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THE UNIQUE FEDERALISM OF THE REGIONAL COUNCILS UNDER THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

*William R. Rogalski**

I believe the cod fisheries are inexhaustible Nothing we do seriously affects the number of fish.

—Thomas Huxley, 19th Century Biologist¹

Since the introduction of motorized net fishing early in the century, small boats have had the capacity to overfish the local waters. Dragged day after day with the otter trawls, shoals turn into underwater deserts Throughout the first part of this century . . . haddock acted as a buffer against further depletion of cod stocks. But with haddock out of the way, the full cunning of our technological genius is now directed against the cod. In the strange new world we are building, fresh cod may soon be as expensive as caviar.

—Boston Globe, November 12, 1979²

I. INTRODUCTION

Recent history has taught us much about the natural world. Fish stocks that were once considered the source of endless bounty have proven to be fragile when abused. Increased technological expertise coupled with a growing world demand for nourishment has led to the commercial exploitation of many fish species, pushing some to

* Solicitations and Book Review Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW

¹ Thomas Huxley as quoted by Harris, *An Angler Mourns the Vanishing Cod*, Boston Globe, Nov. 12, 1979, at A2.

² Harris, *An Angler Mourns the Vanishing Cod*, Boston Globe, Nov. 12, 1979, at A2.

the point of extinction. Competition for the world's fishery resources is becoming continuously keener, and governments have responded by regulating the use of these riches. The Fishery Conservation and Management Act of 1976 (FCMA)³ exemplifies such regulation.

Commonly recognized as the most comprehensive fishery law in 200 years of American history, the Act establishes a zone extending from the outer boundary of the coastal states' three mile territorial zones to a line 200 miles from the United States coastline.⁴ The United States maintains exclusive fishery management authority⁵ within this area statutorily defined as the Fishery Conservation Zone.⁶ The Act further provides for the implementation of a fishery management regime by establishing a system of eight regional fishery management councils, authorized to develop fishery management plans,⁷ which plans are then reviewed by the Secretary of Commerce before being transformed into law.⁸

The work of the regional councils has just begun. By late 1979, they had identified about seventy fisheries for which management plans are needed but had developed and approved only nine plans.⁹ While the councils continue to develop management plans, they themselves are undergoing a developmental process as an organizational entity. These regional councils, composed of federal, state, and public representatives, are not modeled after any other

³ The Fishery Conservation and Management Act of 1976 (FCMA), Pub. L. No. 94-265, § 104, 90 Stat. 1 (*codified at* 16 U.S.C. §§ 1801-1882 (1976), as amended by Act of August 28, 1978, Pub. L. No. 95-354, 92 Stat. 519). The FCMA was signed into law by President Ford on April 13, 1976 and was initially enforced on March 1, 1977.

⁴ *Id.* § 1811 (1976).

⁵ *Id.* § 1812. The U.S. fishery jurisdiction extends to all fish within the zone excluding highly migratory species of tuna. *Id.* It also extends to all anadromous species (i.e., sea fish spawning in fresh water of the United States) throughout their migration range, even beyond the fishery conservation zone, except when these species are found in another nation's recognized fishery zone. *Id.* Further, fishery jurisdiction extends to all Continental Shelf fishery resources (including colenterata, crustacea, mollusks and sponges) beyond the zone. *Id.*

⁶ *Id.* § 1811.

⁷ *Id.* § 1801(b)(5). In addition to being charged with fishery management plan development and closely related functions, the councils are required to prepare comments on foreign fishing applications submitted to them by the Secretary of Commerce under the FCMA. *Id.* § 1852(h)(2). The scope of this article does not extend to a discussion of foreign fishing regulation which is established by the Act, *see id.* §§ 1821-1825, nor does it cover the Act's enforcement provisions. *See id.* §§ 1857-186.

⁸ *Id.* § 1855.

⁹ Comptroller General of the United States, *Report to Congress: Problems Hinder Effective Implementation of New Fishery Management Activities*, 3 (1979).

authority; rather, they were shaped by the demands of compromise and necessity. Congress spoke in broad terms when creating the councils, leaving to the future the hammering out of details and the filling in of interstices. Thus, the last few years have seen their development in many respects.

This article examines several aspects of how that developmental process has shaped the councils. It departs from the focus of a typical article in that it neither canvasses a single area comprehensively nor takes an acute analytical approach to a legal issue; rather, the article surveys several topics relating to the regional fishery management councils. Its goal is to acquaint the reader with the structure and function of the councils, as unique governmental bodies, and to discuss some problems which that uniqueness has caused. The first section provides a background to the regional council system by studying the legislative history of the FCMA and by examining the historical foundation underlying the system's structure and decision-making process. The second section presents a brief overview of the process by which fishery management plans are developed, focusing on the interaction between the regional councils and the federal government. In the third section the legal status of the councils is examined, especially as it relates to the decision-making process. Legal opinions written by federal agencies on the issue of legal status are surveyed and their reasoning is analysed. Where distortion of the councils' true function and nature, as defined by legislative purpose, has occurred, it is identified and remedies for this distortion are proposed. Finally, general suggestions for improving the integration of the regional councils into the federal system are offered in order to keep council development in line with the FCMA's legislative purpose.

II. THE REGIONAL FISHERY MANAGEMENT COUNCILS

A. *Enactment of the FCMA*

The Fishery Conservation and Management Act of 1976¹⁰ was the first comprehensive fishery management scheme legislated by the United States Congress. Its purpose was "to provide for the protection, conservation, and enhancement of the fishery"¹¹ re-

¹⁰ 16 U.S.C. §§ 1801-1882 (1976).

¹¹ A fishery is statutorily defined as one or more stocks of fish which can be treated as a unit for conservation purposes or any fishing for such stocks. *Id.* § 1802(7).

sources of the United States"¹³ by extending seaward the exclusive U.S. fisheries zone¹³ and by creating a system for the development of comprehensive management plans and regulations¹⁴ to control

¹³ H.R. REP. NO. 94-445, 94th Cong., 1st. Sess. 21 (1975) [hereinafter cited as 1975 HOUSE REPORT], reprinted in [1976] U.S. CODE CONG. & AD. NEWS 593, 593 [hereinafter cited as 1976 USCCAN].

¹³ 16 U.S.C. § 1811 (1976). Both historically and to this day, the coastal states have had jurisdiction of "territorial waters," that area within three miles of shore. The basis of this claim is case law interpreting the Commerce Clause, U.S. CONST. Art. I, § 8, cl. 3, as leaving with the state police power within this area, absent any conflict with overriding federal law. See, e.g., *Manchester v. Massachusetts*, 139 U.S. 240 (1890). As long as the states do not discriminate against non-residents, state regulation is generally upheld. *Skiriotes v. Florida*, 313 U.S. 69 (1941). The states were granted ownership of a three-mile marginal belt off their shores, subject to a federal pre-emptive power to protect navigation, commerce, national defense and international affairs by the Submerged Lands Act of 1953. 43 U.S.C. §§ 1301-1315 (1976). Federal power to control the submerged lands beyond the three-mile state belt was created by the Outer Continental Shelf Lands Act, also passed in 1953. 43 U.S.C. §§ 1331-1343 (1976). The federal government was granted fishery regulatory powers within a zone coterminous with the outer boundary of the state belt and extending nine miles seaward of it by the Federal Extra-Territorial Waters Act of 1965. 16 U.S.C. §§ 1091-1094 (1970) (repealed 1976). For additional background information, see Note: *FCMA: An Accommodation of State, Federal and International Interests*, 10 CASE W.J. INT'L L. 703, 704-705 nn. 3, 4, 5 (1978).

¹⁴ The distinction between plans and regulations is critical to an understanding of the function of the councils as opposed to the function of the Secretary of Commerce. The councils have authority to develop fishery management plans. The contents of these plans is statutorily governed by 16 U.S.C. § 1853 (1976):

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States which are—

(A) necessary and appropriate for the conservation and management of the fishery;

(B) described in this subsection or subsection (b) of this section, or both; and

(C) consistent with the national standards, the other provisions of this chapter, and any other applicable law;

(2) contain a description of the fishery, including but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specifications;

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3), and

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing; and

fishing within the zone.¹⁶

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, and number of hauls.

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

(1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fisheries;

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant consideration; and

(7) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

(c) Proposed regulations

Any Council may prepare any proposed regulations which it deems necessary and appropriate to carry out any fishery management plan, or any amendment to any fishery management plan which is prepared by it. Such proposed regulations shall be submitted to the Secretary, together with such plan or amendment, for action by the Secretary pursuant to sections 1854 and 1855 of this title.

16 U.S.C. § 1853 (1976). On the other hand, the Secretary of Commerce is authorized to promulgate regulations implementing the plans. 16 U.S.C. § 1855(c) (1976). These plans are subject to limited judicial review. *Id.* § 1855(d) (1976). The essential difference between the management plans and the regulations is that the former do not affect the rights and obligations of individuals, while the latter do. Though the plans include, among other things, management measures (e.g. a determination that the proper method for managing the concerned fishery is by the establishment of quotas or by restrictions on the type of fishing gear that can be used) they do not establish norms that, if violated, subject the violator to civil or

Prior to passage of the FCMA, fishing on the high seas (that area beyond the three mile state zones¹⁶ regulated, for fisheries purposes, exclusively by the states)¹⁷ had been regulated, to the small extent that it was, mostly by bilateral international treaties¹⁸ and, in a few instances, by the unilateral actions of countries.¹⁹ The international community had attempted to codify fisheries rules at the United Nations Law of the Sea Conference,²⁰ but no meaningful results were obtained. Even as the FCMA was introduced in Congress, hopes ran high that the Conference would produce an internationally acceptable extension of national coastal jurisdictions to the 200 mile limit.²¹ Hopes for such an agreement, however, no longer seem realistic.²²

Prior to enactment of the FCMA, lack of international control coupled with limited management within the then extant nine-mile federal zone contributed to the steady decline of the American fishing industry.²³ This nine-mile federal zone was created by the Federal Extra-Territorial Waters Act of 1965²⁴ and extended nine

criminal liability. The regulations, on the other hand, establish such norms. To illustrate: regulations governing the New England groundfish fishery issued in mid 1979 specified the amount of cod, haddock, and yellowtail flounder that could be harvested per quarter according to class of vessel and area fished. In addition, catch limits were set for the amount an individual vessel could land during a week. 44 Fed. Reg. 55,885-55,887 (1979). Persons violating these regulations would be subject to civil penalties. 16 U.S.C. § 1858 (1976).

¹⁶ *Id.* § 1801 (b)(5). The establishment of a Fishery Conservation Zone grants exclusive authority to the United States to manage all fish within the zone: finfish, molluska, crustaceans and all other forms of marine plant and animal life excluding marine mammals, birds, and highly migratory species of tuna. *Id.* § 1802(6). See also discussion at note 5, *supra*.

¹⁶ See note 14, *supra*.

¹⁷ See note 13, *supra*.

¹⁸ 1975 HOUSE REPORT, *supra* note 12, at 125, 1976 USCCAN at 597.

¹⁹ *Id.*

²⁰ The Law of the Sea Conference has not been successful in solving the problems of national jurisdiction of coastal waters. World Conferences held by the International Law Commission in 1958 and 1960 resulted in legal instruments dealing with the territorial sea and contiguous zone, the high seas, fishing and conservation of living resources and the continental shelf. These agreements, however, have been ratified by less than half the nations of the world because they are now viewed as outdated. Nat'l Fisherman, Sept. 1978 at 39-40. For a general discussion, see PARDO, LAW OF THE SEA CONFERENCE—WHAT WENT WRONG IN MANAGING OCEAN RESOURCES: A PRIMER 137 (R. Friedheim ed. 1979).

²¹ 1975 HOUSE REPORT, *supra* note 12, at 29, 1976 USCCAN at 601.

²² As late as April of 1979, nations were still engaged in boundary disputes. N.Y. Times, Apr. 26, 1979, at 6, col. 6. The Conference has made progress, however, in hammering out international agreements covering mineral rights in the ocean seabed. N.Y. Times, Apr. 29, 1979, at 20, col. 1.

²³ 1975 HOUSE REPORT, *supra* note 12, at 42, 1976 USCCAN at 610.

²⁴ 16 U.S.C. §§ 1091-1094 (1970) (repealed 1976).

miles seaward from the outer boundary of the coastal states' three-mile zones;²⁵ federal activity within the zone consisted mainly of enforcement aimed at encroaching foreign fishermen and gathering data for scientific purposes.²⁶ Thus, little effort was made at comprehensive federal management of U.S. fisheries.

The decline of the American fishing industry occurred against an international backdrop. Although American harvesting results remained fairly stable in the thirty-five year period preceding passage of the FCMA, the international landings²⁷ taken from the oceans of the world rose abruptly; between 1938 and 1973, U.S. landings climbed from 4.3 to 4.7 billion pounds while world landings tripled, soaring from 50 to 150 billion pounds.²⁸ This gross increase in foreign fishing, a significant amount of which was occurring off the U.S. coast, resulted in the serious depletion of at least ten major commercial stocks fished by U.S. fishermen.²⁹ Where exploitation through overfishing occurred, the American fisherman often suffered economic hardship.³⁰ Attending this hardship was the spectre of ecological disaster—the decimation of fishery resources through overfishing by foreign fleets and the threat of a further diminution of the American fisheries as a renewable resource. The FCMA responded to a clearly perceived need to regulate foreign fishing before U.S. fish stocks were pushed to the point of extinction.³¹

The FCMA was, then, a reaction to foreign fishing off the U.S., a measure to save the fishery resources; but its legislative purpose extended beyond the control of foreign fishing. The legislation was also designed to provide for the “development . . . administration, and enforcement of fishery management plans and regulations . . . for fishing conservation and management.”³² The goal was to as-

²⁵ *Id.* § 1092.

²⁶ 1975 HOUSE REPORT, *supra* note 12, at 29, 1976 USCCAN at 601.

²⁷ Landings are the quantities of fish, shellfish, and other aquatic plants and animals sold ashore. Landings may be calculated according to round (live) weight. NATIONAL MARINE FISHERIES SERVICE, FISHERIES OF THE UNITED STATES, 116 (1978).

²⁸ 1975 HOUSE REPORT, *supra* note 12, at 31, 1976 USCCAN at 603.

²⁹ *Id.* at 36, 1976 USCCAN at 608. The depleted stocks were: Alaska pollock, California sardine, haddock, halibut, herring, ocean perch, Pacific mackerel, sablefish, yellowfin sole and yellowtail flounder. *Id.*

³⁰ *Id.*

³¹ See 16 U.S.C. § 1801(a)(3) (1976).

³² S. REP. NO. 94-711, 94th Cong., 2d Sess. 37 [hereinafter cited as 1976 SENATE REPORT] (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 660, 661, [hereinafter cited as 1976 USCCAN].

sure that both "an optimum supply of food and other fish products, and . . . recreational opportunities involving fishing, [be] available on a continuing basis and that irreversible or long term adverse effects on fishing resources [be] minimized."³³ Thus, the legislation was not only remedial in that it aimed to mitigate devastation of fish stocks by foreign fleets. It was also forward-looking in that it reflected a congressional awareness that the fisheries were a vulnerable resource needing careful management and conservation if they were to prosper, even in the absence of foreign ships. The overriding goal of the legislation, then, was broad: the management of fisheries to provide optimum yields³⁴ on a continuing basis in order to "realize the full potential of the Nation's fishery resources."³⁵

Congress expressly described the tools with which to operate the management scheme. At its heart were the fishery management

³³ *Id.* at 39, 1976 USCCAN at 663.

³⁴ Optimum yield, as defined by the FCMA, is that quantity of fish "which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and 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." 16 U.S.C. 1802(18) (1976). The first step in determining optimum yield is the calculation of maximum sustainable yield, a traditional fishery management concept which is a biological measure "of the safe upper limit of harvest which can be taken consistently year after year without diminishing the stock so that the stock is truly inexhaustible and perpetually renewable." 1975 HOUSE REPORT, *supra* note 12, at 47, 1976 USCCAN at 615. Optimum yield is then determined by factoring in such elements as: a recognition of resources use other than harvesting; social and economic considerations such as the financial well-being of commercial fishermen; the interests of recreational fishermen; environmental quality; a recognition of a need for fishery products; present conditions and long term plans of the given fish habitat. Fishery Conservation and Management, 50 C.F.R. § 602.2(b)(3) (1978). The concept is a slippery one in practice, and arrived at only by way of an imprecise equation, which factors in regional and national values, objectives, and scientific (both biological and economic) data. At the legislative stage the concept of optimum yield was thought to be susceptible of reasonably precise calculation. The House Committee said that "while optimum sustainable yield may have many complex components, their quantification should not be beyond the capability of the broad range of individuals who will serve on the Councils, supported by trained economists and marine biologists." 1975 HOUSE REPORT, *supra* note 12, at 48, USCCAN at 616. However, regulations promulgated by the National Oceanic and Atmospheric Administration (NOAA) have taken a more realistic view of the calculation of optimum yield as being a value judgment heavily dependent upon "objectives that must be determined and adopted by the councils with the assistance of their advisory groups and in consideration of the views of user groups and the general public." Fishery Conservation and Management, 50 C.F.R. § 602.2(b)(4) (1978). Since the determination of optimum yield is a value-laden policy decision basic to the development of any fishery management plan, the delegation of it to the regional councils shows the vast policy-related discretion vested in these bodies by the FCMA.

³⁵ 16 U.S.C. § 1801(a)(6) (1976).

plans³⁶ drawn in accordance with national standards³⁷ and designed to achieve optimum yield on a continuing basis.³⁸ These plans were to be prepared by the Regional Fishery Management Councils in a manner that allowed for participation by the States, fishing industry, and consumer and environmental organizations.³⁹ Councils were established in eight regions (New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf, Pacific, North Pacific and Western Pacific) and each council received responsibility for developing plans for the fisheries within its jurisdiction.⁴⁰

The FCMA established these regional councils as the organizational backbone of the management regime, authorizing them to create fishery management plans⁴¹ and granting to them a broad policy-making role. It circumscribed their powers, however, by assigning to the Secretary of Commerce the right to approve or disapprove all plans⁴² and by leaving all regulatory power solely with the Secretary.⁴³ This two-tiered decision-making mechanism the FCMA established called for basic policy determinations such as optimum yield and management strategies⁴⁴ to rest with the coun-

³⁶ See note 14, *supra*.

³⁷ There are seven national standards defined by the Act: (1) plans shall prevent overfishing while achieving optimum yield; (2) measures are to be based on the best scientific information available; (3) a fishery shall be, to the extent practicable, managed as a unit throughout its range; (4) conservation measures shall not discriminate between residents of different states; (5) plans shall promote efficiency in utilization of fishery resources; (6) plans shall take fishery resources variations into account; and (7) plans shall minimize cost and avoid duplication. 16 U.S.C. § 1851 (1976). These standards are defined more explicitly by subsequent regulations published at Fishery Conservation and Management, 50 C.F.R. § 602.2 (1978).

³⁸ 16 U.S.C. § 1801(a)(5) (1976).

³⁹ *Id.* § 1801(b)(5).

⁴⁰ Each council is identified according to its constituent states or Possessions: the New England Council (Maine, New Hampshire, Massachusetts, Rhode Island and Connecticut); the Mid-Atlantic Council (New York, New Jersey, Delaware, Pennsylvania, Maryland and Virginia); the South Atlantic Council (North Carolina, South Carolina, Georgia and Florida); the Caribbean Council (the Virgin Islands and Puerto Rico); the Gulf Council (Texas, Louisiana, Mississippi, Alabama and Florida); the Pacific Council: California, Oregon, Washington and Idaho); the North Pacific Council (Alaska, Washington and Oregon); and the Western Pacific Council (Hawaii, American Samoa and Guam). *Id.* § 1852. This article shall try to preserve a general focus, looking at the councils in general. At some points it will focus on the New England Regional Council. Such a shift in focus will be noted for the reader.

⁴¹ *Id.* § 1852(h)(1).

⁴² *Id.* § 1854(b).

⁴³ *Id.* § 1855.

⁴⁴ Optimum yield is discussed in note 34, *supra*, and management strategies are discussed in note 14, *supra*. Both are determinations that are required in fishery management plans,

cils while review and rulemaking authority vested in the Secretary. Thus, the shaping of policy by the councils was clearly of marked significance in the overall management scheme.

As the system operates currently, the composition of the voting membership is of paramount importance. Since council decisions are made by majority vote,⁴⁵ the composition of the voting group directly determines the policy shaped by the councils. The voting members on each council are: (1) the principal state official with marine fishery management responsibility and expertise in each constituent state;⁴⁶ (2) the regional director of the National Marine Fisheries Service (NMFS)⁴⁷ for the geographic area concerned;⁴⁸ and "public" members, their specific number varying from council to council,⁴⁹ appointed by the Secretary of Commerce from a list of

see note 14, supra. Both are also policy decisions that determine in significant ways the manner in which a fishery is to be managed. The determination of optimum yield, for instance, requires the calculation of the amount of fish that can be harvested so as to "provide the greatest overall benefit to the Nation . . ." 16 U.S.C. § 1802(18) (1976). This determination involves the weighing of essentially incalculable economic, social, and ecological factors; thus, any determination of optimum yield is tantamount to an expression of a council's policy judgments of which interests are to be favored. For example, the New England groundfish management plan was amended thirty times in its first two-and-one-half years of existence; optimum yield was increased five times. The amendments have been characterized by some as a value determination by the New England Council that the economics of the fishery are more important than its biology. *Proposed Amendments to the FCMA: Hearings Before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries* (Oct. 11, 1979) (unpublished statement of Langdon Warner and Micheal Bean of the Environmental Defense Fund) at 3-4. The broad definition given to optimum yield can be seen as a legislative method of vesting in the councils wide discretion in forming management policy.

⁴⁵ 16 U.S.C. § 1852(e)(1) (1976).

⁴⁶ *Id.* § 1852(b)(1)(A).

⁴⁷ *Id.* § 1852(b)(1)(B). The National Marine Fisheries Service is an organization within the Department of Commerce. Reorganization Plan No. 4 of 1970 established the National Oceanic and Atmospheric Administration (NOAA) as an agency of the Department of Commerce by transferring selected marine-related functions previously vested in the Departments of Interior and Defense. 35 Fed. Reg. 15,627, Oct. 3, 1970. The National Marine Fisheries Service, (NMFS), a component of NOAA, basically assumed those functions previously served by the Bureau of Commercial Fisheries of the Department of the Interior. *See* 35 Fed. Reg. 18,455, Dec. 4, 1970. Both organizations serve various functions created by the FCMA. Authority vested in the Secretary of Commerce by the Act has been delegated, in many instances, to the Associate Administrator for Marine Resources of NOAA. *See e.g.* 42 Fed. Reg. 34,452, July 5, 1977. In turn, some of this authority has been redelegated to the National Marine Fisheries Service (NMFS) Administrator of Fisheries. *See note 98, infra.* NOAA also serves the councils by supplying administrative services through its field offices. *Fishery Conservation and Management*, 50 C.F.R. § 601.23 (1978).

⁴⁸ 16 U.S.C. § 1852(b)(1)(B) (1976).

⁴⁹ The number of representatives to be selected from this list varies, depending on the number of voting members and the number of composite states. The New England Council

individuals knowledgeable and experienced in fishery matters submitted by the Governor of each applicable state.⁵⁰ Notably, these "public" members selected by the Governors of the constituent states constitute a voting majority in each council. The non-voting members, who have a less direct role in shaping policy, are: (1) the regional or area director of the U.S. Fish and Wildlife Service;⁵¹ (2) the Commander of the Coast Guard for the district involved;⁵² (3) the Executive Director of the Marine Fisheries Commission in the area involved;⁵³ (4) and one representative of the Department of State.⁵⁴ Thus, the composition of each council shows a strong state representation among those voting on the plans and a strong federal representation among those advising though not voting.⁵⁵

C. *The Regional Council: State Representation*

Practical, biological and political reasons underlie the strong state representation on the regional councils. At the practical level, exploitation of the already rich state expertise in fishery management compelled an active state role in management. Prior to enactment of the FCMA, an estimated 70 percent of the domestic harvest was taken within the three mile state zones;⁵⁶ this statistic suggested to the program's designers a state capability for management that should be utilized to its maximum.⁵⁷

Biological considerations also favored a regional approach to

has eleven of seventeen voting members selected from this list, the Mid-Atlantic has twelve of nineteen, the South Atlantic has eight of thirteen, the Caribbean has four of seven, the Gulf has eleven of seventeen, the Pacific has eight of thirteen, the North Pacific has seven of eleven, and the Western Pacific Council has seven of eleven voting members selected from the list prepared by the Governors. *Id.* § 1852(a).

⁵⁰ *Id.* § 1852(b)(1)(C).

⁵¹ *Id.* § 1852(c)(1)(A).

⁵² *Id.* § 1852(c)(1)(B).

⁵³ *Id.* § 1852(c)(1)(C).

⁵⁴ *Id.* § 1852(c)(1)(D).

⁵⁵ The role of non-voting members on the councils is advisory. They are engaged in council decision-making to the limited extent of participation in discussion at council meetings and perhaps membership in council sub-panels. See *Proposed Amendments to the FCMA: Hearings Before the House Subcommittee on Fisheries Conservation and Management and the Environment of the House Committee on Merchant Marine and Fisheries* (July 10, 1979)(unpublished statement of Dr. Robert Cook, Deputy, U.S. Fish and Wildlife Service, Department of the Interior) at 3.

⁵⁶ *Hearings Before the Senate Committee on Commerce on S. 961*, 94th Cong., 1st Sess., 42 (1975)(statement of David H. Wallace, Associate Administrator for Marine Resources, NOAA).

⁵⁷ *Id.*

management. A basic principle of wildlife management requires controlling a stock or population as a unit throughout its range.⁵⁸ Since many of the stocks affected by the FCMA were likely to traverse the federal/state zones' boundary, the single focus necessary to manage such stocks as a unit was viewed as necessarily involving state input.⁵⁹ Getting the states intensely involved in the federal management program offered a means of promoting coordination between state fishery management plans and those to be developed under the FCMA.⁶⁰ Fishery experts envisioned the ideal scheme as one involving cooperative state management of the nation's fishery resources, but since a lack of uniform state legislation made that impossible, the regional concept prevailed, allowing for an active state role under the general authority of the federal government.⁶¹

Finally, political pressures played an important role in placing the states in a dominant representative position on the councils.⁶² Fishermen probably would have been hostile towards a purely federal regime since they already felt that their interests had been compromised by the federal government's allowing foreign countries to fish off the coast without regulation.⁶³ Industry representa-

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² The original bill as introduced in the House provided for a slightly different composition. Each council was to consist of: (1) the Executive Director of Marine Fisheries Commission for the geographical area concerned; (2) one member appointed by the Governor of each state represented; (3) the Regional Director of NMFS for the area concerned; (4) the Regional Director of the U.S. Fish and Wildlife Service; (5) six out of twenty people suggested by those in groups one, two, three and four above "having knowledge and experience in commercial or recreational fishery"; and (6) two of six people suggested by those in groups one, two, three and four above to represent the public interest. The House Committee expected that conservationists, ecologists and representatives of the scientific community were to be considered for appointment to this last "representatives of the public interest" group. 1975 HOUSE REPORT, *supra* note 12, at 10. The bill as introduced in the Senate showed an even stronger (than both the original House bill and bill as enacted) Federal position in Council composition. According to the original Senate bill, there was to be one national Council comprised of eleven members: a chairman appointed by the President; the Secretary of Commerce; the Secretary of State; the Secretary of the Department in which the Coast Guard is operating; and seven non-government members to be appointed by the President with consent of the Senate, three to be selected from a list recommended by regional fisheries commissions and four to be selected from a list recommended by the National Governors Conference. See S. REP. No. 961, 94th Cong., 1st Sess. (1975), reprinted in COMMITTEE ON COMMERCE, 94TH CONG., 2ND SESS., LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 737 (1976).

⁶³ 122 CONG. REC. 2557 (1976) (statement of Senator Mark O. Hatfield, reading into the

tives argued that active participation by fishermen was necessary if the management was to be effective,⁶⁴ and heavy representation by the states' public members would seem to bring the management machinery—the formulation of plans and regulations—closer to the fishermen. A general feeling also prevailed that too strong a federal representation might result in an inflexible management regime that would be insensitive to local problems.⁶⁵ Spokesmen for the American fishing industry said they were willing to submit to a federal management scheme provided that a regional structure was implemented that would account for local differences in management conditions.⁶⁶

D. *The Regional Councils and Secretarial Review*

The counter-balance to heavy state representation in council voting membership is the review process that the fishery management plans must undergo. This federal review power is the most definite limitation on the regional councils' powers in dictating management policy.⁶⁷ Although strongly regional interests may be represented in the plans, the plans must pass Secretarial review before being implemented.⁶⁸ In practice, many of the Secretary's powers and duties have been delegated to the National Oceanic and Atmospheric Administration (NOAA), an agency of the Department of Commerce, and to the National Marine Fisheries

record an article by Larry Bacon from the Eugene Register Guard of January 14, 1976).

⁶⁴ *Hearings Before the Senate Committee on Commerce on S. 961, 94th Cong., 1st Sess., 59 (1975)*(statement of Murry Berger, president, National Fisheries Institute).

⁶⁵ *Id.*, at 84 (statement of Robert M. White, Administrator, NOAA).

⁶⁶ 122 Cong. Rec. 442-93 (1976) (statement of Senator Stevens).

⁶⁷ In a sense, the strictest limit on the councils' power is their lack of authority to regulate. As was discussed earlier, *supra* note 14, the councils set policy for fishery management by creating plans. This policy is then translated into law through the promulgation of regulations, a duty of the Secretary of Commerce.

⁶⁸ The relevant section states:

REVIEW BY THE SECRETARY—The Secretary shall review any fishery management plan, and any amendment, to any such plan, prepared by any council and submitted to him to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law. In carrying out such review, the Secretary shall consult with—

- (1) the Secretary of State with respect to foreign fishing; and
- (2) the Secretary of the department in which the Coast Guard is operating with respect to the enforcement at sea.

16 U.S.C. § 1854(b) (1976). The Secretary is given sixty days from receipt of the plan from the council to review it and to notify the council in writing of approval, disapproval or partial disapproval. *Id.* § 1854(a).

Service (NMFS), a component of NOAA.⁶⁹

The standards of review imposed by the Secretary are broadly circumscribed, calling for a determination of whether the plan considered is consistent with the seven national standards articulated in the FCMA,⁷⁰ the FCMA in general, and other applicable law.⁷¹ Beyond his review powers, the Secretary holds plan development powers. He may prepare a plan on his own initiative if the appropriate council fails to submit a necessary plan⁷² or if the Secretary partially or totally disapproves a plan and a satisfactory reworking is not achieved by the council.⁷³ In either case, the Secretary must submit plans of his own making to the appropriate council for recommendations, and after allowing forty-five days for the council to review and comment, the Secretary may implement the plan.⁷⁴ Notably, Secretarial plan-preparation powers are *not* of the same order as the councils'. His powers may be invoked only when those with front line responsibility for plan development, the councils, have failed. The FCMA did not grant him the primary policy-making role.

The final procedural balance of powers described above, like council composition, was a matter of heated dispute during the legislative process. Opponents to a strong federal role in the regime

⁶⁹ For a discussion, see note 47, *supra*.

⁷⁰ See note 37, *supra*.

⁷¹ Federal laws of particular importance are: the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976) (assuring federal consideration of environmental values in policy formulation, decision-making and administrative actions and requiring the preparation of Environmental Impact Statements for major federal actions significantly affecting the environment); the Federal Advisory Committee Act, 5 U.S.C. App., §§ 1-15 (1976) (for a discussion, see text accompanying notes 194-245, *infra*.); the Freedom of Information Act, 5 U.S.C. § 552(b)(1976) (requiring public access to government-generated documents, with some limitations); the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. §§ 1461-1464 (1976) (encouraging states in developing management programs and requiring that any federal activities directly affecting the coastal zone be consistent with the state management program); Executive Order 12044, 3 C.F.R. 152 (1979) (regulating the procedures for developing regulations having significant economic impact); the Marine Mammal Protective Act, 16 U.S.C. §§ 1361-1407 (1976) (protecting marine mammals but allowing catches incidental to commercial fishing when authorized by permit); and the Fishermen's Protective Act, 22 U.S.C. §§ 1971-1979 (allowing for federal reimbursement of gear losses and fines resulting from foreign seizure of American boats or from foreign fishing in the Fishery Conservation Zone).

⁷² There is no express time limit in which councils must submit necessary plans. Thus, on this issue the Secretary is not guided statutorily in his determination of when to initiate a management plan.

⁷³ 16 U.S.C. § 1854(c) (1976).

⁷⁴ *Id.* § 1854(c)(2) (1976).

reacted strongly to the veto power granted the Secretary. That he could reject a plan, resubmit it to a council, continue to resubmit it for revision and, finally, if he was still not pleased with the plan, rewrite it himself, led one observer to label the Secretary the "Czar under the fisheries management program."⁷⁵ Several proposals were offered that would have trimmed the Secretary's power. One called for an amendment to the bill that would require any decision made by the Secretary to gain council approval before being implemented.⁷⁶ This proposal was met with the objection that although normally the Secretary must agree to send his decisions back for council approval, fishery management often called for quick and temporary decisions and that some form of power to regulate *ad hoc* was necessary.⁷⁷ Also running throughout the Congressional hearings and debates was the general idea that the "final say-so over any matter (must) lie with the Federal Agency concerned over such matters"⁷⁸ if there was to be a workable uniform management program.

Another attempt to narrow federal authority in plan development called for limiting the exercise of the Secretarial veto power to those instances where the fishery concerned was "substantially and adversely affected,"⁷⁹ but such a limitation was never incorporated. Notably, the FCMA does withhold plenary proposal power from the Secretary in that he cannot implement limited entry⁸⁰ as a management measure without first gaining the majority approval from the concerned council.⁸¹ This provision recognizes the policy question at the heart of management by limited entry and relegates the issue to the proper institution, the councils.

The final scheme arrived at by Congress involved a two-tiered decision-making process involving two decisionmakers, each performing distinct functions. The councils were designated the

⁷⁵ 121 CONG. REC. 32,597 (1975)(statement of Representative Treen).

⁷⁶ 122 CONG. REC. 129(1976)(statement of Senator Stevens).

⁷⁷ *Id.* The Secretary must resubmit disapproved or partially disapproved plans to the concerned council and the council is given forty-five days to make amendments. 16 U.S.C. § 1854(a)(2) (1976). The Secretary is also granted emergency regulatory powers by the FCMA. See note 91, *infra*.

⁷⁸ *E.g.* 121 CONG. REC. 32,541(1976)(statement of Representative Leggett).

⁷⁹ *Id.*

⁸⁰ Limited entry seeks to avoid economic waste by limiting the number of harvesters in a fishery, usually by using licenses, stock certificates or user fees. For a general discussion, see Note, *Legal Dimensions of Entry Fishery Management*, 17 WM. & MARY L. REV., 757 (1976).

⁸¹ 16 U.S.C. § 1854(c)(3) (1976).

primary policy makers, vested with the authority to develop management plans that would dictate the fundamental objectives and methods of managing a given fishery. The Secretary, on the other hand, was given the role of reviewing the plans and of translating them into legally binding regulations. Though each decision maker was assigned a distinct and autonomous role, the plan implicitly envisioned harmonious interrelationship of the regional councils and the Secretary. The FCMA did not, however, provide a detailed plan of how those two authorities would interact but left the resolution of that to the future.

III. THE DECISION-MAKING PROCESS

Since the FCMA's enactment, the process by which a regional council and the Secretary of Commerce develop fishery management plans has been refined considerably. As it currently operates, the process follows a prescribed set of interacting laws and regulations.⁸² As was seen,⁸³ the FCMA regulates the decision-making process at a highly general level by establishing two loose processes for development and implementation of plans. The first process requires: the development of a plan by a regional council,⁸⁴ submission of it to the Secretary for review by him within sixty days,⁸⁵

⁸² Each Council also develops informal processes that mirror, in general, the formal process. As this process operates at the New England Regional Council, it calls for extensive interaction between the Council members and Council staff. Several decisions are made very early in the process. Oversight Committees—bodies that supervise the development stages of a fishery management plan and report to the full Council on its progress—were established for most species requiring management shortly after the Council itself was established. Once the Council as a whole has decided to take up the management plan of a given species or group of species, the Council staff, in collaboration with the Oversight Committee, drafts a set of management objectives. The framing of these objectives is a policy decision critical to the character of the plan that will emerge at the other end of the process. Draft management objectives are presented to the Council for approval, and modified when necessary. At this point, the Council decides whether the plan, which follows a standard format, should be developed by the council staff or be contracted out. See note 14, *supra*. Once the plan is developed, management strategies (the discretionary provisions that determine the regulatory means by which the fishery is to be managed) are developed through council and staff interaction. See note 14, *supra*. At this point, the plan is well into the development process. The National Marine Fisheries Service participates in this process throughout, having representatives on the Oversight Committee. Interview with Rich Ruais, staff member, New England Regional Council (November 8, 1979) (I am indebted to Mr. Ruais for much of the research material that forms the basis of this paper).

⁸³ For a brief view of the Secretary's role under the FCMA in regard to fishery management plan development, see text accompanying notes 67-74, *supra*.

⁸⁴ 16 U.S.C. § 1852(h)(1) (1976).

⁸⁵ *Id.* § 1854(a). The Secretary is required to notify the council in writing of his approval,

publication in the *Federal Register* of the plan and regulations (followed by a period in which public comment may be made),⁸⁶ a public hearing on the proposed plan and regulations,⁸⁷ and final promulgation of the regulations.⁸⁸ The second process which is followed in the event that a council fails to prepare a satisfactory fishery management plan, requires: initiation of the plan by the Secretary,⁸⁹ submission of the plan to the council for consideration and comment (allowing for a forty-five day period)⁹⁰ and implementation following publication and/or hearing.⁹¹

The plan development procedure is further defined by regulations issued by the National Oceanic and Atmospheric Administration (NOAA).⁹² These mandate integration of the following steps, all relating to procedures guiding the council decision-making process, into the plan development process: the identification of fisheries needing management and establishment of plan development priorities;⁹³ the development of management options based on careful analysis of biological, economic, social and ecological data;⁹⁴ selection by the council of the preferred management option by majority vote;⁹⁵ consultation with other councils, when necessary, to coordinate planning;⁹⁶ and solicitation of public comment through public hearings and other appropriate means.⁹⁷ In these ways basic procedural requirements of council decision-mak-

disapproval, or partial disapproval. *Id.* § 1854(a)(2). If the Secretary disapproves in part or whole, he must notify the council of his reasons, suggest improvements, and request re-submission within forty-five days. *Id.* § 1854(a)(2).

⁸⁶ *Id.* § 1855 (a)(2).

⁸⁷ *Id.* § 1855 (b).

⁸⁸ *Id.* § 1855 (c).

⁸⁹ *Id.* § 1854 (c)(1).

⁹⁰ *Id.* § 1854 (c)(2).

⁹¹ *Id.* The Secretary also has emergency powers: after plans have been developed by either of the processes described in the text accompanying notes 65-72, *supra*, and approved by him, he may implement regulations without observing requirements for publication in the *Federal Register* or for conducting public hearings. These powers may be invoked if he determines that an emergency involving any fishery resource exists. The emergency regulations can remain in effect for only forty-five days, although a forty-five day extension is possible. *Id.* § 1855 (e).

⁹² Fishery Conservation and Management, 50 C.F.R. § 602 (1978).

⁹³ *Id.* § 602.5 (a)(1).

⁹⁴ *Id.* § 602.5 (a)(2).

⁹⁵ *Id.* § 602.5 (a)(3).

⁹⁶ *Id.* § 602.5 (a)(4).

⁹⁷ *Id.* § 602.5 (a)(5). Some of the procedural requirements set out by these regulations are the basis of the formal structure underlying the informal decision-making process in the New England Regional Council. See note 41, *supra*.

ing are defined by federal regulations promulgated by NOAA pursuant to FCMA authorization to establish guidelines to assist in plan development.⁹⁸

Even more federal laws, most notably Executive Order 12044⁹⁹ and the National Environmental Policy Act (NEPA),¹⁰⁰ have been applied to the decision-making process. The application of these laws, together with the orchestration required to coordinate several groups of decisionmakers operating simultaneously, has prompted the National Marine Fisheries Service (NMFS) to devise a master plan¹⁰¹ for fishery management plan development. The plan identifies five major steps in the decision-making process.¹⁰²

⁹⁸ 16 U.S.C. § 1851(b) (1976).

⁹⁹ Executive Order 12044, 3 C.F.R. 152-156 (1979), issued in March, 1978, requires a process of careful economic analysis of government regulations having major economic effects. It establishes procedures for developing regulations, requires close oversight by the agency head, calls for public participation in the regulation making process and requires periodic review of existing regulations. *Id.* It also requires an in-depth analysis of the economic impact of the proposed regulation, referred to as a regulatory analysis. *Id.* at 154.

¹⁰⁰ The National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976) encourages federal officials to give consideration to unquantifiable environmental concerns in policy formation, decision-making, and administrative action by requiring inclusion of environmental impact statements in recommendations for federal actions. Its most significant impact on the regional council decision-making process is the requirement of filing an environmental impact statement for each fishery management plan developed. *See Id.* § 4332. The relevant statutory language states: "all agencies of the Federal Government . . . [shall] (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official . . ." *Id.* The report must include an assessment of the environmental impact of the proposed action, adverse impacts that can be avoided, alternative actions, the relationship between short-term uses and long-term productivity of the environment, and any irreversible and irretrievable commitments of resources involved in the proposed action. *Id.*

¹⁰¹ The plan framework is laid out in flow chart fashion in NATIONAL MARINE FISHERIES SERVICE, DRAFT OPERATIONAL GUIDELINE FOR FISHERY MANAGEMENT PLAN PROCESS (1979) [hereinafter cited as DRAFT OPERATIONAL GUIDELINE]. It is available for public inspection at the regional council offices. The process is elaborate, constituting eight pages of flow charts. Only the highlights of the plan development process will be discussed in the text. The master plan concentrates on activities in the Washington Office of the National Marine Fisheries Service (NMFS) rather than on activities at the regional NMFS and council level to allow for the latter two to develop their own internal procedures independently. William G. Gordon, "Management of Living Marine Resources—Challenge of the Future" (June 19, 1979) (a paper delivered at the Fisheries Management Panel, Conference on Comparative Policy), at 20 [hereinafter cited as Gordon].

¹⁰² This discussion excludes two additional steps considered part of the general management scheme, though not a part of plan development itself: continuing fisheries management, including fishery monitoring and modification of regulations and plan amendment, a step that requires observance of the complete plan development process, phases one through five.

Phase one of the fishery management plan development process is the "pre-plan" stage. Identification of a fishery management unit¹⁰³ by a council, acting alone or through consultation with the Secretary or his delegates or with the public, occurs early in the process.¹⁰⁴ This "pre-plan" stage also involves the satisfaction of some preliminary requirements mandated by NEPA. This broad-ranging environmental statute requires that all federal agencies include in their recommendations for federal actions significantly affecting the human environment a detailed statement of the environmental impact of the actions.¹⁰⁵ NEPA has been deemed applicable to the councils by NOAA.¹⁰⁶ Although the precise manner in which it affects plan development has only been defined by informal guidelines issued by the National Marine Fisheries Service,¹⁰⁷ NEPA requirements at this early "pre-plan" stage dictate that actions preliminary to the filing of an Environmental Impact Statement (EIS) be taken; a council decides whether an EIS need be filed at all, and if so, the council then conducts scoping meetings¹⁰⁸ to determine the scope of issues to be covered by the EIS.¹⁰⁹

At this early stage, a council must also contend with requirements under Executive Order 12044, a directive setting out a detailed process for evaluating federal regulations having significant economic impact.¹¹⁰ The order calls for the documented analysis of economic options and impacts in regulation promulgation. Although the councils do not themselves issue regulations but only fishery management plans,¹¹¹ they have become subject to Executive Order 12044 requirements because the purpose of the order is

¹⁰³ A fishery management unit is a stock or group of stocks to be managed as a single unit. For example, the New England groundfish plan identifies cod, haddock and yellowtail flounder as a fishery management unit. See note 82, *supra*.

¹⁰⁴ DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart pre-planning. As was noted in the introduction, about seventy species have been identified as needing management and plans have been developed for nine of them. See text accompanying note 8, *supra*.

¹⁰⁵ 42 U.S.C. § 4332 (1976). See also note 79, *supra*.

¹⁰⁶ Fishery Conservation and Management, 50 C.F.R. § 601.21(b)(1) (1978).

¹⁰⁷ DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart pre-planning.

¹⁰⁸ Scoping meetings require the invitation of affected federal, state and local agencies along with other interested parties to participate in determining the range of actions, alternatives and impacts to be considered in an Environmental Impact Statement. Protection of the Environment, 40 C.F.R. § 1508.25 (1979). Once Scoping meetings have begun, the National Marine Fisheries Service identifies a Plan Coordinator to orchestrate plan development. Gordon, *supra* note 10, at 24.

¹⁰⁹ Protection of the Environment, 40 C.F.R. § 1508.25 (1979).

¹¹⁰ Executive Order 12044, 3 C.F.R. 152 (1979).

¹¹¹ See note 14, *supra*.

to provide analysis of anticipated regulations from their very early developmental stages.¹¹² Since the plans are essentially the basis for the regulations ultimately promulgated by the Secretary, a council participates in the Order's processes. The primary council duty imposed by Executive Order 12044 at this stage is the development of a work plan.¹¹³ The pre-planning stage is rounded out by NMFS's processing the preliminary NEPA documents and the work plan.¹¹⁴

Phase two of the process is called "plan development." Council activity at this stage focuses on the preparation of a Draft Fishery Management Plan—a document that will eventually emerge as a fishery management plan after input from other sources at later stages of the process.¹¹⁵ The Draft Fishery Management Plan is a composite of four documents: (1) a fishery management plan, as defined by the FCMA,¹¹⁶ in draft form; (2) a draft regulatory analysis;¹¹⁷ (3) a draft environmental impact statement,¹¹⁸ and (4) draft proposed regulations.¹¹⁹ A council does not itself produce this document but has a planning team direct its development by council staff, as is often the case with the New England Regional Council, or by outside contractors.¹²⁰ Throughout these early development stages, consultation between those developing plans, the council, and the National Marine Fisheries Service (NMFS) occurs as necessary.¹²¹ Once the draft plan and draft environmental impact statement are approved by council, the latter (referred to as a "discussion paper" before receiving Department of Commerce ap-

¹¹² Executive Order 12044, 3 C.F.R. 152 (1979).

¹¹³ A work plan is a document calling for, among other things, a statement of purpose of regulation, explanation of why the proposed regulation is significant, a schedule for the development of the regulations, a discussion of how the public will be invited to join in the regulation-making process, and a Regulatory Analysis—an explication of the economic impact of the regulations. DRAFT OPERATIONAL GUIDELINE, *supra*, note 101, example I-IV. Work plans, significantly, must be approved by NOAA's Administrator before significant funds can be disbursed by the council for plan development. Gordon, *supra* note 101, at 23.

¹¹⁴ DRAFT OPERATIONAL GUIDELINE, *supra* note 10, at chart plan development.

¹¹⁵ *Id.* at chart public participation.

¹¹⁶ See note 14, *supra*.

¹¹⁷ See note 113, *supra*.

¹¹⁸ See note 100, *supra*.

¹¹⁹ See note 14, *supra*. A council is granted the option of proposing regulations. 16 U.S.C. § 1853(c) (1976). If it fails to do so, the National Marine Fisheries Service, Regional Director, proposes them. DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart plan development.

¹²⁰ See note 82, *supra*.

¹²¹ See generally, *Id.* at charts pre-planning and plan development.

proval) enters an elaborate review process, passing before the Regional Director of NMFS, the NMFS Office of Resource Conservation and Management, the Department of Commerce Deputy Assistant Secretary for Environmental Affairs, and the Department of Commerce Environmental Work Group.¹²² It finally moves on to the Environmental Protection Agency.¹²³

Phase three of the development process is labelled "public participation" and consists of two independent review processes.¹²⁴ The first involves review by the public itself: this calls for announcement of notice by the Environmental Protection Agency of Draft Fishery Management Plan availability in the *Federal Register*, public hearings on the draft plan by the council, and the submission of comments to and compilation of comments by the council.¹²⁵ The other half of the public participation process scheme involves an intensive review of the Draft Fishery Management Plan by the National Marine Fisheries Service (NMFS) at the Washington level.¹²⁶ This is a pre-screening preliminary to the full Secretarial review; NMFS makes informal comments to the council, and if these suggestions are incorporated, they will facilitate, but by no means guarantee, final Secretarial approval.¹²⁷ At this stage, after receiving comments from both NMFS and the public, a council may approve the Draft Fishery Management Plan, converting it into a Fishery Management Plan.¹²⁸ Once this occurs, the document is split into the Fishery Management Plan *per se* and the proposed regulations; the former is passed on for Secretarial Review (phase four) and the latter is transmitted to the NMFS

¹²² DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart plan development.

¹²³ *Id.*

¹²⁴ *Id.* at chart public participation.

¹²⁵ *Id.*

¹²⁶ Gordon, *supra* note 101, at 28. The actual Washington review requires a splitting of the Draft Fishery Management Plan into parts that are reviewed by different federal authorities. The Draft Fishery Management Plan as a whole is sent to the Plan Coordinator, see note 108, *supra*, who distributes it to the Coast Guard, the Department of State, concerned Embassies, and to NOAA advisors; all parties review the document. The Draft Proposed Regulations are sent to the National Marine Fisheries Service Regulations Chief for review and an optional meeting. The Draft Regulatory Analysis is sent to a staff economist of the Service who, after review, passes it along to the Chief Economist of the Department of Commerce. Comments from all review processes are then transmitted to the National Marine Fisheries Service Regional Director who passes them along informally to the concerned council. DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart public participation.

¹²⁷ Gordon, *supra* note 101, at 28.

¹²⁸ DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart public participation.

Regional Director for Regulation Promulgation (phase five).¹²⁹

Phase four, Secretarial Review, requires the Fishery Management Plan to pass through a series of reviews, all at the Washington level. After an initial review which determines if the plan has been modified in accordance with suggestions made at the intensive National Marine Fisheries Service (NMFS) phase three review, NMFS Office of Resource Conservation and Management holds a "Decision Meeting," attended by all concerned federal agencies at which an initial decision on approval, disapproval, or partial disapproval is made.¹³⁰ The Plan then passes to the NMFS Assistant Administrator for Fisheries for final review¹³¹ and final decision on approval.¹³²

The fifth phase of the plan development process, regulation promulgation, occurs simultaneously with phase four but requires more time.¹³³ The phase is initiated by a review, with necessary modifications, of the proposed regulations by the National Marine Fisheries Service's (NMFS) Regional Director.¹³⁴ These then pass to the NMFS Regulation Chief in Washington who reviews and then publishes the regulations in the *Federal Register*.¹³⁵ This starts a sixty-day public review period.¹³⁶ After public comments are compiled and assessed by the NMFS Regional Director, he prepares draft final regulations that are reviewed by the Coast Guard, Department of State and other concerned agencies.¹³⁷ At this point the regulations are reviewed by the NMFS Assistant Administrator for Fisheries and by the NOAA Administrator.¹³⁸ If approved, they are published in the *Federal Register*; this starts the thirty-day period made applicable to regulation promulgation by

¹²⁹ *Id.*

¹³⁰ *Id.* at chart secretarial review.

¹³¹ Although the FCMA specifies that the Secretary of Commerce holds the authority to make this decision, 16 U.S.C. § 1855 (1976), the Secretary has delegated it to NOAA's Administrator who has in turn redelegated it to the National Marine Fisheries Service, Assistant Administrator for Fisheries. Gordon, *supra* note 101, at 29.

¹³² DRAFT OPERATIONAL GUIDELINE, *supra* note 101 at chart secretarial review. If the plan is disapproved or partially disapproved, the council is given forty-five days to resubmit an amended plan. 16 U.S.C. § 1854(a)(2) (1976). Immediately after approval, emergency regulations can be promulgated. See note 91, *supra*.

¹³³ Gordon, *supra* note 101, at 30.

¹³⁴ DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart regulation promulgation.

¹³⁵ *Id.* At this point, the fishery management plan is also published, which starts the forty-five day public review period mandated by 16 U.S.C. § 1855(a)(2) (1976).

¹³⁶ DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart regulation promulgation.

¹³⁷ *Id.*

¹³⁸ *Id.*

the Administrative Procedure Act¹³⁹ to give notice to affected parties. After the running of this period, the regulations become effective.¹⁴⁰

As becomes obvious from study of the plan development process, the plan framework established by the National Marine Fisheries Service shows significant federal regulation—mostly mandated by NEPA and Executive Order 12044—of the plan development procedure. The regulation greatly increases plan development time so that it takes upward of 250 days to develop a fishery management plan, assuming no major policy or procedural conflicts occur.¹⁴¹ Nevertheless, the framework does not show federal impingement on council authority to develop management policy. The overlay of federal law governs the manner in which the councils engage in decision-making, partially by controlling formal procedure through regulations issued by NOAA,¹⁴² and largely by establishing documentation of decision-making rationales through Executive Order 12044 and NEPA requirements. It leaves unrestricted, however, the ability of the councils to develop independently that policy and those values that will furnish the foundation for fishery management planning.

IV. THE LEGAL STATUS OF THE COUNCILS

Like all newly enacted legislation, the FCMA faced the process of integration with already existent law. Though little legislation existed in the field of federal fishery management,¹⁴³ abundant legislation in peripheral areas that the FCMA touched upon needed to be meshed with the Act. The earlier discussion of the plan development process demonstrated how the National Environmental Policy Act and Executive Order 12044 fleshed out and integrated with the FCMA's terse procedural guides for plan development.¹⁴⁴ Viewed as a whole, however, the integrative process has not pro-

¹³⁹ 5 U.S.C. § 553(d) (1976).

¹⁴⁰ DRAFT OPERATIONAL GUIDELINE, *supra* note 101, at chart regulation promulgation.

¹⁴¹ Gordon, *supra* note 101, at 20. This process can be accelerated to a small degree by the reduction of public participation in the plan development process. The forty-five day public review period of the Draft Environmental Impact Statement, the Department of Commerce review of the Discussion Paper, and the thirty-day "notice to affected parties" required by the Administrative Procedure Act can be waived with good cause. Gordon, *supra* note 101, at 21.

¹⁴² See note 92, *supra*.

¹⁴³ For a discussion of law defining rights to marine resources, see note 13, *supra*.

¹⁴⁴ See text accompanying notes 82-142, *supra*.

ceeded without problems. An area that has been particularly vexing involves the application of federal laws to the regional councils as autonomous bodies,¹⁴⁵ a process that involves determining the councils' legal status. That councils were intended by Congress to represent regional interests is clear.¹⁴⁶ However, as a result of the integrative process, the interpretation of several federal statutes—a broad definitional provision of federal employee¹⁴⁷ and the Federal Advisory Committee Act (FACA)¹⁴⁸—has created a threat to the councils' decision-making autonomy. This autonomy faces erosion by federal encroachment upon council independence in policy formulation.

Instances in which this erosion could occur are not difficult to imagine. Policy questions in which federal and regional interests diverge could give rise to federal interference with regional autonomy. The use of logbooks in the New England groundfish manage-

¹⁴⁵ The application has occurred primarily by way of federal agency opinions. Although the opinions touch upon areas as diverse as the tort liability of council members and the purchase of fire insurance for council property, the scope of the present discussion is limited to those opinions that have impact on the independent decision-making authority of the regional councils.

While agency opinions have been the primary context in which the integrative process has occurred, the opinions have prompted legal and political activity that has also furthered the process. The legal activity has manifested itself in the form of a Task Force Report from NOAA, summarizing administrative interpretation with respect to the councils, noting inconsistencies and ambiguities which cause operational problems for the councils, and proposing recommendations to alleviate the problems. NOAA, REPORT OF THE TASK FORCE ON THE LEGAL STATUS OF THE REGIONAL FISHERY MANAGEMENT COUNCILS (1978) [hereinafter cited as TASK FORCE REPORT] at 3. The political activity has come in the form of hearings conducted in 1979 by the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Merchant Marine and Fisheries Committee for the proposal of amendments to the FCMA.

The issue of whether the regional management system is an effective method for implementing the FCMA's general management goals is for the most part beyond the scope of this article. Some observers of the present system assert that it has failed to adequately conserve and manage the nation's fishery resources because it allows industry interest groups too strong a voice. The councils have been charged with serving industry goals while ignoring important ecological issues. See generally *Proposed Amendments to the FCMA: Hearings Before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries* (Oct. 11, 1979) (unpublished statement of Langdon Warner and Michael Bean of the Environmental Defense Fund) at 3-4. The scope of the present discussion is limited to whether the legislative purpose of the regional management system is being skewed by the application of federal law.

¹⁴⁶ For a general discussion of the purposes of the regional system, see text accompanying notes 56-66, *supra*.

¹⁴⁷ 5 U.S.C. § 2105 (1976).

¹⁴⁸ 5 U.S.C. app. §§ 1-15 (1976).

ment plan illustrates such a policy question.¹⁴⁹

The development of fishery management plans requires extensive statistical information on the size and vitality of fish stocks, data collected by the National Marine Fisheries Service (NMFS).¹⁵⁰ In addition to gathering information through sample trawling by fishery research vessels, NMFS collects data from logbooks, records kept by fishermen on where they fish and what they catch.¹⁵¹ Although logbook information is extremely useful to NMFS in stock assessment, fishermen have been reluctant to provide such information: unless confidentiality is guaranteed, turning over information on productive fishery areas is a giveaway of a competitive edge.¹⁵² Thus while NMFS has pushed for use of the logbooks, the New England Regional Council, representing the interest of the local fishermen, has resisted their unrestricted use.¹⁵³ This conflict presents a situation where federal authority, if expanded to the extent that some have suggested, could be exercised so as to erode regional management autonomy. Consider the following hypothetical: the New England Council decides to meet in order to formulate a policy stand on the continued use of logbooks. If council members were converted to federal employees,¹⁵⁴ they might feel pressures—subtle or perhaps overt—to conform to the official “federal” position on logbooks as advocated by NMFS. Furthermore, if FACA were strictly followed, the Council could not call such a meeting without prior approval by a specified federal employee.¹⁵⁵ Even though this situation is hypothetical, it illustrates the type of conflict where regional interests could suffer through the expansion of federal control of the councils.

¹⁴⁹ NATIONAL FISHERMAN, May, 1980 at 7, Letter from Francis J. Mirachi, President, Massachusetts Inshore Draggerman's Association, to the Editor, (hereinafter cited as Nat'l Fisherman letter).

¹⁵⁰ DAVID E. PIERCE & PATRICIA E. HUGHES, INSIGHT INTO THE METHODOLOGY AND LOGIC BEHIND NATIONAL MARINE FISHERIES SERVICE STOCK ASSESSMENTS, 1 (1979) (published by Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce under a program implementation grant to the Commonwealth of Massachusetts).

¹⁵¹ *Id.* at 5.

¹⁵² Interview with Ken Crossman, Jr., Special Agent, National Marine Fisheries Service (Feb. 5, 1980).

¹⁵³ Nat'l Fisherman letter, *supra* note 149.

¹⁵⁴ See text accompanying notes 158-189, *infra*.

¹⁵⁵ See text accompanying note 207, *infra*.

A. *The Status of the Regional Councils' Members and Staffs as Federal Employees.*

In response to an inquiry from the Department of Commerce, the Civil Service Commission made a legal determination of whether the public members (those selected by the Secretary from lists submitted by the Governors)¹⁵⁶ and staff of the regional councils were federal employees.¹⁵⁷ In deciding the issue, the Service used a broad definitional provision¹⁵⁸ applicable to many governmental organizations and their civilian employees. If members and staff of the councils were deemed federal employees under this provision, a battery of regulations, currently applicable to most Civil Service employees, would become applicable to them. However, the commission determined that the definition provision did not apply and held that council members and staff were not federal employees.¹⁵⁹

The relevant statutory section states:

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) the adjutants general designated by the Secretary concerned under section 709(c) of title 32, United States Code;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.¹⁶⁰

The opinion begins by finding subsections one and two of the defi-

¹⁵⁶ 16 U.S.C. § 1852(b)(1)(C) (1976).

¹⁵⁷ Letter from Joseph B. Scott, acting General Counsel, Civil Service Commission, to Joseph E. Kasputys, Assistant Secretary for Administration, U.S. Department of Commerce (Aug. 3, 1976) (hereinafter cited as letter from Joseph B. Scott).

¹⁵⁸ 5 U.S.C. § 2105 (1976).

¹⁵⁹ Letter from Joseph B. Scott, *supra* note 157, at 6.

¹⁶⁰ 5 U.S.C. § 2105 (1976).

tion¹⁶¹ clearly applicable since council members are (1) appointed by a federal official, namely, the Secretary of Commerce, and (2) performing a federal function authorized by statute, i.e., preparing fishery management plans.¹⁶² Proceeding to a third subsection of the provision, the opinion isolates the requirement of supervision by an individual named in section one—here the Secretary of Commerce—as the dispositive issue.¹⁶³ Noting a lack of judicial precedent on the application of the subsection,¹⁶⁴ the opinion applies a common law employee/employer relationship test, and finds that, because the Secretary does not control the manner in which work by a council is performed, the requisite supervisory relationship does not exist.¹⁶⁵ In commenting on a lack of Secretarial supervisory powers, the opinion emphasizes that the Secretary's function vis-a-vis the council function of plan preparation, is to review and either approve or disapprove the plans submitted to him by a council.¹⁶⁶

The opinion also calls attention to congressional silence on the matter of federal employee status of council members, but infers from the regional structure that they could not be considered federal employees:

We must also consider the frequently reiterated concern of Congress for avoiding the creation of situations conducive to conflicts of interest. The more substantial interest of the States in these Councils, as compared with that of the Federal Government, is also evident from the fact that the Governors nominate all public sector appointees We question whether Congress intended the nominees of State governors to be Federal employees while at the same time be in an apparently [state] representative role of high potential for conflict of interest.¹⁶⁷

After passing in this manner on the status of council *members* as federal employees, the opinion takes up the status of council staff. As was noted above,¹⁶⁸ one criterion for qualifying as a federal employee under this provision involves appointment by a specified

¹⁶¹ *Id.* § 2105(a)(1) and (a)(2).

¹⁶² Letter from Joseph B. Scott, *supra* note 157, at 3.

¹⁶³ 5 U.S.C. § 2105(a)(3) (1976).

¹⁶⁴ Letter from Joseph B. Scott, *supra* note 157, at 3.

¹⁶⁵ *Id.* at 4.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 5-6.

¹⁶⁸ See text accompanying note 162, *supra*.

type of federal employee. Since council staff are appointed by the councils¹⁶⁹ and not by any federal employee, they too are not considered federal employees under this statutory definition.¹⁷⁰ Although this opinion may appear to put to rest the threat of "federalization" of council members and staff, the opinion has not gained acceptance and its authority has been challenged.¹⁷¹

NOAA originally read this opinion very broadly to find that the councils were not part of the federal government.¹⁷² This conclusion led to the development of a separate personnel system, funding of the councils through grants, and furnishing office space independently of the federal government.¹⁷³ But as other agencies defined with greater and greater clarity the relationship between the federal government and the councils, NOAA realized that the councils were not at the distance from the federal government that the Commission's opinion had placed them but instead were bodies reliant upon and part of it for limited purposes.¹⁷⁴

NOAA has responded to the inconsistency caused by varying perceptions of the council/federal government relationship. Their first step involved articulating two possible readings of the Civil Service Commission opinion: (1) a broad reading, consistent with the original interpretation of the Commission's opinion and based primarily on the conflict-of-interest discussion¹⁷⁵ that places council members and staff outside the federal government entirely; and (2) a narrow reading based on the absence of a supervisory relationship between the Secretary of Commerce and the councils¹⁷⁶ that would allow them to function as federal instrumentalities and to hire staff free from Civil Service Commission regulation.¹⁷⁷

The second step NOAA took involved offering several options for eliminating inconsistencies between possible readings of the Commission's opinion and other agencies' perceptions of the council/federal government relationship.¹⁷⁸ The first option simply calls

¹⁶⁹ This appointment is made under authority granted the councils at 16 U.S.C. § 1852(f) (1976).

¹⁷⁰ Letter from Joseph B. Scott, *supra* note 157, at 6.

¹⁷¹ TASK FORCE REPORT, *supra* note 145, at 12.

¹⁷² *Id.* at 11.

¹⁷³ *Id.* at 11-12.

¹⁷⁴ *Id.*

¹⁷⁵ See text accompanying note 167, *supra*.

¹⁷⁶ See text accompanying notes 165-166, *supra*.

¹⁷⁷ TASK FORCE REPORT, *supra* note 157, at 13.

¹⁷⁸ *Id.* at 13-15.

for a withdrawal of that part of the opinion based on conflict-of-interest reasoning;¹⁷⁹ although this would lead to a modified perception of the councils as no longer being totally "beyond" the Federal government and thus call for new methods of funding and perhaps supplying office materials, it would retain the highly significant federal immunities that inhere from the councils' status as instrumentalities.¹⁸⁰ The second option calls for a withdrawal of the entire Commission opinion.¹⁸¹ NOAA perceives the result of this approach as being: (1) a conversion of council members to intermittent federal employees and staff to full-time employees and (2) provisions for hiring of staff through the Civil Service Commission process and (3) a calling for application of conflict-of-interest laws¹⁸² and the Hatch Act¹⁸³ to both members and staff.¹⁸⁴ A third option, calling for maintenance of the entire commission opinion, would require substantial amendment to the FCMA to take the councils out of the federal government entirely.¹⁸⁵

¹⁷⁹ See text accompanying note 167, *supra*.

¹⁸⁰ TASK FORCE REPORT, *supra* note 145, at 13-14. The immunities that inhere from an agency consensus of council status as federal instrumentalities are important. The result of such legal determination is that the councils are not subject to state taxation and need not register as business entities under state corporation laws; in addition, they need not maintain state-mandated unemployment compensation or workman's compensation coverage but are protected by the federal equivalent. *Id.* at 4.

¹⁸¹ *Id.* at 14.

¹⁸² Several laws which could all generally be referred to as conflict-of-interest laws have been applied to the councils' members. The most important of these is 18 U.S.C. § 208 (1976) which prohibits an individual from participating in a decision if it will affect his or his family's financial situation. The impact of this provision on the public sector section of council membership would be devastating but for a provision allowing for exemption of individuals from the statute's prohibition when his financial interest is deemed not to compromise the decision-making process. TASK FORCE REPORT, *supra* note 145, at 16.

¹⁸³ The Hatch Act prohibits specified political activities of federal employees. 5 U.S.C. §§ 7321-7327 (1976). NOAA has determined that the law is inapplicable to members and executive staff of the councils because the Act incorporated the definition of "employee" set out at 5 U.S.C. § 2105 (1976). By accepting the Civil Service Commission's opinion on the application of this statutory definition to council members and employees, see text accompanying notes 157-170, *supra*, NOAA reasoned that the council members and staffs were beyond the statute's reach. Letter from Robert Hayes, Staff Attorney for NOAA, to the NOAA Records (May 17, 1977).

¹⁸⁴ TASK FORCE REPORT, *supra* note 145, at 14-15.

¹⁸⁵ *Id.* at 15. A modified version of this approach has been recommended by Robert A. Jones, Chairman of the New England Fishery Management Council. *Proposed Amendments to the FCMA: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries* (October 11, 1979) (unpublished statement of Robert Jones) at 2-3. Jones recommends substantial amendment of the FCMA section on Staff and Administration, 16 U.S.C. § 1852 (f)(1976), so that the councils would be able to regulate employees free from Secretarial

The regional councils have responded forcefully to the issue of member and staff legal status.¹⁸⁶ That the public council *members* are not federal employees within the meaning of the concerned definitional provision has been a premise embraced by the councils and challenged only by the NOAA suggestion of converting members to intermittent federal employees.¹⁸⁷ Even NOAA's suggestion raises important practical questions. How withdrawal of the Commission's opinion will convert public council members to federal employees is not articulated; a reinterpretation of the definitional provision alone would not reach that result since the statutory definition requires that the individuals be supervised by a federal officer.¹⁸⁸ Simple withdrawal of the Commission's opinion clearly does not affect the type of relationship that exists between the Secretary of Commerce and the councils. The conversion of council public members of which NOAA speaks would apparently require substantial legislative amendment. Beyond the practical problems inherent in such a move, the conversion would run counter to the legislative purpose of the regional council system. Such a legislative amendment would require changing a small segment of the regional management scheme so as to put it in conflict with the overriding purpose of the regional system. As legislative history reveals, regional groups representing regional interests was clearly the intent of Congress in instituting the councils as the primary policy makers under the FCMA.¹⁸⁹ Such intent dictated that the regional consensus be obtained by having state, federal and private individuals (the last group being the public council members) each represent their own interests. A conversion of the public council members to federal employees would result in an unwarranted, and implicitly legislatively-prohibited, shift in representative roles. Public council members would conceivably be subject to federal supervision. No longer would a council necessarily be reflecting a regional perspective but it would be swayed by the large voting

control. It varies from option three in that it does not address Council members' status and would, presumably, allow for retention of federal immunities. See note 189, *supra*.

¹⁸⁶ See e.g. *Proposed Amendments to the FCMA: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries* (Oct. 11, 1979) (unpublished statement of Robert Jones) at 1-2.

¹⁸⁷ *Id.*

¹⁸⁸ 5 U.S.C. § 2105(a)(3) (1976).

¹⁸⁹ For a general discussion of the legislative purpose of the regional council system, see text accompanying notes 57-66, *supra*.

bloc of public council members and their deference to their employer, and possible supervisor, the federal government.

A more difficult, but equally important, issue is that of the legal status of council staff.¹⁹⁰ An argument, as compelling as that for the independence of council membership, can be asserted for council staff. As a council spokesman has stated:

The independence of Councils . . . depends upon the independence of their staffs. If the staffs were federal employees, they would not be directly responsible to the Councils. If there were a difference of policy, for example, between the Councils and the Department of Commerce, federal staffs would have to conform to Commerce policy, not that of the councils. This would seriously undermine the councils' ability to do their jobs.¹⁹¹

That the councils were endowed with the statutory power to hire their own staff supports a view that staff loyalties were designed to lie with the councils as regional bodies and not with the federal government.¹⁹² Although internal legislative history is silent on the matter, congressional purpose, as it manifests itself in the FCMA section on Staff and Administration,¹⁹³ would seem to be violated by the conversion of council staff to government employees as recommended by NOAA.

¹⁹⁰ The FCMA provides under a section on Staff and Administration that:

(1) Each Council may appoint, and assign duties to an executive director and such other full-and-part-time administrative employees as the Secretary determines are necessary to the performance of its functions.

(2) Upon the request of any Council, and after consultation with the Secretary, the head of any Federal agency is authorized to detail to such Council, on a reimbursable basis, any of the personnel of such agency, to assist such Council in the performance of its functions under this chapter.

(3) The Secretary shall provide to each Council such administrative and technical support services as are necessary for the effective functioning of such Council.

16 U.S.C. § 1852(f) (1976). Thus, the hiring of staff was viewed by Congress as a council function, limited only by Secretarial determination of staff size. Regulations limit the maximum administrative staff size to seven, except by approval of the Director of the National Marine Fisheries Service. Fishery Conservation and Management, 50 C.F.R. § 601.22(c) (1978). The Act gives no definition of administrative employee, and no legislative history suggesting special meaning exists.

¹⁹¹ *Proposed Amendment to the FCMA: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries* (July 10, 1979)(unpublished statement of Jacob Dysktra, Acting Chairman, New England Regional Fishery Management Council) at 3.

¹⁹² The FCMA does anticipate instances where federal employees would be working for the councils. See 16 U.S.C. § 1852 (f)(2) (1976).

¹⁹³ *Id.* § 1852(f) (1976).

B. The Application of the Federal Advisory Committee Act.

The Federal Advisory Committee Act¹⁹⁴ is directed at "committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government."¹⁹⁵ Its purpose, broadly stated, is to provide a mechanism to review the need for the establishment or perpetuation of advisory committees and to establish "standards and uniform procedures [that] should govern the establishment, operation, administration, and duration of advisory committees."¹⁹⁶

The question of FACA's applicability to the regional councils centers on whether they fall within the statutory definition of advisory committee.¹⁹⁷ Once applied, the Act would affect the decision-making process of the councils in several respects. First, the application *per se* would appear to constrict council authority, to reduce it to a mere advisory function. The councils would no longer seem to hold their role as the primary policy makers under the FCMA.¹⁹⁸ FACA states:

Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.¹⁹⁹

At a practical level, FACA application has resulted in a proposed requirement that policy decisions made by councils be cleared through the Office of Management and Budget,²⁰⁰ a demand that seems clearly inconsistent with a perception of the councils as independent policy makers.

Another section of FACA sets forth procedural requirements that would affect the manner in which council decision-making

¹⁹⁴ 5 U.S.C. app. §§ 1-15 (1976).

¹⁹⁵ *Id.* § 2.

¹⁹⁶ *Id.* § 2(4).

¹⁹⁷ *Id.* § 3(2).

¹⁹⁸ See text accompanying notes 41-44, *supra*.

¹⁹⁹ 5 U.S.C. app. § 9(b) (1976).

²⁰⁰ *Proposed Amendments to the FCMA: Hearings Before the Subcommittee of Fisheries and Wildlife Conservation and the Environment of the House Merchant Marine Committee* (July 10, 1979) (unpublished statement of William Gordon, Director, Office of Resource Conservation and Management, Department of Commerce) at 10.

machinery operates.²⁰¹ It requires that meetings be open;²⁰² that public notice of meetings be given;²⁰³ that interested parties be permitted to attend and present statements;²⁰⁴ that committee documents be available to the public;²⁰⁵ that a designated officer or employee of the federal government attend each meeting;²⁰⁶ and that committees not hold meetings without approval from a designated federal government employee.²⁰⁷

While many of these provisions would undoubtedly have a salutary effect on plan development, others have already proven themselves troublesome. On a procedural level, FACA's application has caused serious problems which the councils have sought to remedy through legislative change.²⁰⁸ Public notice requirements are burdensome and, at times, completely crippling. For instance, if the Secretary rejects a plan and returns it to a council for modification, the council has forty-five days in which to amend it.²⁰⁹ If the council must give public notice to satisfy FACA, this takes fifteen days;²¹⁰ the Department of Commerce has added five more days for review, and NOAA another six.²¹¹ Thus notice requirements consume twenty-six of the forty-five days allowed. If the council wants to convene one of its subpanels, then even more time is required.²¹² Requiring a presiding federal employee or officer for every advisory committee meeting has also proved onerous. The Department of Commerce needs to designate a full-time employee to attend each council meeting and he has statutory power to adjourn meetings found not to be in the public interest.²¹³ This power held by a federal official seems inconsistent with a council's operational independence. NOAA has suggested that the councils' Executive Direc-

²⁰¹ 5 U.S.C. app. § 10 (1976).

²⁰² *Id.* § 10(a)(1).

²⁰³ *Id.* § 10(a)(2).

²⁰⁴ *Id.* § 10(3).

²⁰⁵ *Id.* § 10(3)(b).

²⁰⁶ *Id.* § 10(3)(e).

²⁰⁷ *Id.* § 10(3)(f).

²⁰⁸ *Proposed Amendments to the FCMA: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries* (Oct. 11, 1979) (unpublished statement of Robert A. Jones, Chairman of the New England Fishery Management Council) at 1.

²⁰⁹ 16 U.S.C. § 1854(a)(2) (1976).

²¹⁰ TASK FORCE REPORT, *supra* note 145, at 17.

²¹¹ *Id.* at 18.

²¹² *Id.*

²¹³ *Id.* at 19.

tors be converted to federal employees to avoid this incursion on council independence.²¹⁴ Such a solution, however, would be offensive to the notion that council staff should remain independent of the federal government, a proposition discussed above.²¹⁵

1. The Opinion of the Office of Management and Budget

Each council is authorized by the FCMA to establish scientific, statistical and other necessary advisory committees to assist the councils in plan development.²¹⁶ The Office of Management and Budget (OMB) was asked by the Department of Commerce whether the establishment of advisory committees cited in the FCMA were "specifically authorized by statute" or whether they need be established in consultation with OMB.²¹⁷ In answering this question, OMB concluded that the regional councils are themselves statutory advisory committees: "They are committees which have been established in the interest of obtaining advice or recommendations for the Department of Commerce, whose membership is not composed wholly of Federal employees."²¹⁸ The only authority OMB cites in support of this proposition is a section of the FCMA which provides that:

one of the purposes of the Act is: "to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans, under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and

²¹⁴ *Id.* at 20.

²¹⁵ See text accompanying notes 190-193, *supra*.

²¹⁶ 16 U.S.C. § 1852(g) (1976).

²¹⁷ The relevant section of FACA states:

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Director [of the Office of Management and Budget] with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

5 U.S.C. app. § 9(a) (1976). The Office of Management and Budget determined that subsection (a)(2) applied to the council advisory committees, reasoning that a committee is not specifically authorized by statute merely by a grant of statutory authority to an agency to employ the advisory committee device, as the FCMA provides. Letter from William M. Nichols, General Counsel, Office of Management and Budget, to Homer E. Moyer, Jr., Acting General Counsel, Department of Commerce (March 22, 1977) at 1.

²¹⁸ *Id.* at 2.

economic needs of the states"²¹⁹

On this evidence, OMB concludes that the regional councils are advisory committees and thus subject to FACA.

2. The Opinion of the General Services Administration

The General Services Administration (GSA), spoke to the issue of FACA applicability to the councils in response to a NOAA inquiry as to whether the Administrator of GSA, subject to the Staff and Administration section of the FCMA,²²⁰ was required to provide all services within his authority to the councils or only those requested by them.²²¹ In finding that the councils were regulated by procurement rules governing executive branch agencies, the General Services Administration characterized the regional councils as advisory committees within the FACA definition.²²²

GSA's determination of council status is not so much the product of reasoned elaboration as it appears to be a conclusory labelling. The opinion rests heavily on a fragment of legislative history, a brief excerpt from the Senate Conference Report which states: "The provisions of the Federal Advisory Committee Act apply, and therefore, meetings [of the councils] must be open to the public with few exceptions."²²³ The opinion also: (1) outlines the FCMA section on the regional councils, detailing council establishment, composition, staff and administration; (2) briefly enumerates council duties such as submission of fishery management plans and activity reports to the Secretary of Commerce; (3) provides a sketch of Secretarial duties, namely the implementation of Fishery Management Plans and enforcement of civil penalties and other provisions of the Act; and (4) states summarily: "the Regional Councils are federal agencies established by statute in the interest

²¹⁹ *Id.*

²²⁰ This section states: "[t]he Administrator of General Services shall furnish each Council with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States." 16 U.S.C. § 1852(f)(4) (1976).

²²¹ Letter from Donald P. Young, Assistant General Counsel, Administration and Records Division, General Services Administration, to William C. Brewer, Jr., General Counsel, NOAA (September 30, 1977) at 1.

²²² The issue of FACA applicability arises indirectly in the opinion. The opinion implies that one set of procurement regulations governs all bodies within the executive branch of the federal government. It then holds that the regulations must apply to the regional councils since these bodies are advisory committees of the Department of Commerce, an executive branch agency. *Id.* at 3.

²²³ *Id.* citing 1976 SENATE REPORT, *supra* note 32, at 52, USCCAN at 675-676.

of obtaining advice or recommendations for a Department in the executive branch of the federal government,"²²⁴ reiterating the definitional terms for an advisory committee in FACA.²²⁵ In this manner, the General Services Administration has determined that the councils are advisory committees; at no point, however, are those functions that would make the councils advisory in nature singled out by the opinion. As a result, the logical connection between the discussion in the opinion and the conclusion it reaches is never made apparent.

3. *The NOAA Position on FACA*

Although NOAA has never, through an opinion devoted solely to the issue, squarely faced the question of whether the regional councils are advisory committees for FACA purposes, it has spoken on the matter as a peripheral issue in several opinions.²²⁶ It has also asserted, through regulation promulgation, that FACA does apply to the councils.²²⁷ Where NOAA has argued that FACA applies, its reasoning rests solely on the brief mention of FACA applicability to the councils in the Senate Conference Report.²²⁸ In the Task Force Report on Legal Status, NOAA presents FACA applicability to the councils as an accepted conclusion "representing agency consensus."²²⁹ In discussion, it summarily states: "The legislative history of the FCMA states that the Federal Advisory Committee Act applies."²³⁰

C. *The Federal Advisory Committee Act Generally*

Under the provisions of FACA, no advisory committee can meet until it has filed a charter.²³¹ The regional councils have been chartered by the Department of Commerce as advisory committees under this requirement.²³² Despite this, evidence marshalled on the side of FACA applicability to the councils remains scanty and

²²⁴ *Id.* at 2-3.

²²⁵ See note 238, *infra*.

²²⁶ See e.g. letter from Patrick Travers, NOAA Staff Attorney, to James W. Brennan, Deputy General Counsel, NOAA (Nov. 30, 1976) at 4.

²²⁷ Fishery Conservation and Management, 50 C.F.R. § 601.21(b)(2)(1) (1978).

²²⁸ See text accompanying note 236, *infra*, for the text of the legislative history.

²²⁹ TASK FORCE REPORT, *supra* note 145, at 3.

²³⁰ *Id.* at 6.

²³¹ 5 U.S.C. app. § 9(c) (1976).

²³² Letter from William C. Brewer, Jr., General Counsel, NOAA, to J.T. Smith III, General Counsel, Department of Commerce (Jan. 13, 1977) at 6.

weak. The Office of Management and Budget relies on an excerpt of the FCMA which read in isolation might suggest that the councils perform advisory functions.²³³ The General Service Administration's opinion rests on a conclusory labelling of the council functions as advisory.²³⁴ Both these rulings rely heavily on a brief excerpt of legislative history, as does NOAA,²³⁵ in supporting the contention of FACA applicability.

A critical approach to the issue, placing legislative history in its proper perspective and examining the extent of the councils' advisory nature by looking at their functions, leads to the conclusion that the regional councils are not advisory and should not be subject to FACA. The legislative history relied on by these agency opinions is scanty. All that the Senate Conference Committee Report supplies on point is several sentences: "The Regional Councils and their committees and panels should receive maximum public input. The provisions of the Federal Advisory Committee Act apply, and therefore meetings must be open to the public, with few exceptions. Each Council shall conduct all meetings and hearings within its geographical area of concern."²³⁶ In addition to being terse, the language is ambiguous. Both the sentence preceding and succeeding that mentioning FACA deal with the subject of public access to regional council meetings. The argument can be made that FACA was meant only to apply to meeting standards and should not be applied to all aspects of regional council activity. Furthermore, internal legislative history should never be dispositive in statutory interpretation.²³⁷ To give it the force of law, as some agencies seem to have done here, circumvents constitutionally prescribed methods of lawmaking. The Conference Committee Report was merely an aid for congressional understanding of the FCMA; it was never voted on by Congress and enacted as law. It may provide a guide to the interpretation of difficult statutory provisions; it should not, however, supplant the interpretive process.

Finally, and most importantly, use of legislative history in this manner violates basic principles of statutory interpretation. The law being interpreted by these agencies is FACA. The integration

²³³ See text accompanying notes 216-219, *supra*.

²³⁴ See text accompanying notes 220-225, *supra*.

²³⁵ See text accompanying notes 226-230, *supra*.

²³⁶ SENATE REPORT, *supra* note 32, at 52, 1976 USCCAN at 675-676.

²³⁷ See generally HART & SACKS, *THE LEGAL PROCESS; BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, 1242-1286 (tentative edition, 1958).

of FACA and the FCMA requires at the outset an examination of the definitional provisions of FACA²³⁸ and a determination of whether the definition of advisory committee given there applies to the regional councils. What the Conference Committee Report writers of the FCMA have said on FACA applicability is of questionable relevance to a proper interpretation of FACA. Their area of authority is limited to the proper interpretation of the FCMA.

The relevant definitional section of FACA,²³⁹ read in conjunction with FACA as a whole, suggests that the statute is aimed at bodies whose *primary* function is advisory. If it were to apply to a body that serves advisory purposes in *any* regard, then hardly an executive body would escape its reach. The language of the Act, however, refutes such a reading. The Findings and Purpose section states: "The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which *have been established to advise . . .*"²⁴⁰ Again it states: "the function of advisory committees should be advisory only, and . . . all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved."²⁴¹

The regional councils cannot fairly be characterized as bodies whose primary function is advisory. The councils operate to fulfill the independent function of developing fishery management plans. That plans must pass Secretarial review to determine that they are consistent with national standards and other applicable law²⁴² hardly reduces the councils' function to an advisory level. The question of FACA applicability crystalizes to a single point: who makes the basic decisions about how a fishery is to be managed. If the councils supplied the Secretary with data upon which he could make this decision, then the councils might accurately be described

²³⁸ The subsection, in relevant extract, reads:

The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee thereof (hereinafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or offices of the Federal Government"

5 U.S.C. app. § 3(2) (1976).

²³⁹ See note 238, *supra*.

²⁴⁰ 5 U.S.C. app. § 2(b)(6) (1976) (emphasis added).

²⁴¹ *Id.* § 2(b)(6).

²⁴² 16 U.S.C. § 1854(b) (1976).

as advisory bodies. But it is apparent that the councils have been statutorily empowered to decide how a fishery is to be managed by developing the management plans; the basic policy decisions are theirs while the Secretary reviews the plans and translates them into enforceable law, unless of course, he disapproves and makes his own plan.

Although some functions of the councils can be described as advisory, such as the preparation of comments on foreign fishing applications²⁴³ and the submission of reports which may be requested by the Secretary,²⁴⁴ their dominant purpose, the development of fishery management plans, is clearly not advisory. NOAA has produced the most cogent argument on this point:

The Councils thus perform two separate and distinct types of functions. At any particular time they are acting in either an operational or an advisory role. When preparing comments for the Secretary on applications for foreign fishing and on management plans prepared by the Secretary, the Council is performing an advisory function, as contemplated in the Federal Advisory Committee Act. When preparing fishery management plans, however, the Councils are formulating a regime, which when set in place will have the force and effect of federal law; this substantive action is operational in nature and lends to the Councils the character of a federal agency. Acting in an operational capacity, the Councils enjoy great latitude in the formulation of fishery management plans. They are aided by their own advisory panels. Their submission of a plan to the Secretary is more in the nature of a finding than an offer of advice; this is emphasized by the limited scope of Secretarial review. The Secretary does not oversee their work. Each may act independently of the other; in cases of disagreement, the Secretary has the final word (except with respect to limited access systems), but exercises no dominion over the Council's activities.²⁴⁵

D. Integrating the Councils into the Federal System: An Approach

As the regional councils have been assimilated into the federal system, conflicts affecting their authority as regional bodies given the statutory mission to develop fishery policy have occurred. Conversion of council members and staff to federal employees and the

²⁴³ *Id.* § 1852(h)(2).

²⁴⁴ *Id.* § 1852(h)(4).

²⁴⁵ Letter from William C. Brewer, Jr., General Counsel, NOAA, to J.T. Smith III, General Counsel, Department of Commerce (Jan. 13, 1977) at 6-7.

application of the Federal Advisory Committee Act to the councils are concrete examples of such conflicts. Although these conflicts currently threaten to erode council authority, they may still be resolved in a manner that would preserve council independence in policy formulation—a goal that seems apparent in the legislative purpose of erecting a regional management system. Further, these conflicts and the discussion they have stimulated form a useful basis for constructing general guidelines for statutory interpretation in the continuing integration of the councils into the federal system. A two-tiered method of statutory interpretation provides an approach for preserving congressional purpose during the integrative process. Most federal statutes include a provision identifying those entities to which the statute applies. For example, the Federal Torts Claims Act applies to employees of federal instrumentalities,²⁴⁶ the Federal Administrative Procedure Act applies to agencies,²⁴⁷ and the Federal Advisory Committee Act applies to advisory committees.²⁴⁸ A fundamental principle in applying statutes to the councils is that the councils cannot be given a single label for purposes of applying these laws. Even a single label, such as agency, can have diverse meanings depending on the statute using it. There is little consistency among federal statutes in their use of these identifying labels, so the first step in determining whether a given statute applies to the regional councils is to determine if the councils fall within that group of bodies which the legislation is aimed at, considering the legislative purpose of the statute and any interpretive case law on point. Once this threshold issue is decided and the statute has been deemed applicable to the councils, another interpretive step must be taken. The legislative purpose of the statute—as established through a comprehensive reading of the statute and legislative history—must be integrated with the legislative purpose of the FCMA, *while preserving to the extent possible the purposes of both statutes*. Such an interpretive method is based on a practical perception of federal legislation. Because Congress is not repealing *sub rosa* one piece of legislation every time it enacts a new law that might conflict partially with the federal statutory framework, statutory interpretation should aim at accomodating statutes so that the purpose of each is pre-

²⁴⁶ See 28 U.S.C. §§ 2671-2680 (1976).

²⁴⁷ See 5 U.S.C. §§ 500-559 (1976).

²⁴⁸ See 5 U.S.C. app. §§ 1-15 (1976).

served to the greatest possible extent. If the FCMA and the regional councils as autonomous policy makers are to serve their legislative purposes, these basic guidelines should be kept in mind when interpreting federal statutes applicable to the councils.

V. CONCLUSION

The Fishery Conservation and Management Act was an innovative and comprehensive legislative effort aimed at, as its name suggests, the management and conservation of the nation's fishery resources. It promised to do so by establishing a zone in which the federal government maintained exclusive fishery jurisdiction and by setting up eight regional fishery management councils. The councils were granted the primary role in developing policy to manage the fisheries because of practical, biological, and political considerations. The federal government reserved a review and rulemaking role in the management scheme by assigning these functions to the Secretary of Commerce.

Since the FCMA's enactment, the councils and their relationship with the federal system have developed in many respects, most notably in the area of Fishery Management Plan Development. Executive Order 12044 and the National Environmental Policy Act have been applied to the councils decision-making process, resulting in documentation requirements but respecting council autonomy in policy making. Other statutory provisions, however, have threatened that autonomy. Reactions to a Civil Service Opinion on the status of the councils' public members and staffs and opinions on the applicability of the Federal Advisory Committee Act have presented significant potential incursions on council independence in policy making. This independence, nonetheless, may still be preserved. A two-tiered statutory interpretive method, aimed at preserving legislative purpose, will facilitate the integration of the councils into the federal system while preserving the autonomy they were intended to have. Through its use, the councils' position as the primary decision makers in managing the nation's fishery resources will be maintained.