1976).

33. The 30-day restriction of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1) (1970), has been upheld in *Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1189 (3d Cir. 1975); *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 661 (D.C. Cir. 1975); *Granite City Steel Co. v. EPA*, 501 F.2d 925 (7th Cir. 1974). *Cf.* *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972).

The 90-day restriction of the Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1) (Supp. III 1973), was upheld in *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280 (2d Cir. 1976); *Peabody Coal Co. v. Train*, 518 F.2d 940 (6th Cir. 1975).

34. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947). In this case a farmer procured crop insurance from the Federal Crop Insurance Corporation after disclosing the facts to and receiving assurance from local agents of the corporation that the crop was insurable. Neither he nor the agents knew that under a published regulation the crop was uninsurable. *See also* *Yakus v. United States*, 321 U.S. 414, 435 (1944) (publication of regulation in *Federal Register* constitutes constructive notice to start running of 60-day restriction on filing for review).

review of administrative regulations after thirty days.³⁵ First, procedural due process requires an opportunity, at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case.³⁶ It would be difficult to argue that an affected party who does not acquire actual knowledge of the existence of a published regulation within thirty days is given a meaningful opportunity to contest the regulation's validity. On this basis, the thirty-day limit might be found constitutionally infirm. A second and preferable means of dealing with this problem, suggested by several courts, avoids the constitutional issue: the thirty-day limitation period may be construed as a statute of limitations which can be equitably tolled.³⁷ Whether to toll the limitation would be within the equitable discretion of the court, but lack of actual notice should certainly be a substantial factor in favor of tolling.³⁸ This technique permits Congress to force a quick resolution of a fishery management program's validity, yet also grants courts the authority to avoid injustice in those few cases in which an aggrieved party could not be reasonably expected to have knowledge of the governing regulation.

Assuming that constructive notice and the procedural requirements

35. The *Merrill* holding requires an individual contracting with the federal government on a matter that places a burden on the public treasury to be on notice of the pertinent regulations published in the *Federal Register*. This is a substantially different issue from requiring an individual in a regulated but geographically dispersed industry to be aware of published regulations within 30 days and to have a petition filed within that time.

Although dictum in *Yakus* would seem to apply constructive knowledge to this latter situation, 321 U.S. at 435, the petitioners in that case had actual knowledge of the regulations. *Id.* Similarly, in each decision upholding the review limitations of the FWPCA or Clean Air Act, *see note 33 supra*, the petitioner had actual notice of the contested regulation.

36. *See, e.g.,* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 356 (3d Cir. 1972).

37. *See Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 291 (2d Cir. 1976) (suggested equitable tolling not followed because petitioner had actual notice of regulation); *Peabody Coal Co. v. Train*, 518 F.2d 940, 942 (6th Cir. 1975) (equitable tolling denied because petitioner had actual notice of regulation).

38. The actual opportunity to acquire notice is not limited, however, to the 30 days after the final regulations are promulgated. The Secretary must publish any proposed plan or implementing regulation in the *Federal Register* prior to promulgation, giving interested persons at least 45 days to comment and thus extending the period of constructive notice. FCMA § 305(a), 16 U.S.C.A. § 1855(a) (West Supp. 1977). Furthermore, the Secretary has the authority to schedule a full rulemaking hearing prior to the promulgation of any plan or regulation. *Id.* § 305(b), 16 U.S.C.A. § 1855(b). In such instances an affected party might have even greater opportunity to acquire notice, and an aggrieved party will be more likely to have actual notice of an adverse regulation. This extended duration would also make it more reasonable to find constructive notice to be binding.

of the FCMA are sufficient legal notice to start the thirty-day limit running, constitutional challenges to the promulgated regulations should also be precluded. For the thirty-day period to withstand due process attack, it must be reasonable.³⁹ If it is reasonable to preclude non-constitutional challenges after thirty days, it would also seem reasonable to preclude constitutional challenges.⁴⁰ In other words, if Congress can successfully withdraw jurisdiction to review administrative regulations from the courts after thirty days it can do so for all issues.⁴¹

2. *Collateral attack on a regulation as a defense in an enforcement proceeding*

A fisherman or other party could collaterally challenge the validity of a regulation if he violates it⁴² and has a civil enforcement proceeding brought against him, even though the thirty-day period has

39. See, e.g., *Yakus v. United States*, 321 U.S. 414, 435 (1944).

40. Constitutional infirmities are not necessarily any more serious than failure to comply with statutory requirements. For example, it could be far more serious for a Regional Council to grossly miscalculate the optimum yield of a fishery than to deny an affected party his procedural due process rights in a rulemaking proceeding.

The FCMA purports only to limit challenges of regulations promulgated under the statute, not challenges to the legislation itself. Thus, although the Supreme Court has held that in such a situation there can be no preclusion of review of the constitutionality of the legislation, *Johnson v. Robison*, 415 U.S. 361 (1974), "this does not disturb the rule that decisions . . . made *under* the statute" are unreviewable to the extent Congress prescribes. *Perry v. United States*, 527 F.2d 629, 636 n.5 (Ct. Cl. 1975). *Accord*, *Weinberger v. Salfi*, 422 U.S. 749 (1975).

41. An exception to the general validity of a legislative denial of review is illustrated by the Supreme Court's decision in *Oestereich v. Selective Serv. System*, 393 U.S. 233 (1968). In the companion case of *Clark v. Gabriel*, 393 U.S. 256 (1968), the Court had held that conditioning judicial review on the risk of incurring a substantial penalty in an enforcement proceeding did not amount to "no review at all" and did not violate due process guarantees. *Id.* at 259. The exception to this rule, set forth in *Oestereich*, is that where an agency makes a "clear departure . . . from its statutory mandate" or acts in a "blatantly lawless manner," a court will entertain review of the action. 393 U.S. at 238. *Accord*, *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970). See also *Hykel v. Federal Sav. & Loan Ins. Corp.*, 317 F. Supp. 332 (E.D. Pa. 1970).

42. See, e.g., *United States v. McCrillis*, 200 F.2d 884 (1st Cir. 1952) (in absence of legislative intent to the contrary, failure to pursue an administrative remedy does not preclude a defendant in an enforcement proceeding from challenging the validity of a regulation). *Accord*, *Yakus v. United States*, 321 U.S. 414 (1944). In this case the Supreme Court held that if an aggrieved party failed to contest the validity of a war time price regulation within the prescribed time in the Emergency Court of Appeals, it could not challenge the regulation in an enforcement procedure in a federal district court. The Court held that because Congress intended to confer exclusive jurisdiction on the Emergency Court of Appeals to determine the validity of any regulation or order promulgated under the Emergency Price Control Act of 1942, the federal district courts had no such authority. In contradistinction, the FCMA does not provide separate courts for preenforcement review and enforcement proceedings.

run.⁴³ Section 305(d) merely precludes direct attack on the regulation within thirty days of promulgation; it makes no mention of barring collateral attack in an enforcement proceeding.⁴⁴ Because Congress could have raised such a bar, it would be inappropriate for a court to rebut the presumption of reviewability⁴⁵ and bar such an attack by implication.⁴⁶ Furthermore, the opportunity for such collateral attack may be sufficient to make the otherwise restricted review procedure "meaningful" for due process purposes.

The consequences of failing to meet the thirty-day limitation are magnified when it is realized that only those persons who will be in a position to violate the regulations will have a chance to collaterally attack them. Thus, for example, conservationists who claim that the regulations overestimate the optimum yield, or sport fishermen who claim that their interests were not taken into account, may have no opportunity to assert a regulation's invalidity after the thirty-day period. If it is true, as some observers believe, that industry interests are dominant among appointed members of the Regional Councils,⁴⁷ such a result could further favor the interests of the industry at the possible expense of environmental, consumer, and other interests. Furthermore, when a party is in the position of having neither actual notice of a regulation nor opportunity to attack a regulation collaterally in an enforcement proceeding, the argument that there has been a deprivation of the due process right to a meaningful hearing is greatly strengthened.

3. *Challenges based on information acquired after thirty days*

Instances may arise where the grounds for challenging an imple-

43. FCMA §§ 308, 310, 16 U.S.C.A. §§ 1858, 1860 (West Supp. 1977). Any person prosecuted for a criminal offense under § 309, 16 U.S.C.A. § 1859, would not be in a position to collaterally attack a regulation, because none of the offenses proscribed therein deal with violations of regulations per se.

44. In this regard the FCMA noticeably differs from the FWPCA and Clean Air Act Amendments of 1970. See note 27 *supra*. The FWPCA states: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(1)(a) (Supp. V 1975). Nearly identical language was used in the Clean Air Amendments. See 42 U.S.C. § 1857h-5(b)(2) (1970).

45. See cases cited in note 22 *supra*.

46. See, e.g., *Hykel v. Federal Sav. & Loan Ins. Corp.*, 317 F. Supp. 332, 336 (E.D. Pa. 1970).

47. See Pontecorvo, *Fishery Management and the General Welfare: Implications of the New Structure*, 52 WASH. L. REV. 641 (1977).

menting regulation or management plan do not exist until the thirty-day period for review has expired. In such cases, section 305(d) provides little help.⁴⁸ On its face, this section would seem to preclude any review of the matter; however, section 302 of the Act provides that the Regional Councils are required to "review on a continuing basis, and revise as appropriate" the assessment and specification of optimum yield, as well as the capacity and the harvest of the fishery by both foreign and domestic fishermen.⁴⁹ Although this section does not expressly require a Council to review the more detailed regulations, if any, which it proposed to the Secretary,⁵⁰ such review could arguably be required.⁵¹ More importantly, if a Regional Council should fail to revise a plan or regulation despite changed conditions, the Secretary has the authority to do so.⁵²

The Act thus clearly provides an administrative structure to remedy any shortcomings of management schemes made visible by newly acquired information. When such information becomes available, an aggrieved party should be barred from directly challenging a plan or regulation in a judicial proceeding until he has exhausted the available administrative remedies.⁵³ The reasons for requiring exhaustion in

48. The Act makes no reference to such a situation. In comparison, both the FWPCA and Clean Air Amendments provide for judicial review of regulations after the 30- or 90-day time limit has expired, if the petition is based solely on grounds arising after the limit has expired. See 33 U.S.C. § 1369(b)(1) (Supp. III 1973); 42 U.S.C. § 1857h-5(b)(1) (1970).

49. FCMA § 302(h)(5), 16 U.S.C.A. § 1852(h)(5) (West Supp. 1977).

50. Section 302(h)(5), 16 U.S.C.A. § 1852(h)(5), only requires review of assessments and specifications made pursuant to § 303(a)(3) and (4), not § 303(b). Section 303(b) contains the discretionary provisions within a Regional Council's authority, including, *inter alia*, catch and gear restrictions and limited access systems.

51. Section 302(h)(6), 16 U.S.C.A. § 1852(h)(6), states that each Council shall "conduct any other activities which are required by, or provided for in, this Act or which are necessary and appropriate to the foregoing functions." (emphasis added).

52. Section 304(c), 16 U.S.C.A. § 1854(c) provides: "The Secretary may prepare . . . any amendment to [a fishery management] plan . . . if—(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time . . . any necessary amendment to such a plan . . ." The Secretary's authority to promulgate regulations is found at *id.* § 305(g), 16 U.S.C.A. § 1855(g).

53. The Supreme Court has stated: "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972).

The distinction between the management plan and implementing regulations may be significant vis-a-vis the exhaustion doctrine. The primary responsibility for creation and review of the plans is with the Regional Councils, and arguably they should thus be the bodies to which any claim of a material change in conditions should be brought. On the other hand, because primary responsibility for promulgation of regulations

such circumstances are: (1) The Secretary has authority to amend the plans and implementing regulations; (2) the risk of irreparable injury from pursuit of the administrative remedy is not likely to be greater than from pursuit of a judicial remedy; and (3) the subject matter involves specialized administrative understanding, and the administration should be allowed to evaluate the relevant facts first.⁵⁴

The Act provides little guidance to a party adversely affected by the failure of the Secretary to amend or promulgate a regulation in response to newly acquired information.⁵⁵ However, because the thirty-day limit applies only to promulgated regulations,⁵⁶ there would be no time bar to challenging a decision by the Secretary not to act on new information.⁵⁷ In such a case of administrative inaction, an affected party could petition the reviewing court to order the Secretary or Regional Council to consider the new information and to give a statement of reasons for its inaction. In extreme circumstances, the court might consider deciding the substantive issues itself.⁵⁸

Challenges to management schemes based upon newly acquired information, as discussed above, should be distinguished from situations in which either the Regional Councils or the Secretary possessed the information in issue but did not make it publicly available. If such information becomes available, and if it is relevant and could have had a significant effect on the content of the regulations, it should be allowed to serve as the basis for challenge to the management scheme's validity. In such a situation the reviewing court should equitably toll the thirty-day limit⁵⁹ and review the regulations on the basis of the whole record, including the information that had been withheld.

rests with the Secretary, requesting the Secretary to alter a regulation in light of newly acquired information would seem sufficient to exhaust administrative remedies.

54. See 1 K. DAVIS, *supra* note 32, § 20.03, at 652-53 (Supp. 1970).

55. The refusal or failure of the Secretary to *consider* a challenge to a regulation or plan could be overturned by a reviewing court as arbitrary and capricious action, or an abuse of discretion. See note 91 and accompanying text *infra*.

56. FCMA § 305(d), 16 U.S.C.A. § 1855(d) (West Supp. 1977).

57. The rationale supporting the 30-day limit is prevention of delay in implementing the fishery management program by requiring prompt resolution of contested issues. See text accompanying note 29 *supra*. This rationale does not exist in a situation of administrative inaction, because judicial review of a decision not to act could in no way impair a management program.

58. *Accord*, Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); see generally Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968).

59. See notes 37-38 and accompanying text *supra*.

B. *Removal of the Reviewing Court's Power to Enjoin*

In addition to limiting judicial review to those challenges brought within thirty days of a regulation's promulgation, section 305(d) of the Act also provides that "section 705 [of the Administrative Procedure Act] is not applicable,"⁶⁰ thereby depriving a reviewing court of the authority to enjoin the implementation of a contested regulation pending judicial review.⁶¹ Deprivation of the injunctive remedy is particularly significant to affected fishing interests and the regulatory authority. Issuance of preliminary injunctions could result in substantial harm to a fish stock by permitting unregulated fishing practices. On the other hand, review of a regulation without an injunctive remedy may easily last longer than a fishing season and thus result in irreparable injury to a fisherman.⁶²

It appears well settled that congressional limitation of a reviewing court's power to grant particular remedies is constitutionally valid if the opportunity for ultimate judicial determination of the regulation's validity is adequate.⁶³ As Professor Hart stated:

The denial of *any* remedy is one thing. . . . But the denial of one remedy while another is left open, or the substitution of one for another, is very different. It must be plain that Congress necessarily has

60. 16 U.S.C.A. § 1855(d) (West Supp. 1977). Section 705 of the APA provides in part:

On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal . . . , may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (1970).

61. The Conference Report on the Act stated:

Regulations to implement a fishery management plan are subject to judicial review under the Administrative Procedure Act (5 U.S.C. ch. 7) if a petition for judicial review of such regulations is filed within 30 days after the date of promulgation *except that the reviewing court is without authority to enjoin the implementation of those regulations pending the judicial review*

S. REP. NO. 94-711, 94th Cong., 2d Sess. 54 (1976), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 37, 90 (emphasis added). Thus, the power to stay implementing regulations lies exclusively in the Secretary. FCMA § 305(b)(A), 16 U.S.C.A. § 1855(b)(A) (West Supp. 1977).

62. *Cf. Washington Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 87 Wn. 2d 417, 553 P.2d 113 (1976), wherein it was stated that "[i]n legal controversies involving the validity of fishing regulations, the time between action and effect is usually so compressed that the issues are moot before the appellate process can be fully utilized." *Id.* at 422, 553 P.2d at 116 (Utter, J., dissenting).

63. *See, e.g., Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931). *See also* notes 65-68 *infra*.

a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension.⁶⁴

In *Bob Jones University v. Simon*,⁶⁵ a university which concededly refused to admit black students brought an action to enjoin the Internal Revenue Service from revoking a ruling letter declaring that the institution qualified for tax-exempt status, and from withdrawing advance assurance that contributions to the institution would be characterized as charitable. The government argued that the Anti-Injunction Act removed the reviewing court's jurisdiction to issue a preliminary injunction. Although the Supreme Court recognized the potential for irreparable injury to the university from the IRS action, it held that Congress has the power to deny a reviewing court the authority to enjoin a regulation pending review, even when substantial irreparable injury may occur to the petitioner.⁶⁶ Furthermore, the Court subsequently held that the constitutional nature of a petitioner's claim is of no consequence under a statute denying injunctive authority.⁶⁷

The rule stated in *Bob Jones* was based upon protecting the government's interest in assessing and collecting taxes "as expeditiously as possible with a minimum of preenforcement judicial interference."⁶⁸ Because the interest of the government in managing depletable common property resources with a minimum of preenforcement interference is *at least* as strong as the IRS interest in *Bob Jones*, it would seem that the FCMA's denial of preliminary injunctive relief similarly should be upheld.

The Supreme Court, however, has fashioned two exceptions when injunctions will be granted despite a statute purporting to bar the injunctive remedy. First, when an agency fails to follow statutory procedural requirements, an aggrieved party may sue for injunctive relief.⁶⁹ Second, when equity jurisdiction otherwise exists—that is, there is a clear showing of irreparable harm, *and* "it is clear that under no

64. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953). See also *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974).

65. 416 U.S. 725 (1974).

66. *Id.* at 748. This rule has been upheld repeatedly by the Supreme Court. See, e.g., *Commissioner v. Shapiro*, 424 U.S. 614 (1976); *United States v. American Friends Serv. Comm.*, 419 U.S. 7 (1974). See also *Solitron Devices, Inc. v. United States*, 537 F.2d 417 (Ct. Cl. 1976).

67. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 11 (1974).

68. 416 U.S. at 736.

69. *Laing v. United States*, 423 U.S. 161, 184 (1976).

circumstances could the Government ultimately prevail"—a court may enjoin enforcement of a contested regulation.⁷⁰ The Supreme Court recently expanded the second exception: although the petitioner still has the burden of proving irreparable injury, the government must litigate the question of whether the regulation has a basis in fact.⁷¹ Thus, while more than a good faith allegation by the government is now required, these judicial exceptions remain "narrow situations of infrequent occurrence."⁷²

A party challenging a regulation promulgated under the FCMA will rarely fall within one of these exceptions. First, the procedural requirements placed on the Councils and the Secretary are limited in scope. The primary procedural duty of the Councils is to conduct public hearings so as to allow all interested persons an opportunity to be heard.⁷³ The Secretary's principal procedural duty is to publish proposed regulations in the *Federal Register* and allow comment for at least forty-five days. Hearings on the proposed regulations are discretionary,⁷⁴ and therefore absence or denial of such a hearing would not fall within the procedural exception to the injunction prohibition. Second, for a substantive challenge to be grounds for an injunction, the government must have *no* chance ultimately to prevail. Because of the breadth of discretion granted to the Councils and the Secretary for the purpose of management,⁷⁵ it is unlikely that an injunction could be obtained on substantive grounds.⁷⁶

70. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, (1962). In *Williams Packing*, the Court also stated that a court should give "the most liberal view of the law and the facts," because "[t]o require more than good faith on the part of the Government would unduly interfere with [the objectives of the act]." *Id.* at 7. In applying this test, the Court has made clear that the "inadequacy of available remedies goes only to the existence of irreparable injury, an essential prerequisite for traditional equity jurisdiction, but only one of the *two* parts of the *Williams Packing* test." *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 11 (1974).

71. *Commissioner v. Shapiro*, 424 U.S. 614 (1976) (government must disclose the information which was the basis for its action). *See also Solitron Devices, Inc. v. United States*, 537 F.2d 417, 422 (Ct. Cl. 1976), where the court stated that *Shapiro* stands for the proposition that a mere good faith allegation by the government is not sufficient. Compare the earlier statement by the Court in *Williams Packing*, *supra* note 70.

72. *Solitron Devices, Inc. v. United States*, 537 F.2d 417, 423 (Ct. Cl. 1976).

73. FCMA § 302(h)(3), 16 U.S.C.A. § 1852(h)(3) (West Supp. 1977).

74. *Id.* § 305(b), 16 U.S.C.A. § 1855(b).

75. *See, e.g., id.* §§ 3(2), 3(18), 301, 16 U.S.C.A. §§ 1802(2), 1802(18), 1851. *See also* 41 Fed. Reg. 39,441-45 (1976).

76. For example, a litigant ultimately might succeed in proving that "the best scientific information available" was not used in formulating implementing regulations. However, no injunction would lie unless the challenger proved that the government

The denial of a reviewing court's authority to enjoin regulations preliminarily has another significant effect. The Secretary has the authority to promulgate emergency regulations which may last up to ninety days, but there is no provision requiring that an affected party or the Regional Councils be afforded a hearing or an opportunity to comment on such action.⁷⁷ With preliminary injunctive relief unavailable, there seems to be no effective means to review such regulations except in those rare situations discussed above.⁷⁸

IV. PROCEDURAL CHALLENGES TO FISHERY MANAGEMENT SCHEMES

Because the procedures which an administrative agency uses in making its regulatory determinations may be critical in the formulation of a management program, it is essential for a reviewing court to be satisfied that the agency has strictly adhered to the procedures dictated by the authorizing legislation, the Constitution, and judicial policy. After first discussing the required and discretionary procedures which the FCMA imposes on the Councils and the Secretary, this Part suggests potential bases for procedural challenges to fishery management schemes, and predicts the probable resolution of such challenges.

A. *Administrative Procedures and the Role of the Regional Councils under the FCMA*

The FCMA requires each Regional Council to:
conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this Act.⁷⁹

could under no circumstances prevail. Even though the government must disclose the information upon which it based the regulation, this is a heavy burden, especially in the preliminary stages of a court proceeding.

77. FCMA § 305(e), 16 U.S.C.A. § 1856(e) (West Supp. 1977).

78. Summary judgment generally would not be available as a remedy, because to prevail the moving party must establish that there is no "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). It is unlikely that there would be no contested issues of fact in a challenge to an emergency regulation.

79. FCMA § 302(h)(3), 16 U.S.C.A. § 1852(h)(3) (West Supp. 1977).

The term "public hearing" is not defined by the Act, but both the legislative history⁸⁰ and analogous case law⁸¹ indicate that the term expands the informal rulemaking procedures of section 553 of the Administrative Procedure Act (APA)⁸² to include a right to oral presentation. The present procedure of the Councils recognizes this and includes such an opportunity.⁸³

Less clear is the point in the development of the management plans at which such hearings are required. The present language of the Act appears to be a compromise between the House bill, which would have used hearings basically as a means of acquiring information for the Councils,⁸⁴ and the Senate bill, which granted interested parties an opportunity to comment on both the management plan and proposed regulations.⁸⁵ The result under the FCMA is that parties may be heard "at appropriate times . . . in the development [and amendment] of fishery management plans" and "with respect to the administration and implementation of the provisions of the Act."⁸⁶

After a management plan is prepared by a Council, the Secretary

80. See H.R. REP. No. 94-445, 94th Cong., 1st Sess. 65 (1975), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 1051, 1117-18.

81. *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974). In this case the court construed the requirement in the Clean Air Act that a "public hearing" be held before the EPA could promulgate a state implementation plan. 42 U.S.C. § 1857c-5(c) (1970). The court found that the term "public hearing" expanded the minimum requirements of informal rulemaking by including a right to oral presentation. 504 F.2d at 660 n.15. See also *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 (D.C. Cir. 1973).

82. 5 U.S.C. § 553 (1970). Section 553(c) provides in part:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the ruling making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

83. Interview with Professor Donald McKernan, Institute of Marine Studies, University of Washington (member North Pacific Regional Council) in Seattle (May 4, 1977).

84. House Bill provided: "Each Council shall—(A) solicit, by means of public hearings to the extent practicable, and evaluate on a continuing basis, comments and recommendations from all interested persons in the geographical area concerned with respect to the administration and implementation of the provisions of this Act." H.R. 200, 94th Cong., 1st Sess. § 303(g)(1) (1975), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 753, 792.

85. Senate Bill 961 provided that each Council "shall conduct public hearings, at appropriate times and in appropriate locations, so as to allow all interested persons an opportunity to be heard on (A) the overall fishery management plan; (B) any separate management program; (C) recommended regulations; and (D) any amendments to regulations." S. 961, 94th Cong., 1st Sess. § 202(c)(7) (1975), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 699, 710.

86. FCMA § 302(h)(3), 16 U.S.C.A. § 1852(h)(3) (West Supp. 1977).

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approves or disapproves the plan.⁸⁷ If approved, it is published in the *Federal Register* along with any accompanying regulations which may be approved or prepared by the Secretary.⁸⁸ Following publication, interested parties must be afforded at least forty-five days to submit written "data, views, or comments."⁸⁹ It is then within the discretion of the Secretary whether to schedule a hearing in accordance with section 553 of the APA on the proposed management plan or regulations.⁹⁰

B. The Role of the Secretary

1. The decision to hold a hearing

Like any exercise of discretion, the Secretary's decision whether to hold a hearing on a proposed regulation or management plan may be reversed by a reviewing court if it is found to be arbitrary, capricious, or an abuse of discretion.⁹¹ Additionally, a body of administrative common law has developed under which such discretion can be con-

87. *Id.* § 304(a), (b), 16 U.S.C.A. § 1854(a), (b).

88. The Regional Councils may prepare proposed regulations to implement the management plans, and they must be approved by the Secretary. *Id.* § 303(c), 16 U.S.C.A. § 1853(c). The Secretary may also prepare regulations to implement the plans, *id.* § 305(a), 16 U.S.C.A. § 1855(a), and there is no requirement that the Regional Councils review them prior to promulgation.

89. *Id.* § 305(a), 16 U.S.C.A. § 1855(a).

90. *Id.* § 305(b), 16 U.S.C.A. § 1855(b). The hearings the Secretary is empowered to hold are procedurally less formal than those held by the Councils. The Act defines them as § 553 notice and comment hearings under the APA, which do not require any oral presentation. See note 82 *supra*.

The doctrine of exhaustion of administrative remedies should not prevent an affected party from seeking a hearing from the Secretary, even when that party did not raise the grounds for challenge at the Council hearing level. The exhaustion doctrine, when applied, is used to deny judicial relief until administrative remedies have been exhausted. See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 424-58 (1965); 3 K. DAVIS, *supra* note 32, at § 20 (1958). In the situation discussed here, the Secretary is the last step in the administrative process prior to judicial review, and neither the management plan nor the regulations are final. There is no significant risk of substantial delay or cost in holding a § 553 hearing, and there is no statutory requirement that a party utilize the Council hearings. Furthermore, there may be times when the plans or regulations finally proposed to the Secretary differ significantly from those discussed at the Council hearings. Finally, the exhaustion requirement is more appropriate for adjudicatory hearings than legislative rulemaking.

91. The Administrative Procedure Act provides that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A) (1970). See Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 *DUKE L.J.* 51, 73; Williams, "Hybrid Rulemaking" Under the *Administrative Procedure Act: A Legal and Empirical Analysis*, 42 *U. CHI. L. REV.* 401, 411-12 (1975).

fined by requiring more extensive procedures than those prescribed by the APA or the statute governing the agency. Such action may be ordered in the interest of fairness,⁹² or when the record is inadequate for meaningful judicial review.⁹³ The Conference Report on the Act provides some guidance as to when a hearing should be held by the Secretary:

The conferees anticipate that the Secretary will not normally hold hearings on fishery management plans prepared by the Regional Fishery Management Councils inasmuch as the plans (and amendments thereto) are themselves the product of mandatory public hearings by the Councils. However, hearings may be appropriate in cases (1) in which written submissions are received asserting that the proposed regulations are inconsistent with the plan to be implemented thereby, (2) in which the plan was prepared by the Secretary himself . . . , or (3) in which there are controverted issues of material fact.⁹⁴

This statement indicates, *inter alia*, that the conferees anticipated that the Secretary would hold hearings on plans s/he prepared more frequently than on plans prepared by the Councils. Despite these guidelines, however, the statutory purpose of the discretionary hearings by the Secretary is unclear.

The legislative history is not particularly helpful in deciphering Congress intent. The language of section 305 was derived from the House bill,⁹⁵ the first part of which was in effect identical to the present section 305(a): it provided for the publication of proposed regula-

92. See, e.g., *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1015-16 (D.C. Cir. 1971), *discussed at* notes 120-21 and accompanying text *infra*; *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 632 (D.C. Cir. 1966).

93. See, e.g., *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 636 (2d Cir. 1976) (if an agency is going to rely on scientific literature it must specify what is employed so that affected parties and the reviewing court may trace its reasoning and application); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Dry Colors Mfrs. Ass'n v. Department of Labor*, 486 F.2d 98, 105-06 (3d Cir. 1973); *Kennecott Copper Corp. v. EPA* 462 F.2d 846 (D.C. Cir. 1972).

94. S. REP. NO. 94-711, 94th Cong., 2d Sess. 53 (1976), *reprinted in* LEGISLATIVE HISTORY, *supra* note 6, at 37, 90.

95. H.R. 200, 94th Cong., 1st Sess. § 307 (1975), *reprinted in* LEGISLATIVE HISTORY, *supra* note 6, at 753, 803-06. Senate Bill 961 established a different but simpler procedure for the Secretary's review of proposed regulations. First, the Secretary was to determine if the regulations were consistent with the national standards. If consistent, the Secretary would adopt and publish them, and give a notice of proposed rule-making. This notice was to request comment, designate the fishery regulated, summarize the recommendations of the Councils, and describe where and why the proposed regulations differed from those recommended by the Councils. The Secretary was

tions and plans, and a forty-five-day minimum period for comment.⁹⁶ The present section 305(b), however, differs from the original House bill, which provided that if any adversely affected citizen of the United States, or any State, requested a hearing on a proposed regulation, the Secretary was *required* to hold a “public hearing” in accordance with section 553 of the APA “for the purpose of receiving information relevant to the matters identified in the notice of hearing.”⁹⁷ After the hearing, the Secretary was to make a determination and include a statement of her/his reasons for the determination.⁹⁸

The present language of section 305(b) eliminates the House bill’s bar to foreign interests seeking review, the mandatory hearing upon request by an adversely affected party, the “public hearing” language, and the required statement of reasons for decision. Much of the purpose of the hearing provision was thus eliminated, with the result that its only rational function can be to resolve serious disputes over the implementing regulations and management plans which have not been adequately resolved either at the Council level or through the forty-five-day comment period.

2. *Remand to the Secretary*

Under the bifurcated administrative structure of the FCMA, the Secretary is the final arbiter in the promulgation of fishery management measures, as s/he must approve all management plans and implementing regulations. Furthermore, the Secretary is responsible for ensuring that the management schemes are consistent with legislative standards, that the reviewing court is presented with an adequate record, and that affected parties have an opportunity both to be informed of and to contest proposed management measures. As a result, any procedural or substantive defects found by a court should be returned to the Secretary for curative action.⁹⁹ In this respect, the Secretary

also authorized to promulgate regulations independently of the Councils. See S. 961, 94th Cong., 1st Sess. § 203(c),(d) (1975), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 699; 712–13.

96. See H.R. 200, 94th Cong., 1st Sess. § 307 (1975), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 753, 803–06.

97. *Id.* § 307(c). The hearing requirements for the Regional Councils were set forth in *id.* § 303(g), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 792–93.

98. *Id.* § 307(c), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 804.

99. In many situations a remand to the Secretary for explanation may be sufficient to assure the court that the action taken was proper. But in those situations

may act as a buffer between the courts and the Regional Councils. Remand to the Secretary, who is backed by the technical expertise of the National Marine Fisheries Service, will remedy defects in a management scheme more expeditiously than beginning the administrative process anew by remand to the Councils. The following is a discussion of several potential areas in which procedural defects may arise and thus where it would be appropriate for a reviewing court to remand a contested regulation to the Secretary.

a. *Fairness and administrative bias*

"The most basic concept of conflict-of-interest regulation . . . is that a public official should not be in the position of acting for the Government where his private economic interests are involved."¹⁰⁰ Although in theory a person with such a conflict of interest should be disqualified from the decisional process,¹⁰¹ the FCMA appears to create just such a situation, because persons representing interests of the fishing industry constitute a substantial proportion of the membership of the eight Regional Councils.¹⁰² The issue remains as to how a reviewing court should deal with this legislatively-created situation.¹⁰³

where the issue raised is one which neither the Secretary nor the Regional Council fully confronted, a reviewing court may determine that only a remand for further hearings will be adequate. *See, e.g.,* South Terminal Corp. v. EPA, 504 F.2d 646, 665 (1st Cir. 1974).

100. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1129 (1963). The conflict problem has been analyzed as a tension between two interests:

[O]ne is the interest of the government official (and of the public) in the proper administration of his office; the other is the official's interest in his private economic affairs. A conflict of interest exists whenever these two interests clash, or appear to clash.

A conflict of interest does not necessarily presuppose that action by the official favoring one of these interests will be prejudicial to the other, nor that the official will in fact resolve the conflict to his own personal advantage rather than the government's. . . . [B]ut the experience of centuries indicates that the contrary is more likely, and that affairs should be so arranged as to prevent a man from being put in such an equivocal position.

B. MANNING, FEDERAL CONFLICT OF INTEREST LAW 2-3 (1964).

101. *See generally* 2 K. DAVIS, *supra* note 32, § 12.03 at 153 (1958).

102. *See* Pontecorvo, *Fishery Management and the General Welfare: Implications of the New Structure*, 52 WASH. L. REV. 641 (1977). Professor Pontecorvo estimates that 79% of the appointed members of the eight Regional Councils are presently members of the fishing industry.

103. Section 302(b)(C) of the FCMA, 16 U.S.C.A. § 1852(b)(C) (West Supp. 1977), provides that to qualify for membership on a Regional Council a person must be "knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishery resources of the geographical area

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Courts have dealt more frequently with the conflict of interest issue in the context of adjudication¹⁰⁴ than in the rulemaking setting. Delegation of rulemaking authority to private parties has met less judicial resistance¹⁰⁵ despite the existence of potential conflicts of interest. The United States Supreme Court has not produced a satisfactory principle to govern such delegation.¹⁰⁶ The California Supreme Court, however, illustrated the division of judicial thought on this subject in the *Thrift-D-Lux Cleaners* case.¹⁰⁷ The court invalidated a statute as a standardless delegation of legislative authority,¹⁰⁸ but added as an alternative basis for its decision:

[T]he statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule . . .

. . . .
Where the legislature attempts to delegate its powers to an administrative board made up of interested members of the industry, the majority of which can initiate regulatory action by the board in that industry, that delegation may well be brought into question.¹⁰⁹

Justice Traynor, expressing the opposing view, characterized the problem as one of legislative rather than judicial concern.¹¹⁰

concerned." This definition of a qualified individual significantly restricts the number of eligible persons and forms a pool of potential Council members which may be composed predominantly of members of the fishing industry.

104. See generally 2 K. DAVIS, *supra* note 32, at § 12.03 (1958). The problem is greater in the adjudicatory setting because an individual's rights to procedural due process and a fair hearing are imperiled when the tribunal has an interest in the outcome which is adverse to that of the affected party.

105. See Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 709 (1975).

106. See Freedman, *Review: Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 331-35 (1976).

107. *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 254 P.2d 29 (1953).

108. 254 P.2d at 36. Section 301 of the FCMA sets out the standards to be followed in promulgating management plans and regulations. 16 U.S.C.A. § 1851 (West Supp. 1977). Although the standards are very broad and of little value as specific guidance, they appear sufficient, in light of an abundance of precedent, to preclude constitutional attack on the grounds of excessive or standardless delegation. See, e.g., Freedman, *supra* note 106, at 307 n.6; *South Terminal Corp. v. EPA*, 504 F.2d 646, 676-77 (1st Cir. 1974).

109. 254 P.2d at 36.

110. Justice Traynor stated:

It may be debatable whether the manifest advantages of submitting highly technical problems to an informed tribunal are outweighed by the possible danger that an agency largely composed of members representing an interested economic group may be tempted to act for selfish ends. The Legislature is free to make its choice.

254 P.2d at 41 (dissenting opinion). Cf. Jaffe, *Law Making by Private Groups*, 51

There are several mitigating, although not curative, factors under the FCMA which indicate that the courts should not disturb the statutory composition of the Councils. First, all Regional Council decisions must be reviewed by the Secretary of Commerce,¹¹¹ who presumably can scrutinize the management plans for self-serving measures.¹¹² Second, although the fishing industry may dominate the composition of the Councils, it is unlikely that the various interests representing that industry will always have the same, or even reconcilable, objectives.¹¹³

A third reason courts may not become involved in the conflict of interest issue is a judicial escape mechanism termed "the rule of necessity." This rule provides that when an administrative body is the *only* body granted authority to act by the legislature, its decisions, even if biased, will be judicially accepted.¹¹⁴ Although Congress plainly intended that the Regional Councils be the bodies primarily responsible for the promulgation of management plans,¹¹⁵ the applicability of the rule of necessity to Regional Council determinations under the FCMA is doubtful because the Secretary, untouched by the conflict of interest problem, is also given the authority to promulgate plans and regulations.¹¹⁶

Despite scholarly suggestion that it might be appropriate for courts

HARV. L. REV. 201 (1937). Thus, unlike the majority, which held that such delegation to interested persons violates due process guarantees, Justice Traynor found the composition of the regulatory board to have "no constitutional significance." 254 P.2d at 40-41.

111. FCMA § 304, 16 U.S.C.A. § 1854 (West Supp. 1977).

112. A difficulty with this argument is that the effects of the conflict of interest may not be detectable from the face of the management plan, and thus remain uncorrected. See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW—CASES AND COMMENTS* 962 (6th ed. 1974).

113. For example, while commercial and recreational fishing interests may coincide on the issue of the permissible catch by foreign fleets, they easily could differ on other issues, such as gear or seasonal restrictions. Similarly, fishermen and cannery may have inconsistent interests on various issues.

114. See McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review*, 52 TEX. L. REV. 1257, 1261-62, 1298 (1974); W. GELLHORN & C. BYSE, *supra* note 112, at 960-62; 2 K. DAVIS, *supra* note 32, § 12.04. Justification for the rule is significantly weakened when criminal sanctions may attach to violation of the regulatory scheme. See Liebmann, *supra* note 105, at 711. However, there are no criminal penalties under the FCMA for the simple violation of an implementing regulation. See FCMA § 309, 16 U.S.C.A. § 1859 (West Supp. 1977).

115. See, e.g., LEGISLATIVE HISTORY, *supra* note 6, at 451 (remarks of Sen. Hathaway); *id.* at 454-55 (remarks of Sen. Magnuson); *id.* at 845 (remarks of Rep. Leggett). See also Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 436 (1977).

116. FCMA §§ 304(c), 305; 16 U.S.C.A. §§ 1854(c), 1855 (West Supp. 1977).

to forbid agencies staffed with members of a regulated industry to promulgate standards "that promote the interests of that industry,"¹¹⁷ it seems on balance of all the above factors that the delegation to the Regional Councils should not be disturbed by judicial action.¹¹⁸ Implicit in this judgment is the proviso that "if in fact vitiating unfairness and prejudice do become manifest, the result . . . can be set aside" by a reviewing court.¹¹⁹

Because the Secretary acts as intermediary between formulation and implementation of management schemes, and has the power both to review and promulgate measures independently of the Councils, the courts should be able to deal with any conflict of interest problems through close scrutiny of the record and increased reliance on the Secretary. The procedural options available to a court reviewing an apparently biased management or regulation plan thus include remand to the Secretary for further explanation of questionable points, remand to the Secretary for further hearings on the issue, or invalidation of the management plan or regulation with a requirement that the Secretary promulgate new measures. The selection of an option should depend upon a challenging party's ability to demonstrate both the substantive impact of the conflict of interest and an adverse effect of the conflict upon himself.

In the landmark case of *Walter Holm & Co. v. Hardin*,¹²⁰ the Court of Appeals for the District of Columbia Circuit remanded a regulation limiting the size of imported tomatoes to allow an importer the opportunity to contest the regulation's validity in an oral presenta-

117. McCormack, *supra* note 114, at 1297-98. Professor McCormack also suggests that a recent United States Supreme Court decision, *Gibson v. Berryhill*, 411 U.S. 564 (1973), could be a forerunner for such a proposition. *Id.*

118. This is not meant to suggest that such a regulatory scheme is desirable as a device for legislative decisionmaking. Furthermore, the New Deal legislation invalidated by the Supreme Court as improper delegation of legislative authority to interested members of a regulated industry offers some interesting analogies to the structure established under the FCMA. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In *Schechter*, the Court responded to the government's argument that it was availing itself of the assistance of "representative members of that industry . . . the persons most vitally concerned and most familiar with its problems," 295 U.S. at 537, by stating that such delegation is "utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* Compare note 103 *supra*. In *Carter Coal*, the Court characterized the delegation of regulatory authority to producers in the regulated industry as "an intolerable and unconstitutional interference with personal liberty and private property." 298 U.S. at 311.

119. W. GELLHORN & C. BYSE, *supra* note 112, at 962.

120. 449 F.2d 1009 (D.C. Cir. 1971).

tion to Department of Agriculture officials. The statutory rulemaking procedure restricted the importer's challenge to a committee dominated by domestic agricultural producers, and thus the court found that fairness required an additional hearing:

This conclusion [to require an oral hearing before the Secretary] is undergirded by basic considerations of fairness arising out of the framework of the restriction, a statutory pattern of self-regulation by industry, and an assertion not palpably devoid of substance that the approach of the domestic producers to the factual issue, which would normally be given deference by the Secretary, is in fact a rationalized determination of a discrimination against importers.¹²¹

Because of the potential conflict of interest within the Regional Councils,¹²² the fairness doctrine of *Walter Holm* could be applied to require the Secretary to hold a hearing when noncommercial or foreign interests are able to make a potentially valid charge that a Council has proposed self-serving measures.¹²³ Regional Council determinations as to the amount of the optimum yield available to foreign fishermen could easily become a hotbed for this sort of claim.¹²⁴

121. *Id.* at 1016. Judge Leventhal, the author of the *Walter Holm* opinion, has also advocated additional procedures in the interest of fairness in other legal literature. See Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 537-40 (1974). For different perspective on fairness by another judge, see Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 379-81 (1974).

122. See Pontecorvo, *supra* note 102, at 652.

123. The distinction between regulations affecting domestic and foreign fishing was recognized by Congress in a context which supports the concept of guarding foreign interests from possible Regional Council prejudice. In its report on the Senate bill, the Senate Committee on Commerce stated: "Clearly, writing regulations which would apply to foreign fishing is more properly a function of the Federal government, rather than the councils. It is expected, therefore, that the Secretary will have more discretion with regard to these regulations to insure that they are compatible with U.S. international obligations." S. REP. NO. 94-416, 94th Cong., 1st Sess. 40 (1975), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 693.

124. FCMA § 303(a), 16 U.S.C.A. § 1853(a) (West Supp. 1977). The allocation to foreign fishermen could be reduced in three ways. First, the Councils could refuse to allocate fully the amount of the optimum yield that American vessels would not harvest. However, this seems abusive and capricious, and contrary to legislative intent. See, e.g., LEGISLATIVE HISTORY, *supra* note 6, at 899 (remarks of Rep. Ruppe). See also Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427 (1977). Second, the capacity of American fishing vessels to harvest the optimum yield could be overestimated. Third, the optimum yield figure itself could be underestimated, thus reducing the amount of fish available to foreign fishermen. This distortion would be the most difficult to remedy because it would be more difficult for a foreign fisherman to rebut the defenses of conservation and caution in managing depletable resources.

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At the very minimum, an allegation that a plan or regulation has been affected by a conflict of interest should place a greater burden on the Secretary to justify not holding a hearing.

b. Ensuring an adequate record for judicial review

An essential role of judicial review of legislative rulemaking is to ensure that the administrative agency has engaged in “reasoned decision-making”¹²⁵ and has exercised a “reasoned discretion.”¹²⁶ Without an adequate record a reviewing court will be unable to meet this task, and should remand the regulation to the agency for such further action as is necessary to convince the court that the agency has reasonably dealt with all material facts and issues.¹²⁷ This requirement of an adequate record will be examined here to determine when the Secretary may be required to hold hearings on fishery management schemes. As will be seen, the outcome of this determination may depend on whether the Secretary or a Regional Council prepared the management scheme.

The record for judicial review includes “virtually all the relevant materials that an administrator has utilized as a basis for action.”¹²⁸ Thus, the courts have regarded the information produced by informal rulemaking procedures as an integral part of the record for review.¹²⁹

125. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

126. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976).

127. Generally, in such situations a regulation remains in effect during the administrative agency's reconsideration of the record on remand. See, e.g., *Public Serv. Comm. v. FPC*, 511 F.2d 338, 342 n.14, 355 (D.C. Cir. 1975).

128. Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 Ad. L. REV. 199, 209 (1974). The reviewing court “must have not merely that full articulation of the agency's reasoning, but it must also have . . . ‘the full administrative record that was before the Secretary at the time he made his decision.’” *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973). For a discussion of the importance of the Scientific and Statistical Committees in providing a record for review, see Alverson, *The Role of Conservation and Fishery Science Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 723 (1977).

129. See, e.g., *Rodway v. United States Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1262 (D.C. Cir. 1973), *aff'd* 417 U.S. 283 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973). Professor Nathanson notes that the minimum procedural requirements of informal rulemaking, originally instruments for the education of the administrator, are now used by the courts as the basis of judicial review. See Nathanson, *Probing the Mind of the Administrator: Hearing*

In order to facilitate meaningful judicial review, moreover, the administrative agency under both the APA¹³⁰ and recently fashioned common law¹³¹ must furnish, in addition to the record, an explanation of underlying factual and policy determinations relevant to the ultimate agency decision. Detailed explanation by the agency of every step in the administrative process is unnecessary because a reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."¹³²

In the context of voluminous factual records which the regulations and management plans under the FCMA will generate, there are two reasons for requiring more than a generalized statement of reasons. First, the absence of a specific explanation places too great a burden on affected parties to ascertain and challenge the basis of the management determination. Second, requiring such an explanation prevents agency *post hoc* rationalizations that do not reflect agency reasoning at the time of implementation.¹³³

Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 COLUM. L. REV. 721, 754-58 (1975).

130. Section 553 of the APA, 5 U.S.C. § 553 (1970), provides that after receiving written comments, the agency "shall incorporate in the rules adopted a concise general statement of their basis and purpose." This originally did not require a detailed statement of findings of fact: "findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947).

It appears, however, that this is precisely what the courts now require. For example, in *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974), the court stated that the requirement of a "concise general statement" of "basis and purpose":

must be sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted. . . . In particular, the statement must advert to administrative determinations of a factual sort to the extent required for a reviewing court to satisfy itself that none of the regulatory provisions were framed in an "arbitrary" or "capricious" manner.

Id. at 739.

131. For example, in *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972), the court remanded EPA air quality standards and required the Administrator "to supply an implementing statement that will enlighten the court" as to how the EPA reached the standard from the material before it. The court did not base this requirement on the APA "basis and purpose" statement, *see* note 130 *supra*, but rather "in aid of the judicial function, centralized in this court, of expeditious disposition of challenges to standards." 462 F.2d 850. *See also* *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875, 881 (1st Cir. 1973).

132. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). *See also* *Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528, 537 (D.C. Cir. 1972).

133. Administrative agencies' *post hoc* rationalizations to support agency actions are forbidden. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 634 (2d Cir. 1976).

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The Conference Report on the FCMA suggested that it may be appropriate for the Secretary to hold hearings on proposed plans or regulations when the management measure was prepared by the Secretary her/himself.¹³⁴ If the record in such a case was created solely by the Secretary without benefit of "public hearings," it may present the most likely situation for a court to find a record inadequate to support a plan or regulation. The procedure of receiving only written comments can produce an adequate record for review only when the Secretary (a) provides affected parties the opportunity to comment on all material issues embodied in or produced by a regulation,¹³⁵ (b) gives notice of and makes available all information the agency finally decides to rely on in promulgating the measures,¹³⁶ (c) responds to all material comments made regarding the validity of the management standards or the findings relied upon in their formulation,¹³⁷ and (d) specifically explains the final administrative determination.¹³⁸

Nevertheless, the burden on the Secretary to substantiate regulatory decisions, and therefore the extent of required procedure and record, varies depending upon whether a party's challenge is to a "factual" determination or a "policy" determination.¹³⁹ Some decisions made by

134. S. REP. No. 94-711, 94th Cong., 2d Sess. 53 (1976), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 37, 90.

135. *Cf.* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 640-41 (D.C. Cir. 1973) (not only may a party challenge the bases of a regulation, but the effect of the regulation on the regulated industry may also be a grounds for challenge).

136. In South Terminal Corp. v. EPA, 504 F.2d 646, 659-60 (1st Cir. 1974), the court held that the EPA satisfied this requirement when it stated in its published notice of rulemaking that technical documents upon which it relied were available. See also National Asphalt Pavement Ass'n v. Train, 539 F.2d 775, 779 n.2 (D.C. Cir. 1976); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). See generally K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 6.01-1, at 170 (1976); Wright, *supra* note 121, at 380-81.

When an administrative body wishes to incorporate evidence from a source outside the immediate proceeding, it must provide interested parties with notice and an opportunity to comment on all such evidence. See Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973), *aff'd* 417 U.S. 283 (1974).

137. See Duquesne Light Co. v. EPA, 522 F.2d 1186, 1196 (3d Cir. 1975) (failure to investigate and resolve serious economic questions raised by objecting parties was arbitrary and capricious). *Accord*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

138. See Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974) (explanation of required basis and purpose statement in informal rulemaking). Nevertheless, review does not hinge solely on such a statement, and a court may uphold an agency determination when there is an inadequate statement "[i]n appropriate cases, if the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons." Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 537 (D.C. Cir. 1972).

139. The "factual" and "policy" terminology recently used by courts seems to

the Secretary or Regional Councils will be policy choices, in which factual information alone does not determine the choice to be made. Such decisions involve a reasoned choice between competing demands, and if the Secretary provides "adequate reasons and explanations," the decision should be upheld.¹⁴⁰ On the other hand, when a regulatory decision is based primarily on a factual determination, there is no reason to defer to an agency's determination if an affected party can show that the facts are inaccurate.

Rarely, however, will implementing regulations be based exclusively on facts or policies. An additional complicating factor is that data used in fishery management often is necessarily incomplete, resulting in the promulgation of regulations based on a combination of policy decisions and inadequate data. This creates a situation similar to that presented in *Industrial Union v. Hodgson*,¹⁴¹ in which the Court of Appeals for the District of Columbia Circuit stated:

[S]ome of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis. . . . Judicial review of inherently legislative decisions of this sort is obviously an undertaking of different dimensions. . . .

. . . [The Secretary's decision] rests in the final analysis on an essentially legislative policy judgment, rather than a factual determination, concerning the relative risks of underprotection as compared to overprotection.¹⁴²

embody much of the distinction that Professor Davis's terminology of "legislative" and "adjudicative" facts was meant to make. See 1 K. DAVIS, *supra* note 32, § 7.02 (1958).

140. *Amoco Oil Co. v. EPA*, 501 F.2d 722, 741 (D.C. Cir. 1974). Although the agency must provide an adequate record, policy decisions are generally "left to the discretion and developed expertise of the agency." *National Ass'n of Food Chains, Inc. v. ICC*, 535 F.2d 1308, 1314 (D.C. Cir. 1976).

141. *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974). In this case, the court reviewed asbestos exposure regulations promulgated under the Occupational Safety and Health Act. The exposure standard necessarily involved difficult predictions based upon imperfect or unavailable factual information. The court approved a strict standard although "the evidence did not establish any one position as clearly correct." *Id.* at 478-79. In a statement that illustrates difficulties similar to those likely to arise under the FCMA, the court noted that "reliable data is not currently available with respect to the precisely predictable health effect of various levels of exposure to asbestos dust; nevertheless, the Secretary was obligated to establish some specific level as the maximum permissible exposure." *Id.* at 475.

142. *Id.* at 474-475. *Permian Basin Area Rate Cases*, 390 U.S. 747, 811 (1968);

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Because such legislative or policy-type decisions involve more administrative discretion and thus invoke less substantive judicial scrutiny, the “record” tends to become more a vehicle for the agency to explain the rationale behind a decision that a product which may be challenged as inaccurate by an affected party.

Nevertheless, some policy decisions are founded upon facts which are ascertainable. These facts should always be subject to challenge, and when a party can show they are inaccurate, the regulation should be vacated or remanded to the agency.¹⁴³ When factual certainties do not exist, the agency must be allowed a wider leeway subject to the constraints that administrative prediction be “reasonable,”¹⁴⁴ and that the Secretary define the uncertainties and then “go on to identify the considerations . . . found persuasive.”¹⁴⁵ When the record before the court shows that this has been done, the regulation can then be substantively reviewed. If the record does not reveal full consideration and explanation,¹⁴⁶ the regulation must be remanded to the Secretary.¹⁴⁷

In summary, there is no inherent procedural defect in the forty-five day period for written comments which would *require* the Secretary to hold additional hearings when s/he alone promulgates management measures.¹⁴⁸ But the Conference Report suggestion that such addi-

Society of the Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 421 U.S. 922 (1975); *Texas v. EPA*, 499 F.2d 289, 319 (5th Cir. 1974) (administrative standards upheld even though they were based on “projections, assumptions and flimsy data,” where that was all that was “feasibly available”); *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1082–84 (8th Cir. 1974).

143. *See generally* Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 209–22.

144. *See, e.g.*, *CPC Int’l, Inc. v. Train*, 515 F.2d 1032, 1048 (8th Cir. 1975) (agency prediction overturned as unreasonable because of lack of support in the record); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (administrator’s projections are “subject to the restraints of reasonableness”).

145. *Industrial Union Dep’t, AFL-CIO v. Hodgson*, 499 F.2d 467, 476 (D.C. Cir. 1974).

146. Despite the handicaps imposed by an uncertain state of knowledge and difficult management-policy choices, adequate judicial review requires that agencies be held to “a high standard of articulation.” *Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528 (D.C. Cir. 1972).

147. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The reviewing court’s authority generally does not extend beyond vacating or remanding the administrative determination to the agency, and stating what further evidence or explanation is necessary. Absent exigent circumstances, the court cannot “proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency.” *FPC v. Transcontinental Pipe Line*, 423 U.S. 326, 333 (1976) (*per curiam*).

148. If parties are held to have a right to respond to comments received by the

tional hearings "may be appropriate" is sound procedural advice, since the required record and statement of explanation must fully explain the policy-type decisions and effectively answer all material comments regarding a management scheme's factual foundation.

c. Substantial difference between final and proposed rules

It appears settled that a new opportunity to comment on a proposed rule does not arise "merely because the rule promulgated by the agency differs from the rule it proposed, partly in response to submissions."¹⁴⁹ Even when changes in the final regulation are "substantial," the regulation may be upheld if it is "in character with the original scheme" and a "logical outgrowth of the hearing and related procedures."¹⁵⁰ The reasoning of the courts is that the administrative agency must be permitted to respond flexibly to input on proposed regulations, and that continued procedural rounds of commentary for each change would be cumbersome and of minimal value.

In the context of informal rulemaking, perhaps the only test that can be devised to determine whether a change is within permissible limits is that affected parties must be adequately appraised of the subject matter proposed to be regulated and the means proposed for regulation.¹⁵¹ Anytime affected persons are not adequately appraised of a possible major alteration of a proposed regulation, it would be arbitrary and capricious for the Secretary to deny such persons an opportunity to comment on the intended alterations, either through an additional section 305(b) hearing or through an extended period for notice and comment.

Secretary, however, difficulty may be encountered regarding notice and the 45-day period. See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 6.01.1, at 171 (1976).

149. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

150. *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974). In *Chrysler Corp. v. Dep't of Transp.*, 515 F.2d 1053, 1061 (6th Cir. 1975), the court stated that notice of proposed rulemaking is defective only when a regulation as adopted embraces "major subjects that were not described in the notice of proposed rulemaking."

151. For cases holding regulations invalid because notice of proposed rulemaking did not adequately inform interested parties of the content of the regulation, see *Rodway v. United States Dep't of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975), and *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972) (the fact that some parties appreciated the relationship between the proposal and final regulations is not relevant).

152. 5 U.S.C. §§ 551-706 (1970).

d. *Additional "hybrid" procedures*

The Administrative Procedure Act¹⁵² divides all federal agency rulemaking into informal rulemaking under section 553, and formal "on the record" rulemaking under sections 556 and 557. In formal rulemaking, regulations must be based on information developed "on the record," and must be supported by substantial evidence in the record; in addition, formal procedures such as a right to oral presentation, rebuttal evidence, and cross-examination are mandated.¹⁵³ Under informal rulemaking, interested persons generally express their views through written comments, and there is no right to an oral presentation¹⁵⁴ or to cross-examination.¹⁵⁵

Section 305(b) of the FCMA provides that the additional hearings the Secretary is empowered to hold are to be informal proceedings in accordance with section 553 of the APA.¹⁵⁶ Even though these minimum APA procedures comport with due process,¹⁵⁷ and Congress has prescribed additional procedures for informal rulemaking under certain statutes,¹⁵⁸ there is an important line of cases in which affected parties have been granted greater procedural rights than are required by statute.¹⁵⁹ These procedures range from a limited right of cross-examination¹⁶⁰ to remand for a more complete agency explanation of the decision.¹⁶¹

153. *Id.* §§ 556–557.

154. Section 553 allows for oral presentations, but the decision to hold such hearings is within the discretion of the agency.

155. 5 U.S.C. § 553 (1970). Adjudicating procedures under the APA "need be applied 'only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be "on the record."'" *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

156. FCMA § 305(b), 16 U.S.C.A. § 1855(b) (West Supp. 1977).

157. *See, e.g.*, *United States v. Florida East Coast Ry.*, 410 U.S. 224, 242 (1973). The Supreme Court has stated that due process does not require an oral hearing in rulemaking even when substantial issues are raised, and that only a case-by-case determination can determine when oral presentation is required on due process grounds. *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 276–77 (1949).

158. *See Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972).

159. For discussions of the additional procedures required by the courts, see Leventhal, *supra* note 121, at 536–41; Nathanson, *supra* note 129, at 746–62; Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Williams, "Hybrid Rulemaking" *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975); Wright, *supra* note 121, at 380–81.

160. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629–31 (D.C. Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495, 503 (4th Cir. 1973); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

161. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (general statement requirement of § 553 of the APA inadequate).

In *International Harvester Co. v. Ruckelshaus*,¹⁶² the Court of Appeals for the District of Columbia Circuit held that under a statute providing for "public hearings," the right of cross-examination would be extended to parties when there is "a need for cross-examination of live witnesses on a subject of critical importance which could not be adequately ventilated under the general procedures."¹⁶³ Unfortunately, the court offered no guidance as to what specific issues or instances give rise to a need for such cross-examination.¹⁶⁴ Similarly, a party may have a right to an oral presentation before the agency when that is the minimum procedure which will adequately present his position.¹⁶⁵

Despite the apparent importance of *International Harvester* and the "hybrid" rulemaking cases of the early 1970's, there has not been a significant increase in cases remanded for additional procedures. The explanation may be that the "hybrid" procedural concept came under critical scrutiny;¹⁶⁶ but it is perhaps more important that the burden of demonstrating when and why additional procedures are necessary rests on the challenging party,¹⁶⁷ and that only in exceptional circumstances will written comments and inquiries concerning proposed regulation be inadequate to ventilate an issue fully. Accordingly, the courts have held that hybrid procedures are not required because an informal rulemaking procedure deals with environmental, technical,¹⁶⁸ or very important issues.¹⁶⁹ Rather, such procedures have

162. 478 F.2d 615 (D.C. Cir. 1973).

163. *Id.* at 630-31. *Accord*, *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (when "a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency [to utilize adjudicatory hearings and] to lose itself in an excursion into detail").

164. The court was equally unclear in *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971), when it stated that "fairness may require an opportunity for cross-examination on the crucial issues." *See also* *O'Donnell v. Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974) where the court stated that "cross-examination may be necessary if critical issues cannot be otherwise resolved," but found no such circumstances.

165. *See* *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971).

166. *See, e.g.*, *Wright*, *supra* note 21, at 385-95.

167. *See, e.g.*, *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 633 (D.C. Cir. 1966).

168. *See* *South Terminal Corp. v. EPA*, 504 F.2d 646, 660 (1st Cir. 1974); *O'Donnell v. Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974).

169. *See* *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250, 1267 (3d Cir. 1974). *Accord*, *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949) (due process does not require oral presentation when issue raised is "substantial"). *But cf.* *Appalachian Power Co. v. EPA*, 477 F.2d 495, 503 (4th Cir. 1973), where the court stated

been ordered when the contested issue is a material factual determination, and oral presentation (or cross-examination) is the only practicable way to create a record that will enable the court to determine whether the administrative body has taken, in Judge Leventhal's words, "a hard look at the salient problems."¹⁷⁰

It appears that the desired end—an adequate record on substantial questions of disputed fact—can usually be achieved under the FCMA without resort to judicially required hybrid procedures at the Secretary's level. The "public hearing" procedures of the Regional Council generally should provide an adequate opportunity for an effective oral presentation of position. However, if the Secretary is the promulgator, or if a controverted issue of material fact¹⁷¹ arises that has not been adequately dealt with by a Regional Council, the hybrid procedural requirements may then come into play to require more than minimum APA rulemaking procedures—but only when such procedures are the only means to create an adequate record for the reviewing court.

V. SCOPE OF REVIEW—SUBSTANTIVE CHALLENGES

Before discussing the standard to be applied in substantive review of fishery management regulations, it is necessary to establish precisely what a court will be reviewing. The Act only provides for judicial review of "regulations promulgated by the Secretary"; there is no mechanism provided for the direct review of the management plans themselves.¹⁷² This does not mean, however, that the courts will never hear

that "public hearings" on state implementation plans under the Clean Air Act may "include the right to more than merely the opportunity to comment" because of the regulation's "drastic impact."

170. *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

171. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), wherein the court stated that comments by affected parties "must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." The court added that the "comment . . . must show why the mistake was of possible significance." *Id.*

172. FCMA § 305(d), 16 U.S.C.A. § 1855(d) (West Supp. 1977). This distinction is emphasized by the Conference Report:

The terms "fishery management plan" and "regulations" are not used interchangeably in this Act. In this Act, the fishery management plan is the comprehensive statement of how the fishery is to be managed, including time and area closures, gear restrictions, and the like. "Regulations" as used in this Act, means the regulations promulgated to implement what is contained in the fishery management plan.

S. REP. No. 94-711, 94th Cong., 2d Sess. 54 (1976), *reprinted in* LEGISLATIVE HIS-

challenges to the plans. Instead, the opportunity to challenge a plan is limited by requiring that a person be affected by an implementing regulation before bringing suit. A party should then be able to challenge a plan to the extent that the regulation is based on that plan. For example, if a party challenges a regulation limiting fishing effort based on a management plan's determination of optimum yield, he should have a full opportunity to challenge the optimum yield determination. Because of the determinative effect of the management plans on many issues involved in the promulgation of the implementing regulations, it would be an "empty and useless thing"¹⁷³ to review the regulations without scrutiny of the plans as well.

A. *The Standard of Review*

The FCMA provides that a court reviewing an implementing regulation is to determine whether the regulation is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."¹⁷⁴ Although Congress omitted the "substantial evidence" test as a criterion of review,¹⁷⁵ it is questionable whether in application the differ-

TORY, *supra* note 6, at 37, 90.

173. *Alabama Ass'n of Insur. Agents v. Board of Governors*, 533 F.2d 224, 235 (5th Cir. 1976). Professor Davis has stated: "When the facts are of central importance and might be challenged, parties adversely affected by them should have a chance to respond to them. Clearly, whatever factual information the agency has considered should be part of the record for judicial review of rules." K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 29.01-6, at 672-73 (1976).

174. Section 305(d) of the FCMA, 16 U.S.C.A. § 1855(d) (West Supp. 1977), incorporates 5 U.S.C. § 706(2)(A)-(D) (1970). This section of the Administrative Procedure Act provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or application of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]

(D) without observance of procedure required by law.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

175. Under the "substantial evidence" test, a reviewing court determines whether the findings of fact underlying the administrative conclusion are based upon "such

ence between the two tests is of much significance.¹⁷⁶ In *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁷⁷ the United States Supreme Court stated the standard for “arbitrary and capricious” review:

To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.¹⁷⁸

In applying this test, the courts generally immerse themselves in all of the evidence in the record to determine whether the reasoning process which the agency used is sound, and whether the conclusions are “rationally supported.”¹⁷⁹ Thus, while the review is substantial, its purpose is primarily to insure that the agency took a “hard look” at all relevant issues and engaged in “reasoned decisionmaking,” rather than

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The “substantial evidence” test, codified at 5 U.S.C. § 706(2)(E) (1970), was omitted from the standards of review under the FCMA. FCMA § 305(d), 16 U.S.C.A. § 1855(d) (West Supp. 1977).

176. Nevertheless, the difference between the two tests, as applied by the courts, is not substantial. See, e.g., *Synthetic Organic Chem. Mfrs. v. Brennan*, 503 F.2d 1155, 1158 (3d Cir. 1974); *Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1313 (1975); *Leventhal, supra* note 121, at 540; *Pederson, Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 48–49 (1975). *Accord*, 4 K. DAVIS, *supra* note 32, § 29.07, at 151–52 (“Perceptive judges can hardly be expected to sustain an order because it has basis in fact if that basis does not seem to them to be substantial”). *But see Wright, supra* note 121, at 392 (“If weightings on conflicting evidence need be only ‘reasonable’ to pass the substantial evidence test it follows that they can be less than reasonable and still survive the ‘arbitrary, capricious’ test”).

Congress apparently intended to narrow the scope of review by omitting the substantial evidence test. See S. REP. NO. 94–711, 94th Cong., 2d Sess. 54 (1976), reprinted in LEGISLATIVE HISTORY, *supra* note 6, at 37, 90.

177. 401 U.S. 402 (1971).

178. *Id.* at 416 (footnotes omitted). The definition of any standard of review is difficult “[s]ince the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951). It should be noted that there has been much discussion of the unfortunate use of the phrase “clear error of judgment.” For an excellent discussion of the effect of that terminology, see *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 n.74 (D.C. Cir. 1976) (Wright, J.).

179. In *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972), the Supreme Court described the scope of review of the Interstate Commerce Commission’s informal rulemaking as follows: “We do not weigh the evidence . . . we do not inquire into the wisdom of the regulations . . . we inquire into the soundness of the reasoning . . . only to ascertain that the [conclusions] are rationally supported.”

to review the substance of the decisions.¹⁸⁰ The Court of Appeals for the District of Columbia Circuit recently explained this process in the following manner:

The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence.¹⁸¹

If a court is satisfied that the agency has addressed all relevant issues, the substantive review is limited to determining whether there is a rational basis to the regulation or plan. If such a basis exists, the court must affirm even if it disagrees with the agency decision.¹⁸²

Administrative expertise, however, is legitimate only when the agency rationally weighs those factors and only those factors that Congress intended it consider. Thus a reviewing court could set aside fishery management regulations if (a) the Secretary excludes from consideration a factor which Congress intended to be considered,¹⁸³ (b) irrational weight is given to one or more relevant factors,¹⁸⁴ (c) the regulation is based upon consideration of irrelevant factors,¹⁸⁵ (d) the

180. The "hard look" rule of administrative law is explained by its creator, Judge Leventhal, in Leventhal, *supra* note 121, at 511-15. For Judge J. Skelly Wright's view, see Wright, *supra* note 121, at 390-95.

181. *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc) (per Wright, J.) The court went on to add: "The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors." *Id.* See also *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

182. *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc).

183. This does not mean that the Councils or the Secretary must weigh equally all factors set forth by Congress, but rather that they cannot ignore relevant factors. See, e.g., *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). See also *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974); Wright, *supra* note 121, at 379-80.

Furthermore, factors that Congress intended to be considered may be found by the courts through construction of the statute or through implication. See, e.g., *Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1194-96 (3d Cir. 1975), where the court held that EPA approval of a state implementation plan under the Clean Air Act "without investigating and resolving the serious economic questions raised by the objecting companies was 'arbitrary, capricious [and] an abuse of discretion.'" *Id.* at 1196.

184. See, e.g., L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 182 (1965).

185. *Id.* at 181. "The question of whether the action of the administrative body is within the limits of relevance is always a question for the courts, regardless of how reasonable the agency's conception of relevance may be." Jaffe, *Judicial Review: Substantial Evidence on the Whole Record*, 64 HARV. L. REV. 1233, 1259 (1951).

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regulation is founded upon improper purpose,¹⁸⁶ or (e) there is no reliable evidence supporting the Secretary's decision.¹⁸⁷ Such acts constitute abuse of discretion because the agency is no longer acting within the scope and protection of its legislative mandate. The agency's value as an expert body—the basis of judicial deference—is dissipated; furthermore, arbitrary implementation or application of a statute is contrary to due process.¹⁸⁸

A matter of particular importance under the Act is determining when the Regional Councils' and the Secretary's interpretations of the Act's management provisions are within the legislative mandate.¹⁸⁹ The Supreme Court has stated that where there is no factual dispute, the test to determine whether an administrative agency has exceeded its delegated authority is that "the validity of a regulation . . . will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" ¹⁹⁰ A party attacking a regulation on the ground that it is inconsistent with the purpose of the enabling legislation has a difficult burden of proof due to the deference often accorded the administrative interpretation of the statutory scheme.¹⁹¹ This deference

186. See, e.g., *Morrill v. Jones*, 106 U.S. 466 (1883), where Congress had authorized the Secretary of the Treasury to provide for duty free admission of animals specially imported for breeding purposes "under such regulations as he may prescribe." A regulation was promulgated that required the official concerned to be "satisfied that the animals are of superior stock adapted to improving the breed in the United States," before admitting such animals without charge. *Id.* at 466. This was held invalid as an attempt by the Secretary to use his authority for a purpose other than what the legislature intended. See also *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

187. See, e.g., *First Girl, Inc. v. Regional Manpower Admin.*, 499 F.2d 122 (7th Cir. 1974).

188. See *Berger, Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783, 785 (1966). Because laws which are arbitrary and capricious violate due process, see *Nebbia v. New York*, 291 U.S. 502, 537 (1934), the application of a law which is arbitrary and capricious should similarly be invalid. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

189. The Act's management standards are discussed in *Christy, The Fishery Conservation and Management Act of 1976: Management Objectives and the Distribution of Benefits and Costs*, 52 WASH. L. REV. 657 (1977), and *Alverson, The Role of Conservation and Fishery Science Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 723 (1977).

190. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973). See also *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607 (1944), where the agency promulgated regulations under a statute providing an exemption from the minimum wage law for "any individual within the area of production" as defined by the Administrator. The regulations established a geographical test, but also indicated that the exemption would not apply if the number of employees in the establishment exceeded seven. The Court held this regulation invalid, ruling that a numerical test was inconsistent with the intent of Congress.

191. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Talley v. Mathews*, 550

to the implementing agency's interpretation may be magnified when the statute is new,¹⁹² when the state of knowledge of the regulated subject matter is incomplete, or when a challenged regulation is part of a technical, scientific, or economic management scheme.¹⁹³ All three factors weigh in favor of deference to the decisions of the Regional Councils and Secretary under the FCMA.

It is within this framework of carefully defined deference to the administrative bodies and close judicial scrutiny of the record¹⁹⁴ that the Regional Councils and the Secretary will attempt to implement their broad legislative instructions. To illustrate the variables which may affect management determinations and which will ultimately involve judicial scrutiny and guidance, a hypothetical example regarding the determination of optimum yield will be analyzed. It does not propose to give answers to the issues which may arise in making such a determination, but is intended only to illustrate the points at which the courts may get involved.

The FCMA requires the Regional Councils to determine the optimum yield for a fishery.¹⁹⁵ The optimum yield (OY) is defined as:

the amount of fish—

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) 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.¹⁹⁶

The first stage in defining this figure is determining the maximum sustainable yield (MSY). Although this is not always a readily determinable figure, it should be roughly definable. The first issue a court will face is whether this biological determination (MSY) is consistent with

F.2d 911, 919 (4th Cir. 1977); *Florida v. Mathews*, 526 F.2d 319, 323-24 (5th Cir. 1976); *Johnson's Professional Nursing Home v. Weinberger*, 490 F.2d 841, 844 (5th Cir. 1974).

192. *See, e.g., Ethyl Corp. v. EPA*, 541 F.2d 1, 31 n.64 (D.C. Cir. 1976).

193. *See, e.g., Graham v. National Transp. Safety Bd.*, 530 F.2d 317, 319 (8th Cir. 1976).

194. *See* text accompanying note 181 *supra*.

195. FCMA § 303(a)(3), 16 U.S.C.A. § 1853(a)(3) (West Supp. 1977).

196. *Id.* § 3(18), 16 U.S.C.A. § 1802(18). The Regional Councils must prepare a summary of the information used in making such specifications. This summary must consist of more than conclusory statements as it will serve as the basis of judicial review of optimum yield determinations. *See* Part III-B-2 *supra*.

the national standard requiring that “the best scientific information available” be used.¹⁹⁷ Then the court must decide if the administrative weighing of the information was rational.

The next set of issues the court will face relates to the modification of the MSY by “any relevant economic, social, or ecological factor.” First, the court must determine whether the modifying factor used was relevant.¹⁹⁸ Second, the court must determine whether that factor, if relevant, was based on “the best scientific information available.”¹⁹⁹ Third, the court must decide if the factor was rationally used in varying the MSY. Finally, the court may be faced with assertions that one or several factors were not considered by the Councils, or if considered, were not given adequate consideration. Thus, all of these issues will receive a very close scrutiny from the courts, but only so far as to satisfy the court that the Councils and Secretary engaged in “reasoned decisionmaking” and that the scheme is supported by a rational basis.²⁰⁰

B. *The Burden of Proof*

The allocation of the burden of proof in a judicial challenge to a management plan or implementing regulation may be of central im-

197. FCMA § 301(a)(2), 16 U.S.C.A. § 1851(a)(2) (West Supp. 1977). One of the Senate Reports on the Act shed some light on this standard:

If little is known about the size of the stock or environmental effects on other stocks or similar relationships, . . . even the best management scheme will fail. Therefore another primary goal must be to achieve the best available scientific information about the stocks. The term “scientific information” is meant to include not only biological and ecological data *but also economic and sociological information as well.*

S. REP. NO. 94-416, 94th Cong., 1st Sess. 30 (1975), *reprinted in* LEGISLATIVE HISTORY, *supra* note 6, at 653, 685 (emphasis added).

For a construction of the term “best scientific evidence available” as used in the Marine Mammal Protection Act, 16 U.S.C. § 1371(a)(3)(A) (Supp. V 1975), *see* Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141 (D.C. Cir. 1976). The court there found an obligation for the National Marine Fisheries Service to produce reliable data as a condition for permitting tuna fishermen to incidentally take porpoises, even though NMFS stated that it would take three to seven years to acquire scientifically valid information as to the actual populations of porpoises, the optimum sustainable populations, or the effect of the taking on the optimum sustainable population.

198. *See* note 185 *supra*. An issue may also arise as to the extent to which relevance is a regional or national concept, and the extent to which uniformity of relevance determinations among the eight Regional Councils is a desirable or necessary factor. The answer may depend largely on whether the factor is ecological, social, or economic.

199. *See* note 197 *supra*.

200. *See* notes 178-82 and accompanying text *supra*.

portance in the entire procedure—from the decision to file a petition for review to the ultimate outcome. Particularly in cases where facts are not definitely ascertainable or not the primary basis of a contested measure, the placement of the burden can often determine the outcome.²⁰¹

As a general rule, the party challenging a regulation promulgated through informal rulemaking has the burden of proving that agency action is arbitrary, capricious, or otherwise unlawful.²⁰² Instances may arise, however, in which a court will find it appropriate to shift the burden to the agency. For example, when the material necessary to prove or disprove a fact, or set of facts, “lies particularly within the knowledge” of a party, the courts generally require that party to bear the burden of proof.²⁰³ Shifting the burden in such a situation is clearly a sound policy choice when the fact in issue is discernible; to do otherwise would enable the knowledgeable party to gain a tactical advantage by withholding crucial factual information.

However, where there is no factual uncertainty, and where the burden has not been statutorily placed,²⁰⁴ a balancing of all competing policies and interests should precede placement of the burden of proof.²⁰⁵ Applied on a case-by-case basis, this procedure enables a reviewing court not only to foster the policy values behind the authorizing legislation, but also to control risks of error.²⁰⁶

201. Compare *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 478–79 (D.C. Cir. 1974) with *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1084 (8th Cir.), application to vacate stay of injunction denied, 418 U.S. 911 (1974), injunction modified after hearing en banc, 514 F.2d 492 (8th Cir. 1975).

202. See, e.g., *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1083 (8th Cir. 1974); *American Nursing Home Ass'n v. Cost of Living Council*, 497 F.2d 909, 913–34 (Temp. Emer. Ct. App. 1974); *United States v. Boyd*, 491 F.2d 1163, 1167 (9th Cir. 1973) (“burden is a heavy one”); *Angel v. Butz*, 487 F.2d 260, 263 (10th Cir. 1973). This rule seems so well settled that some courts do not even mention that the burden is being placed on the challenger. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976); *O'Donnell v. Shaffer*, 491 F.2d 59, 63 (D.C. Cir. 1974).

203. See, e.g., *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 36 (7th Cir. 1975); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973).

204. See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 592 n.22 (D.C. Cir. 1971).

205. See generally Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1760–68 (1975).

206. Leventhal, *supra* note 121, at 535–36. Judge Leventhal also stated:

It is my feeling that the burden of proof concept will be relied upon increasingly in review of similar questions by courts which are reluctant, on the one hand, to interfere with an agency's expert manipulations of test data and, on the other, to defer blindly to whatever methodology the agency puts forth in support of its predictions.

Id. at 536. See also *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*,

Congress, recognizing that the state of knowledge of marine fisheries was incomplete and sometimes inaccurate, decided in the FCMA to institute a program of management and conservation of these fisheries through delegation of authority to a unique regulatory structure.²⁰⁷ This regulatory scheme is protected and fostered if the burden is placed on the party challenging either policy or factual determinations in fishery management schemes.²⁰⁸

However, the national standard in the Act requiring that all “conservation and management measures shall be based upon the best scientific information available”²⁰⁹ illustrates that countervailing policies may make it appropriate to shift the burden. If a challenging party can make a *prima facie* showing that a management measure was not based on the “best scientific information available,” the burden should be shifted to the Secretary.

After weighing the policies and interests at stake and determining that a shift of the burden is appropriate, the court then must determine what it is that will be shifted. Because factual certainty is not likely to exist in most cases where a shift of burden is appropriate,²¹⁰ “burden of proof” as used in civil trials is not an appropriate standard. Instead, the courts that have adopted this burden of proof approach seem to shift more than the burden of going forward but require less than proof of the correctness of a decision.²¹¹ What is required is that the administrative body adduce a reasoned presentation of evidence sufficient to persuade the court that the measure is not arbitrary or capricious.

Thus, the ability of a court to shift the burden of proof offers a

523 F.2d 25, 36 (7th Cir. 1975) (“the incidence of the burden of proof is primarily a matter of policy based on experience”).

207. See generally Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 436 (1977) (“The Councils are unique among institutions that manage natural resources”).

208. It is substantially more difficult to prove that a policy-type decision is arbitrary and capricious than to prove that a factual determination is unsupported by the evidence. See notes 139–45 and accompanying text *supra*.

209. FCMA § 301(a)(2), 16 U.S.C.A. § 1851(a)(2) (West Supp. 1977). See note 197 *supra*.

210. An exception to this statement is discussed at note 203 and accompanying text *supra*.

211. See *Amoco Oil Co. v. EPA*, 543 F.2d 270, 278 (D.C. Cir. 1976) (“burden of supporting the agency regulation with evidence . . . rests upon the agency”); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973) (EPA must “bear a burden of adducing a reasoned presentation supporting the reliability of its methodology”).

flexible mechanism to control administrative error or abuse when: (1) The administrative action or procedure is contrary to judicial policy (for example, withholding information that was either relied on in formulating a management measure or which only the Councils or Secretary can prove or disprove); (2) the administrative action is contrary to legislative policy (for example, failure to use the "best scientific information available"); or (3) the reviewing court finds the administrative action to be on the borderline of the legislative mandate.²¹²

VI. CONCLUSION

Senator Warren Magnuson, one of the principal sponsors of the Act, has stated that "the legislation is new and complex. Any new law requires a 'shakedown' period, and the FCMA will be no exception."²¹³ An important, if not the most important, participant in this shakedown will be the courts. They must decide all justiciable conflicts spawned by the Act—ranging from the fundamental structure of the legislative scheme²¹⁴ to the permissible balancing of interests in specific management plans. Hence, it will not be until the courts have developed a body of precedent under the Act that the operation of this new legislation can effectively be evaluated. Until that time, both the courts and those affected by the Act will be forced to proceed with little direct guidance other than the bare outlines of section 305(d).

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212. See *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976).

213. See Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 427 (1977).

214. See, e.g., Note, *Congressional Authorization and Oversight of International Fishery Agreements Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 495 (1977); Part IV-B-2—a *supra*.