THE NEED FOR *CHEVRON* STEP ZERO IN JUDICIAL REVIEW OF INTERPRETATIONS DEVELOPED BY FISHERY MANAGEMENT COUNCILS

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The world's fisheries are in crisis. In 2007, 28% of fish stocks were classified as over-exploited, depleted, or recovering from depletion.[1] Scientists predict that by the year 2050 nearly all commercial fisheries will have collapsed.[2] Fisheries in the United States do not fare any better. In fact, the United States contains some of the most over-exploited fisheries in the world.[3] In 2009, the National Oceanic and Atmospheric Administration ("NOAA") National Marine Fisheries Service ("NMFS") estimated that 15% of fish stocks are subject to overfishing and that 23% of fish stocks are overfished.[4]

In the United States, the Magnuson-Stevens Fishery Conservation and Management Act ("MSFCMA" or "the Act") governs the management of marine fisheries from three miles to two hundred miles off the coast.[5] The MSFCMA creates broad policy goals of conserving the nation's fishery resources and preserving, to the extent possible, the fishing industry.[6] The Act charges eight regional Fishery Management Councils with the job of developing fishery management plans to achieve these policy

[1] FOOD AND AGRIC. ORG. OF THE U.N. (FAO), THE STATE OF WORLD FISHERIES AND AQUACULTURE 2008 (2009), *available at* ftp://ftp.fao.org/docrep/fao/011/i0250e/i0250e01.pdf [hereinafter STATE OF WORLD FISHERIES].

[2] *See* Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCIENCE 787, 788–89 (2006) (projecting trends in fisheries collapses).

[3] STATE OF WORLD FISHERIES, *supra* note 1, at 7.

[4] NATI'L MARINE FISHERIES SERV., 2009 STATUS OF U.S. FISHERIES 1 (2010), *available at* http://www.nmfs.noaa.gov/sfa/statusoffisheries/2009/StatusFisheries_2009.pdf [hereinafter 2009 STATUS OF U.S. FISHERIES]. NMFS defines "subject to overfishing" as a fish stock in which the mortality or harvest rate exceeds what is necessary to provide for the maximum sustainable yield. *Id.* NMFS defines a stock as "overfished" if the biomass level of the stock falls below a threshold established in the stock's fisheries management plan. *Id.*

[5] Fishery Conservation Act, 16 U.S.C. §§ 1801–1891d (2006).

[6] *Id.* § 1801(b)(1), (3).

goals.[7] In 1996, Congress reissued the MSFCMA and added stringent requirements to identify overfished fisheries within the United States and to develop plans to rebuild these fisheries.[8]

While the MSFCMA creates a strong framework for fisheries management, U.S. marine fisheries remain in crisis.[9] While enforcement problems play a major role in the continued decline of fisheries, courts may also contribute to this decline. Relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("*Chevron*"), courts generally defer to regulations and fishery management plans issued pursuant to the MSFCMA, even if industry-influenced Fishery Management Councils developed the plan or regulation at issue.[10] *Chevron* established a default rule of deferring to reasonable agency interpretations of its own enabling statute in the event of statutory silence or ambiguity. As a result of such deference in the fishery management context, courts, in some cases, support and approve ineffective policies.

This Note focuses on the role of *Chevron* deference in judicial review of fishery management plans under the MSFCMA, arguing that interpretations within management plans developed by Fishery Management Councils generally should not receive *Chevron* deference and that courts must apply a rigorous gate-keeping role through *Mead*/Step Zero to prevent improper deference. Part II of this Note provides an overview of the MSFCMA, as well as the *Chevron* doctrine and its scope. Part III discusses the role of *Chevron* deference in reviewing actions under the MSFCMA. Part IV argues that interpretations developed by Fishery Management Councils should not receive *Chevron* deference, and proposes applying a more rigorous *Mead*/Step Zero analysis, focusing on Council procedures, before moving to the traditional *Chevron* framework. Part V presents a brief conclusion.

[7] *Id.* § 1852(a).

[8] *Id.* § 1854(e).

[9] *See generally* 2009 STATUS OF U.S. FISHERIES, *supra* note 4 (describing overfishing and depletion of U.S. fish stocks).

[10] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1986).

I. BACKGROUND

A. *Overview of the Magnuson-Stevens Fishery Conservation and Management Act*

Congress initially passed the MSFCMA in 1976 to conserve and manage U.S. fisheries in the face of drastic declines in stocks.[11] The Act declared coastal waters from the seaward boundaries of the states out to two hundred nautical miles off the coast the Exclusive Economic Zone ("EEZ") of the United States and under federal management.[12] States retained control of and jurisdiction over the first three nautical miles off the coast. In addition, Congress created eight Fishery Management Councils ("Councils") to develop regional fishery management plans ("FMPs") in accordance with the Act.[13] The Secretary of Commerce ("Secretary"), acting through the NMFS, must approve the fishery management plans developed by the Councils.[14]

The MSFCMA creates ten national standards to guide the development of fishery management policies and the Secretary must ensure that all management plans comply with these standards. The national standards span a range of topics. The first national standard requires that management plans "prevent overfishing while achieving on a continuous basis, the optimum yield from each fishery for the [U.S. fishing industry]."[15] Other national standards require that all policies be based on the best available science, that the importance of fishery resources to fishing communities be considered, and that, where practicable, costs be minimized.[16] The Secretary may not approve an FMP

[11] 16 U.S.C. § 1801(b)(1) (2006) ("It is therefore declared to be the purposes of the Congress in this chapter . . . to take immediate action to conserve and manage the fishery resources found off the coasts of the United States . . . .").

[12] *See id.* §§ 1802(11), 1811–1812. *See also* Proclamation No. 5030, 43 Fed. Reg. 10,605, 10,605 (May 10, 1983).

[13] *See* 16 U.S.C. § 1852(a).

[14] *Id.* § 1854(a)(1). *See also id.* § 1802(33) (defining "'optimum,' with respect to the yield from a fishery" as the amount of fish which will provide the "greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; [and is prescribed] on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor.").

[15] *Id.* § 1851(a)(1).

[16] *Id.* § 1851(a)(2), (7), & (8). The full list of national standards include: "(1)

submitted by a Council unless it complies with the national standards.[17] Congress reauthorized the Act in 1996 and further amended the Act in 2007.[18]

1. *Fishery Management Councils*

The MSFCMA creates eight regional fishery management Councils to draft fishery management plans.[19] Each regional Council has jurisdiction over waters within the EEZ off the coasts of multiple states and the Act requires that the Council "reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority."[20] The Councils have both voting and non-voting members. Voting members include the principal State official with marine fishery

Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry. (2) Conservation and management measures shall be based upon the best scientific information available. (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination. (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. (5) Conservation and management measures shall, when practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose. (6) Conservation and management measures shall take into account and allow variations among, and contingencies in, fisheries, fishery resources, and catches. (7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication. (8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirement of [National Standard (2)], in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities. (9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize mortality of such bycatch. (10) Conservation and management measures shall to the extent practicable, promote the safety of human life at sea." *Id.* § 1851(a).

[17] *Id.* § 1854(a)(1).

[18] Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996); Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 (2007).

[19] *Id.* § 1852(a)(1).

[20] *Id.* § 1852(a)(2).

management responsibilities for each constituent state, the regional director of the National Marine Fisheries Service or his designee, and several members appointed by the Secretary.[21] The Act requires the Secretary to appoint individuals to the Council who "by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned."[22] The Act requires the Secretary to make appointments in a fair and equitable manner in order to balance the representation of commercial and recreational fishing interests on the Councils.[23] The Secretary chooses his appointments from a list submitted by the Governor of each state with the names and pertinent biographical information of individuals meeting the statutory requirements.[24] Voting members serve three-year terms and may not serve for more than three consecutive terms.[25] The Act allows the Secretary to remove voting members for cause.[26] Nonvoting members include the regional or area director of the United States Fish and Wildlife Service, the Commander of the Coast Guard district for the geographical area concerned or his designee, the executive director of the Marine Fisheries Commission for the geographical area concerned or his designee, and one representative of the Department of State appointed by the Secretary of State.[27] As of 2007, all new Council members receive training from the Sea Grant College Program on fishery science, fishery management techniques, and other relevant subject areas.[28]

Each Council has authority to adopt many of its own procedures.[29] However, the procedures adopted by the Councils

[21] *Id.* § 1852(b)(1)(A)–(C).

[22] *Id.* § 1852(b)(2)(A).

[23] *Id.* § 1852(b)(2)(B).

[24] *Id.* § 1852(b)(2)(C). If the list submitted by a governor does not meet the statutory requirements, the Secretary may publish a notice in the Federal Register calling for residents of the particular state to submit their name and pertinent biographical information for appointment consideration. *Id.* § 1852(b)(2)(D)(ii).

[25] *Id.* § 1852(b)(3).

[26] *Id.* § 1852(b)(6).

[27] *Id.* § 1852(c).

[28] *Id.* § 1852(k)(1).

[29] *See id.* § 1852(f)(6) ("Each Council shall determine its organization, and prescribe its practices and procedures for carrying out its functions under this chapter, in accordance with such uniform standards as are prescribed by the Secretary.").

must comply with statutory guidelines.[30] These guidelines require the Councils to conduct public hearings "at appropriate times and in appropriate locations . . . to allow all interested persons an opportunity to be heard in the development of fishery management plans."[31] Further, the Council must provide timely notice of their meetings, allow interested persons to present oral or written statements on agenda items, and record detailed minutes of each meeting.[32] The Act also requires each Council to establish a scientific and statistical committee in the development of fishery management plans.[33] The Councils must develop procedures to ensure the involvement of the statistical and scientific panel in the development of fishery management plans.[34]

The primary duty of the Councils is to prepare fishery management plans (FMPs) for each fishery under its jurisdiction.[35] These plans must include a description of the fishery involved,[36] and the conservation and management measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery."[37] FMPs must also include the maximum sustainable yield and the optimum yield of the fishery,[38] and describe essential fish habitat for the fishery.[39] In addition, FMPs must include a "fishery impact statement" assessing, specifying, and analyzing the likely effects of the measures within the FMPs, including the cumulative conservation, economic, and social impacts for participants in the fishery,[40] participants in adjacent fisheries, and the safety of human life at sea.[41]

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[30] *Id.*

[31] *Id.* § 1852(h)(3).

[32] *Id.* § 1852(i)(2).

[33] *Id.* § 1852(g)(1)(A) ("Each Council shall establish, maintain, and appoint the members of a scientific and statistical committee to assist it in the development, collection, evaluation, and peer review, of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.").

[34] *Id.* § 1852(i)(5).

[35] *Id.* § 1852(h)(1).

[36] *Id.* § 1853(a)(2).

[37] *Id.* § 1853(a)(1)(A).

[38] *Id.* § 1853(a)(3).

[39] *Id.* § 1853(a)(7).

[40] "Participants" include commercial and recreational fishers.

[41] *Id.* § 1853(a)(9).

Essentially, the fishery impact statement examines the effect of the FMP on the fishing community, evaluating the impact on commercial and recreational fishers as well as the conservation benefits. Moreover, as the MSFCMA's primary goal is to prevent overfishing, each FMP must include criteria for identifying when a particular fishery is overfished.[42] Councils also develop regulations to implement FMPs and submit these proposed regulations to the Secretary for approval.

2. *Role of the Secretary*

The Council submits FMPs to the Secretary for approval and codification. Upon receipt of a FMP, the Secretary must publish a notice in the Federal Register stating the availability of the FMP and requesting comments from the public.[43] Additionally, the Secretary must review the FMP to ensure it complies with all statutory requirements, including the ten national standards.[44] In ensuring this compliance, the Secretary must take public comments into consideration.[45] However, the MSFCMA only permits the Secretary to approve, disapprove, or partially approve a FMP—the Secretary may not make revisions to the FMP.[46] If the Secretary disapproves a FMP, he must return it to the Council for revision, specifying the applicable law with which the FMP fails to comply, the nature of the non-compliance, and recommendations for how the FMP can meet the legal requirements.[47] If a Council fails to prepare a FMP after a reasonable period time or fails to revise a FMP after the Secretary partially or wholly disapproves it, the Secretary may develop his own FMP.[48]

A. *The Structure of the MSFCMA Creates the Potential for Effective Fisheries Management.*

The MSFCMA creates a foundation for potentially effective fisheries management. First, the Act allows for a wide range of regulatory policies to manage fisheries. Fisheries constitute

[42] *Id.* § 1853(a)(10).
[43] *Id.* § 1854(a)(1)(B).
[44] *Id.* § 1854(a)(1)(A).
[45] *Id.* § 1854(a)(2)(A).
[46] *Id.* § 1854(a)(3).
[47] *Id.*
[48] *Id.* § 1854(c).

dynamic and complex systems; regulators must confront a significant amount of scientific uncertainty when evaluating policy options.[49] In many cases, scientists face difficulties collecting data on the health of fish stocks.[50] Given the complexity and uncertainty inherent to fisheries, effective management requires a diverse range of strategies and policies.[51] Regulators may adopt both direct regulations, such as catch limits and quotas, as well as indirect regulations, such as gear restrictions and closures of areas to fishing. The MSFCMA allows the Councils to experiment and adopt a variety of policies, including fishery closures, quotas, gear limits, licensing, and many other management strategies. Accordingly, Councils have the ability to balance direct and indirect controls on fishing to ensure effective management.

In addition, the MSFCMA, as amended in 2007, permits the Councils to adopt "limited access privilege" programs to manage fisheries.[52] Limited access privilege programs essentially create a system of individual fishing quotas (IFQ), in which fisheries managers determine a total allowable catch for a fishery and then divide up portions of the catch to eligible boats, fishermen, or others.[53] Recipients of individual quotas may use their individual

[49] *See* Michael J. Fogarty, *Rejoinder: Chaos, Complexity, and Community Management of Fisheries: An Appraisal*, 19 MARINE POL'Y 437, 439 (1995) ("Whether fish populations fluctuate because of deterministic chaos, environmental stochasticity, or both, it is unquestionably true that fish populations are highly variable and we must deal with the resulting uncertainty.").

[50] *See* Andrew A. Rosenberg et al., *Rebuilding U.S. Fisheries: Progress and Problems*, 4 FRONTIERS IN ECOLOGY & ENVT. 303, 305 (2006) (finding that for 45% of fisheries declared "overfished," there is insufficient information to determine biomass trends under rebuilding plans).

[51] *See* Fogarty, *supra* note 49, at 439 (describing the need for a variety of techniques in fisheries management).

[52] *See* 16 U.S.C. § 1853a(a) ("After January 12, 2007, a Council may submit and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish . . . ."). Congress's decision to statutorily permit the adoption of new limited access programs in the 2007 amendments represented a significant change from the 1996 reauthorization of the MSFCMA. In the 1996 reauthorization, entitled the Sustainable Fisheries Act, Congress placed a moratorium on the development of any new individual fishing quota (IFQ) programs. Congress extended the moratorium through September 2002, and then allowed it to expire. Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(e), 110 Stat. 3559, 3576 (1996); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-277, INDIVIDUAL FISHING QUOTAS: METHODS FOR COMMUNITY PROTECTION AND NEW ENTRY 2 (2004).

[53] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-241, INDIVIDUAL

allotment or sell it in a market.[54] Accordingly, IFQs or limited access programs create a private property interest in a common pool resource. Marine fisheries constitute a classic "tragedy of the commons," in which a resource open to all is overused and exploited.[55] Creating a system of property rights provides the classic solution to the "tragedy of the commons."[56] Property rights occur more naturally in other contexts, for example public grazing areas that may be fenced, and intuitively may make less sense in the contexts of oceans and fisheries. However, IFQs and limited access programs create property interests in the particular fishery that they manage. By allowing Councils to utilize limited access programs, the MSFCMA ensures that Councils have access to what many academics hail as the most promising solution to overfishing.[57]

Moreover, the MSFCMA creates rigorous requirements to restore overfished fisheries. The MSFCMA requires the Secretary to monitor fish stocks and annually inform the Councils of fisheries within their jurisdiction that are overfished or approaching an overfished status.[58] Within one year of such notification, the Councils must prepare an FMP that will end overfishing and begin rebuilding of the stock in as short a period as possible, and in no longer than ten years unless special circumstances exist.[59] The Secretary must review the FMP at regular intervals to ensure that it reduces overfishing in practice.[60] This structured response to overfishing provides an effective framework for moving toward sustainable fisheries. To make fisheries sustainable, regulators must ensure that the amount of fish removed per season stays at or below the maximum sustainable

FISHING QUOTAS: MANAGEMENT COSTS VARIED AND WERE NOT RECOVERED AS REQUIRED 1 (2005) (providing an overview of IFQs).

[54] *Id.*

[55] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (describing the problems that arise from an open common resource, such as public grazing areas).

[56] *See id.* at 1245 (describing potential solutions to the tragedy of the commons in the context of National Parks).

[57] *See, e.g.*, Toddi A. Steelman & Richard L. Wallace, *Property Rights and Property Wrongs: Why Context Matters in Fisheries Management*, 34 POL'Y SCI. 357, 357–58 (2001) (describing how developing property rights may lead to effective fisheries management).

[58] 16 U.S.C. § 1854(e)(1).

[59] *Id.* § 1854(e)(3)–(4).

[60] *Id.* § 1854(e)(7).

yield.[61] Scientific studies should allow regulators to determine the maximum sustainable yield for overfished fisheries; adopting direct management strategies to achieve catches below this level, such as quotas, should allow the fisheries to rebuild. Further, scientists have shown that most fishery stocks can be rebuilt within ten years, which coincides with the outer limit of the statutory time limit.[62] Accordingly, the MSFCMA's requirements for responding to overfished fisheries contain the necessary elements to successfully rebuild stocks.

Most importantly, the structure of the MSFCMA promotes co-management strategies and allows for stakeholder involvement in the development of fisheries policies. Academics evaluating domestic and international fisheries management have long advocated for a co-management approach, in which those most involved in the industry—commercial and recreational fishers—collaborate with regulators to develop effective and implementable policies.[63] Involving members of the industry in policymaking increases the likelihood that fishers will perceive policies as legitimate and will be willing to sacrifice their personal interests to comply with the policies.[64] In contrast to top-down, command-and-control regulations by the central government, co-management seeks to create a fair and just decision-making system that allows those regulated and constrained by the policies to help develop the

[61] Rosenberg, *supra* note 50, at 304.

[62] *See* Carl Safina et al., *U.S. Ocean Fish Recovery: Staying the Course*, 309 SCIENCE 707, 707 (2005) ("Ten years is a reasonable and beneficial rebuilding window.").

[63] *See* Svein Jentoft, *Fisheries Co-Management*, 13 MARINE POL'Y 137, 140 (1989) (finding that "fishermen, if properly organized, can handle [fishery] management functions and that they are able to solve their conflicts of interest even if they take the form of zero-sum games."); Thomas A. Okey, *Membership in the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?*, 27 MARINE POL'Y 193, 194 (2003) ("Direct participation of fishing people and organizations in management decisions ('co-management') is recognized as crucial because of the knowledge and preferences that fishing people bring to process, and the tendency for them to cooperate in resulting management regimes."). *But see* Fogarty, *supra* note 49, at 441 (cautioning that lessons learned about co-management in smaller-scale fisheries abroad may not apply to U.S. fisheries because of contextual differences and the different motivations of subsistence-fishers versus large industrial fishers).

[64] *See* Jentoft, *supra* note 63, at 139 (explaining that involving industry in the development and implementation of fisheries policy may increase legitimacy and compliance).

policies.[65] The MSFCMA adopts a co-management strategy by requiring the Secretary to appoint individuals to the Councils who have experience with fishing and specifically requiring a fair and balanced apportionment of appointments of active participants (or their representatives) in commercial and recreational fisheries.[66] The statute foresees that individuals from the commercial and recreational fishing industries will act as voting members on the Councils. Given the involvement of fishing interests in the development of policy, the Councils have the potential to develop effective management strategies through the co-management process, which has proven successful in other areas.[67]

In addition to including individuals from the fishing industry as voting members on the Councils, the MSFCMA requires the Councils to follow certain procedures to ensure further stakeholder involvement. Councils must post notice of their meetings and hold meetings at "appropriate" locations and times to ensure that stakeholders have an opportunity to attend and have their voices heard.[68] The Council must also include a copy of the meeting's agenda. At the meeting, individuals from the public may make oral or written comments about any agenda item. These procedures for public meetings ensure that individuals concerned with the policies promulgated by the Councils have an opportunity to participate.[69]

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[65] *See* Jentoft, *supra* note 63, 145.

[66] 16 U.S.C. § 1852(b)(2)(A)–(B).

[67] *See* Jentoft, *supra* note 63, at 140–45 (summarizing case studies). *But see* JOSH EAGLE, ET AL., TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS, PEW SCIENCE SERIES ON CONSERVATION AND THE ENVIRONMENT 5 (2003) (describing the problems that plague Councils, including "councils are dominated by the fishing industry and, as a result, do not enjoy the breadth and robustness of perspectives important for good decision-making [and] council members who represent the fishing industry face frequent conflict of interest, which threaten to undermine both balanced decision-making and the public's confidence in the councils."); Okey, *supra* note 63, at 194 (explaining that the issue of representation of the general public interest has largely been ignored in discussions of fisheries management, and, as a result, U.S. fisheries policies may not reflect the public interest). The failure of the Councils to develop effective policies, despite the incorporation of co-management strategies, will be discussed in Part II(C)(iii).

[68] 16 U.S.C. § 1852(h)(3).

[69] *But see* EAGLE, *supra* note 67, at 35 (assessing public participation at Council proceedings and finding that in general, the public failed to take adequate advantage of opportunities to participate because of apathy, costs of attending meetings, the confusing nature of the process of the Council decision-

Finally, the MSFCMA prioritizes science as the foundation of all policies. National Standard 2 requires that fishery management plans be based on the "best scientific information available." Further, the Act provides the Councils with the resources necessary to have scientific and statistical committees and access to the best scientific data available.[70] Such requirements increase the likelihood that policies will reflect experts' beliefs about what will actually work to restore fisheries. In addition, the Act, as amended in 1996, reflects new understandings of the importance of ecology in fisheries management and requires the identification and protection of essential fish habitat to ensure the sustainability of fisheries. The important role of science in the Act helps ensure the development of effective policies.[71]

C. *Problems within the MSFCMA*

Despite a statutory structure that attempts to enact effective fisheries management strategies, the MSFCMA has largely failed to address or remedy the litany of problems facing fisheries in the United States.

1. *Overfishing*

In 1976, Congress enacted the MSFCMA to conserve and sustain U.S. fisheries, and in 1996, when Congress reauthorized the Act, it expanded the goals to include rebuilding overfished

making, and the perception that fishing interests dominate the Councils).

[70] *See* 16 U.S.C. § 1852(g)(1)(A) ("Each Council shall establish, maintain, and appoint the members of a scientific and statistical committee to assist it in the development, collection, evaluation, and peer review of such statistical, biological, economic, social and other scientific information as is relevant to such Council's development and amendment of any fishery management plan."). In addition to the Scientific and Statistical Committees, the Councils receive scientific information from regional fishery science centers, which are managed by NOAA but independent from the Councils. *See* Josh Eagle & Barton H. Thompson Jr., *Answering Lord Perry's Question: Dissecting Regulatory Overfishing*, 46 OCEAN & COASTAL MGMT. 649, 655 (2003) ("The science used by the councils in setting annual quotas originates in five regional Fisheries Science Centers. These science centers are not under the direction or supervision of the councils. Rather, they are directed by NOAA . . . .").

[71] *But see* EAGLE, *supra* note 67, at 15 ("An examination of several case histories, however, shows that councils sometimes ignore the recommendations of fishery scientists."); Eagle & Thompson, *supra* note 70, at 659–60 (finding that the Gulf Council at times set quotas for the King Mackerel Fishery above the upper range of the allowable biological catch recommended by NMFS scientists, thus disregarding scientific data in their policymaking).

stocks.[72] However, the Act has not succeeded in achieving these goals. First, overfishing continues. In 2006, fewer than 5% of fish stocks identified as overfished and subject to rebuilding plans had been rebuilt and only 13% of such stocks were no longer overfished.[73] Although 48% of such stocks experienced increases in biomass, 82% of fisheries identified as overfished were still, technically, overfished.[74] Furthermore, in 2009 NMFS estimated that 23% of fish stocks are overfished.[75] Six stocks are approaching an overfished status.[76]

2. *Enforcement*

Enforcement of fisheries policies exacerbates animosity between the NMFS and the fishing industry. Recently, the Under Secretary of Commerce requested the Inspector General investigate NOAA's enforcement of fisheries policies under the MSFCMA.[77] The resulting report found several problems with the enforcement programs, resulting in a "highly-charged regulatory climate and [a] dysfunctional relationship between NOAA and the fishing industry . . . ."[78] Lack of clear policies and guidelines within NOAA leads the industry to perceive NOAA's civil penalty assessment process as unfair and arbitrary.[79] The conception of unfairness in the enforcement process alienates the regulated community. In addition, NOAA focuses most of its enforcement efforts on criminal investigations and sanctions, while enforcing civil penalties may have a more positive effect on overall fisheries management outcomes.[80]

3. *Capture of Councils*

Capture, a term coined in the 1950s, refers to collusion

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[72] 16 U.S.C. § 1801(a)(6), (b)(1).

[73] Rosenberg, *supra* note 50, at 303.

[74] Rosenberg, *supra* note 50, at 303.

[75] 2009 STATUS OF U.S. FISHERIES, *supra* note 4, at 1.

[76] 2009 STATUS OF U.S. FISHERIES, *supra* note 4, at 6.

[77] *See* U.S. DEP'T OF COM., OFFICE OF INSPECTOR GEN. REPORT NO. OIG-19887 1, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: REVIEW OF NOAA FISHERIES ENFORCEMENT PROGRAMS AND OPERATIONS (2010) (describing the context of the Inspector General's report).

[78] *Id.* at 3.

[79] *Id.*

[80] *See id.* at 4 (stating that 90% of NOAA's enforcement personnel deals with criminal matters).

between a regulatory agency and the industry that it oversees to the detriment of the public interest.[81] In general, an agency is captured when its policies promote industry interests rather than the public interest.[82] Capture presents a regulatory problem as it undermines the purpose of regulatory agencies and leads to sub-optimal policies. Recent studies of Council membership suggest that, while not technically captured, industrial commercial extractive fishing interests dominate Councils.[83] Specifically, industrial fishing interests are overrepresented and small-scale commercial fishers and conservationists are underrepresented both in raw numbers and percentages.[84] Given this skewed representation, the Secretary appears to have neglected his statutory duty to ensure a "fair and balanced" representation of fishing interests on the Councils. As a result, in practice, the benefits of co-management are lost because one interest group—industrial commercial fishers—dominates the policymaking process, likely inhibiting the development of effective policies.[85] The capture of Councils by industrial interests may lead to management failure because "[industrial fishers] have vested interests that maximize short-term returns for themselves at the expense of long-term sustainability for the general public."[86] Accordingly, the composition of Councils in practice may lead to overly risky policies that threaten the long-term sustainability of fisheries.

4. *Judicial Review*

Although many factors, including lack of effective enforcement and capture of the Councils by industry, contribute to ineffective fisheries management, the courts also play a role in

[81] Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 107 (2002).

[82] *Id.*

[83] *See* Okey, *supra* note 63, at 197–99 (finding that between 1990 and 2001, Council members representing commercial fishing interests out-numbered those representing recreational fishing interests and far out-numbered those representing the scientific and conservation communities).

[84] *See* Okey, *supra* note 63, at 197–99. *See also* EAGLE, ET AL., *supra* note 67, at 24 (finding in a study of Council membership, "[o]nly 18 percent of the appointed council members in 2001 did not directly work in or represent the fishing industry. Many of these members, moreover, were academic scientists or economists with long-standing affiliations with the fishing industry.").

[85] The evidence of continued overfishing discussed *supra* suggests that policies adopted by the Councils are ineffective.

[86] Okey, *supra* note 63, at 195.

perpetuating this problem. In many cases, interested parties challenge the legality of FMPs in court. Courts, in reviewing whether or not FMPs comply with the MSFCMA, apply the standards of judicial review established in the Administrative Procedure Act ("APA"), and thus perform a very deferential review.[87] Under the APA, courts may overturn an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[88] Specifically, to avoid a finding of arbitrary and capricious decision-making, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[89] Most agency regulations survive review under this standard, given the thorough analyses that generally emerge through notice-and-comment rulemaking. As a result, the courts often uphold FMPs developed by the Councils and promulgated as rules by the Secretary because they have a reasonable basis in the record and are not arbitrary or capricious. Courts apply Chevron deference, discussed in the next section, to agency interpretations of the Act. *Chevron* deference, like arbitrary and capricious review, is highly deferential. This Note focuses on the particular role of *Chevron* deference in judicial review of Council-developed management plans.

D. *The* Chevron *Doctrine*

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a two-step formula to determine the appropriateness of judicial deference to agency interpretations of statutory ambiguities or silence.[90] First, the court must examine whether Congress has spoken to the issue in question; if so, the inquiry ends, as the judgment of Congress controls.[91] However, if Congress has not spoken to the issue, the court must examine the reasonableness of the agency's

[87] Administrative Procedure Act, 5 U.S.C. §706 (2006).

[88] *Id.* § 706(a)(2)(A).

[89] Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1116 (9th Cir. 2006) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

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

[91] *Id.* at 842–43.

interpretation and must defer to reasonable interpretations.[92] This two-step analysis replaced a case-by-case approach established in *NLRB v. Hearst Publications*[93] and *Skidmore v. Swift & Co.*, [94] which required the courts to weigh multiple factors in determining whether to defer to an agency interpretation of law.[95]

The Court's opinion in *Chevron* created a default rule of deference to reasonable agency interpretations in the event of statutory ambiguity or silence, reading such silence as implying Congress's intent to allow an agency to fill in the gaps.[96] Justice Stevens, writing for the Court, highlighted the superior institutional competency of agencies to make policy in areas left open by Congress. Justice Stevens emphasized the technical expertise and greater political accountability of agencies as compared to courts, finding such factors persuasive in justifying deference.[97] In addition, Justice Stevens explained that Congress often explicitly delegates policymaking authority to agencies, in which case courts may not substitute their judgment for agency interpretations; in cases where Congress implicitly delegates policymaking authority to agencies the same rule of deference must apply.[98]

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[92] *Id.* at 843–44.

[93] NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).

[94] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[95] Under *Skidmore* and *Hearst Publications*, in reviewing formal agency actions, courts could substitute judgment and override agency interpretations on "questions of law" but had to defer to agency judgment on questions of fact. For cases involving mixed issues of law and facts, courts had to defer to an agency judgment if the agency's conclusion had "'warrant in the record' and reasonable basis in the law." *Hearst Publ'ns*, 322 U.S. at 131. For less formal agency interpretations, such as advice letters and implementation guidelines, courts could accept and adopt the agency interpretation if it had the "power to persuade" based on its thoroughness, validity of reasoning, and consistency with prior and later agency actions. *See Skidmore*, 323 U.S. at 140 ("The weight of [an agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[96] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (explaining that Congress may explicitly, as well as implicitly, delegate legislative authority to an agency).

[97] *See id.* at 865 (explaining the institutional competencies of agencies that entitle them to deference).

[98] *Id.* at 843–44. However, most scholars agree that the idea that silence or ambiguity within a statute represents implicit Congressional intent to delegate interpretive authority to agencies is a legal fiction. *See* Cass R. Sunstein,

While many hailed the *Chevron* doctrine as clarifying the amorphous *Skidmore* framework, questions as to the scope of the doctrine immediately followed the decision. Clearly, some limits to *Chevron* existed. For example, courts only apply *Chevron* to agency interpretations of statutes that the agency administers.[99] Hence, the Environmental Protection Agency ("EPA") receives *Chevron* deference when interpreting the Clean Air Act, which Congress charges the EPA with implementing, but not when interpreting the Administrative Procedure Act, which applies to all agencies.[100] But even with this limit in place, questions about the scope of *Chevron* remained. Could the Court's reasoning in *Chevron*, which involved a rule promulgated through notice-and-comment rulemaking, apply to interpretive letters or guidelines, not subject to notice-and-comment rulemaking?

The Court addressed the scope of the *Chevron* doctrine in *United States v. Mead Corp*.[101] The Court presented a framework, often referred to as "*Chevron* Step Zero," for determining when *Chevron* deference applies to an agency interpretation. In *Mead*, the Court focused on procedural processes and particular versus general decisions to determine whether *Chevron* deference applied to a tariff classification ruling by the United States Customs Service. Essentially, the Court determined that *Chevron* deference applies when Congress intends for an agency to speak with the "force of law" when interpreting a particular statute.[102] The Court found that such intent generally exists when the statute in question confers upon an agency rulemaking authority or the power to

Chevron *Step Zero*, 92 VA. L. REV. 187, 206 (2006) (characterizing *Chevron* as a legal fiction). Nevertheless, Justice Scalia celebrates *Chevron* as creating a useful across-the-board presumption of deference in the face of silence or textual ambiguity. He notes that *Chevron* created a clear default rule that backdrops all Congressional actions, and if Congress does not intend for *Chevron* deference to apply to ambiguities and silence within a particular statute, it may state such an intent and the Court will not apply *Chevron* deference. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

[99] Sunstein, *supra* note 98, at 208–09 (citing Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 893 (2001)).

[100] Sunstein, *supra* note 98, at 209 (explaining that *Chevron* does not apply to agency interpretations of the APA because agencies do not "administer" the APA).

[101] United States v. Mead Corp., 533 U.S. 218 (2001).

[102] *Id.* at 226–27.

engage in adjudication.[103] When an agency has such authority from Congress and utilizes that authority to develop an interpretation, the agency's interpretations of the particular statute fall under the *Mead* "safe harbor" and receive *Chevron* deference. However, even if an agency does not have rulemaking or adjudicatory authority from the statute, the agency's interpretations may still receive *Chevron* deference if the court determines that Congress intended the agency to act with the force of law in a particular matter, considering the "degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[104] The Court noted that Congress likely intends an agency to act with the force of law when the statute requires the agency to adhere to relatively formal administrative procedures that foster fairness and deliberation.[105] Further, in concluding that the Customs Service tariff classification ruling did not carry the force of law and therefore was not entitled to *Chevron* deference, the Court emphasized that the Customs Service makes tens of thousands of such rulings each year.[106] The Court reasoned that Congress could not intend for such particularized decisions, decided on such a continuous basis, to carry the force of law.[107]

The Court further elucidated the Step Zero analysis of whether an agency's interpretation carries the force of law in *Barnhart v. Walton*.[108] Specifically, the Court explained that the application of *Chevron* deference depends on the "the interpretive method used and the nature of the question at issue."[109] The Court elaborated that the application of *Chevron* deference hinges on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the

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[103] *Id. See also* Gonzalez v. Oregon, 546 U.S. 243 (2006) (holding that an interpretive ruling by the Attorney General under the Controlled Substances Act (CSA) was not entitled to *Chevron* deference because the CSA did not confer a general grant of rulemaking authority to the Attorney General).

[104] *Mead*, 533 U.S. at 228 (internal citations omitted).

[105] *Id.* at 230.

[106] *Id.* at 233.

[107] *See id.* at 233 ("Indeed, to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year . . . . Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").

[108] Barnhart v. Walton, 535 U.S. 212 (2002).

[109] *Id.* at 222.

statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . . ."[110] Hence, questions of expertise, process, and the importance of an interpretation determine whether *Chevron* deference applies. An action may also carry the force of law if it binds private parties, in the sense that those who violate the rule or decision will face sanctions.[111] The Court's cases limiting the scope of the *Chevron* doctrine provide insight when evaluating the role of *Chevron* deference in fisheries polices under the MSFCMA.

II. *CHEVRON* DEFERENCE AS APPLIED TO THE MSFCMA

Courts appear to accept that *Chevron* deference applies to legal interpretations in FMPs, ignoring the established Step Zero analysis. In explaining the standards of judicial review that apply to challenges of FMPs and other regulations under the MSFCMA, courts generally cite *Chevron*.[112] While at times courts review regulations or management plans developed and issued by the NMFS,[113] many of the cases in which courts apply *Chevron* to interpretations of the MSFCMA involve a regulation initially developed by the Councils. For example, in *Ocean Trollers Association v. Gutierrez*, the Ninth Circuit applied *Chevron* and deferred to an interpretation developed by the Pacific Fishery Management Council and promulgated as a regulation by the Secretary.[114] The Council developed an FMP in 1989 that set escapement goals for spawning salmon; the FMP did not permit

[110] *Id.*

[111] *See* Sunstein, *supra* note 98, at 222 (discussing possible meanings of the "force of law").

[112] *See, e.g.*, Ocean Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1119 (9th Cir. 2006) ("Our obligation to give *Chevron* deference to the [National Marine Fishery Service's (NMFS)] interpretation of the Act that it is charged to administer [resolves the question in this case]. . . ."). Many courts cite *Chevron* when discussing the standard for judicial review in a challenge to an FMP or other regulation under the MSFCMA. *See* State of New York v. Locke, No. 08-CV-2503, 2009 WL 1194085, at *11 (E.D.N.Y. Apr. 30, 2009) (citing *Chevron*, 467 U.S. at 842–43 (1986)); Fisherman's Finest, Inc. v. Gutierrez, No. C07-1574MJP, 2008 WL 4889958, at *3 (W.D. Wash. Nov. 12, 2008) (citing *Chevron*, 467 U.S. at 842–43).

[113] *See* Northwest Envtl. Def. Ctr. v. Brennen, 958 F.2d 930, 935 (9th Cir. 1992) (granting *Chevron* deference to the Secretary's reasonable definition of "overfishing").

[114] Ocean Trollers Ass'n v. Gutierrez, 452 F.3d 1104.

hatchery spawning salmon to count toward the escapement goals.[115] The Ocean Trollers Association challenged this determination. Applying the *Chevron* doctrine, the court determined that it had to defer to the interpretation that the Council could treat natural salmon as a single stock for management purposes and that hatchery salmon need not be counted toward the escapement goals.[116] The court did not perform a thorough *Chevron* analysis and merely described the ambiguity within the statutory language and noted that the statute did not preclude the interpretation in the FMP.[117] The court did not fully analyze whether the interpretation carried the force of law or assess its reasonableness, thereby skipping Step Zero and neglecting Step Two respectively.

In other cases, courts apply *Chevron* deference but end the inquiry at Step One, finding that Congress spoke to the issue in question. In *Western Sea Fishing, Co., Inc. v. Locke*, the district court applied *Chevron* deference to determine the permissibility of an amendment to the Atlantic herring FMP issued by the New England Fishery Management Council.[118] Specifically, the court applied a *Chevron* analysis to determine whether the MSFCMA permits the Secretary to enact measures to protect future optimum yield of a fishery that is not currently subject to overfishing.[119] The court's inquiry ended at Step One, finding that National Standard 1 in the MSFCMA prioritizes preventing overfishing while assuring continued achievement of the optimum yield for all fisheries and does not permit regulations that result in fishing beneath the optimum yield in the absence of overfishing.[120] The court found that since herring had been fished below the optimum yield for years, and the regulation would further reduce fishing effort, it did not meet the statutory requirement of achieving optimum yield.[121] Accordingly, the court invalidated the amendment, finding that it contravened the clear intent of

[115] *Id.* at 1109–10. "Escapement goals" are defined as "the number of spawning adults needed to produce the maximum number of juvenile salmon that, after incubation and freshwater rearing, will outmigrate to the sea." *Id.* at 1109.

[116] *Id.* at 1118–19.

[117] *Id.*

[118] W. Sea Fishing, Co. v. Locke, 722 F. Supp. 2d 126, 136 (2010).

[119] *Id.* at 139.

[120] *Id.*

[121] *Id.* at 140.

Congress.

Similarly, in *Oceana, Inc. v. Evans*, the court applied *Chevron* and ended its inquiry at Step One.[122] *Oceana* involved an amendment to a groundfish FMP developed by the New England Fishery Management Council to protect the overfished fishery while minimizing economic hardship to the fishing industry; however, the amendment did not immediately end overfishing.[123] Oceana challenged the regulation, arguing that the amendment violated the MSFCMA by failing to immediately end overfishing. The court applied the *Chevron* analysis to determine if it had to defer to the agency's interpretation that an FMP for an overfished fishery need not immediately end overfishing. The court's inquiry ended at Step One, finding that Congress spoke to the issue at hand when it required FMPs for an overfished fishery to "specify a time period for ending overfishing."[124] The court read this language to allow overfishing to continue for some period of time and found that the regulation accorded with the plain meaning of the statute.[125] Furthermore, the court noted that even if the statutory language was ambiguous, the court would defer to the interpretation in the amendment under Step Two, because allowing overfishing to continue for some time while rebuilding the fishery remained possible as a reasonable interpretation of the statute.[126]

In some cases, courts apply the *Chevron* doctrine and find ambiguity at Step One, but refuse to adopt the Council's interpretation at Step Two on the grounds that the interpretation is unreasonable. In *Arctic Sole Seafoods v. Gutierrez*, the district court applied *Chevron* to an amendment of an FMP that prohibited vessel owners from transferring licenses to fish in the Bering Sea Aleutian Islands non-pollack groundfish fishery to newly acquired vessels.[127] The MSFCMA was silent on whether the licenses could be transferred from an older vessel to a replacement vessel.[128] The Secretary approved the FMP amendment developed by the

[122] Oceana, Inc. v. Evans, No. Civ.A.04-0811, 2005 WL 555416, at *12–13 (D.D.C. Mar. 9, 2005).

[123] *Id.* at *1, *10–11.

[124] *Id.* at *12.

[125] *Id.*

[126] *Id.* at *12–13.

[127] Arctic Sole Seafoods v. Gutierrez, 622 F. Supp. 2d 1050, 1052, 1056 (W.D. Wash. 2008).

[128] *See id.* at 1057–59 (analyzing the statute for ambiguity).

Northern Pacific Fishery Management Council that barred such transfers. The court viewed this FMP amendment as interpreting statutory language and applied *Chevron* deference, finding ambiguity in the statute at Step One after a thorough analysis of the statutory language, legislative history, and context.[129] However, the court refused to defer to the FMP's interpretation, finding that no "good reason" supported the Agency's decision to bar license transfers to new vessels.[130] The court noted that such an interpretation leads to absurd results, as all vessels will eventually require replacements and if the licenses cannot be transferred, the fishery will die as the vessels become unworkable.[131] The court concluded that an interpretation that could completely eliminate the fishery could not fall within the meaning and intent of the statute.[132]

Similarly, the D.C. Circuit refused to defer to an interpretation within an FMP in *Natural Resources Defense Council, Inc. v. Daley*.[133] In this case, the D.C. Circuit reviewed a quota issued pursuant to a summer flounder FMP issued by the Mid-Atlantic Fishery Management Council. The NFMS issued the quota based in part on recommendations by the Council and its summer flounder committee.[134] However, the NMFS did not adopt the Council's recommendation, which had only a 3% chance of obtaining the optimum yield of summer flounder, nor did the NMFS adopt the committee's recommendation, which had a 50% chance of obtaining the optimum yield.[135] Instead, the NMFS chose a quota between the two recommendations with an 18% chance of obtaining the optimum yield. In reviewing the quota, the district court found ambiguity in the Act's balancing of the requirements of National Standard 1, requiring that FMPs obtain the optimum yield, and National Standard 8, requiring Councils to minimize, to the extent practicable, adverse economic impacts on fishing communities.[136] Accordingly, the lower court deferred to

[129] *Id.* at 1056–59.
[130] *Id.* at 1060–61.
[131] *Id.* at 1061.
[132] *Id.*
[133] Natural Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 756 (D.C. Cir. 2000) [hereinafter *NRDC II*].
[134] *See id.* at 750–51 (describing the history surrounding the quota).
[135] *Id.*
[136] Natural Res. Def. Council, Inc. v. Daley, 62 F. Supp. 2d 102, 106–07 (D.D.C. 1999).

the NMFS's decision to prioritize minimizing adverse economic impacts. The D.C. Circuit reversed, finding that a quota with only an 18% chance of obtaining optimum yield was so far removed from the purposes of the MSFCMA as to be unreasonable and ineligible for deference under *Chevron* Step Two.[137] The court noted that any quota with less than a 50% chance of obtaining the optimum yield qualifies as unreasonable.[138] The D.C. Circuit also noted that no ambiguity exists between the National Standards, as the plain language of the statute indicates the other standards take precedence over the cost minimization standard.[139] Nevertheless, the court proceeded to analyze the issue under *Chevron* Step Two, finding silence in the statute because it does not mandate a precise quota figure or require a specific likelihood of obtaining the optimum yield.[140]

III. ARGUMENT

This brief survey of cases reveals that district and circuit courts apply the *Chevron* doctrine to FMPs, amendments to FMPs, and regulations pursuant to such FMPs. The case law does not demonstrate a trend in the application of deference—courts end their analyses at Step One, defer at Step Two, and refuse to defer at Step Two. However, throughout the case law one trend emerges: in general, courts neglect to perform anything resembling a *Mead*/Step Zero analysis, most likely assuming that these plans fall into the *Mead* safe harbor, which assumes that interpretations promulgated through notice-and-comment rulemaking carry the "force of law."[141] This Note first argues that Council-developed interpretations are not entitled to *Chevron* deference under the *Mead* framework, and, second, that such interpretations should not be evaluated under the *Chevron* deference framework given the initial rationales offered for the doctrine and its recent critiques.

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[137] *NRDC II*, 209 F.3d at 753.

[138] *Id.* at 754.

[139] *Id.* at 753–54.

[140] *Id.* at 754.

[141] *But see* Motion Picture Ass'n of Am. v. FCC, 309 F.3d 796, 801, 807 (D.C. Cir. 2002) (holding that an FCC interpretation developed pursuant to notice-and-comment rulemaking did not fall into the *Mead* safe harbor because the interpretation was inconsistent with the statute); Rubie's Costume Co. v. United States, 337 F.3d 1350, 1355 (Fed. Cir. 2003) (rejecting the argument that customs "classification rulings published pursuant to a deliberative notice-and-comment rulemaking process are entitled to *Chevron* deference.").

This Note then argues that to promote more effective fisheries management policies, courts should apply a rigorous *Mead*/Step Zero analysis when evaluating Council-developed interpretations of the MSFCMA.

A. *Council Developed Interpretations Do Not Qualify for Chevron Deference Under the Standards Established by Mead.*

The structure of the MSFCMA suggests that Council-developed FMPs and FMP amendments may not meet the requirements for the *Mead* safe harbor. First, although the Secretary publishes notice of FMPs developed by Councils in the Federal Register and calls for comments from interested parties, this notice-and-comment process lacks several of the features of traditional notice-and-comment rulemaking. Unlike under traditional notice-and-comment rulemaking, the Secretary's ability to respond to comments on an FMP is severely restricted by the Act. In traditional notice-and-comment rulemaking, an agency or administrator may revise the proposed rule to take into account issues raised in the comments. However, under the MSFCMA, the Secretary may only approve, disapprove, or partially approve a FMP and thus cannot respond to public comments through revisions to the FMP.[142] The comments, therefore, have less potential to change policy than in traditional notice-and-comment rulemaking. Furthermore, the MSFCMA does not require the Councils—the drafters of the regulations and policies—to review or respond to comments received after publication of the proposed regulation in the Federal Register. Hence, only the Secretary must review the comments, but the Secretary cannot revise FMPs to take into account the comments. This rulemaking process differs significantly from traditional notice and comment rulemaking, in which agencies must respond to comments. Given the more limited role of the Secretary in revising FMPs and the more truncated rulemaking process, Council-developed FMPs should not fall into the *Mead* safe harbor for interpretations made pursuant to notice-and-comment rulemaking.[143]

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[142] 16 U.S.C. § 1854(a)(3).

[143] A somewhat analogous situation occurs under the Clean Air Act. States must development implementation plans (SIPs), which the EPA reviews and approves or rejects. Hall v. EPA, 273 F.3d 1146, 1153 (9th Cir. 2001) (en banc). The Ninth Circuit held that interpretations within SIPs do not fall into the *Mead* safe harbor and do not carry the force of law. *Id.* at 1155–56.

If one accepts that Council-developed FMPs should be evaluated outside of the *Mead* safe harbor, the Council structure may lack the requisite formal procedures necessary for FMPs to carry the force of law. In *Mead*, the Court established several factors for courts to consider when determining whether an agency interpretation falls under the *Chevron* framework, including "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[144] Although several of these factors— consistency, persuasiveness, and degree of care—cannot be evaluated outside the context of a particular interpretation, the other factors may be examined abstractly and suggest that interpretations developed by Councils in FMPs will rarely carry the force of law.

First, *Mead* suggests that interpretations will likely carry the force of law when the interpretive body follows formal procedures.[145] Although the MSFMCA prescribes certain procedures for Councils to follow, Councils may set many of their own procedures.[146] As a result, Council decision-making may not follow formal procedures. Moreover, in *Mead*, the Court emphasized formality as a way to ensure deliberative decision-making.[147] A key component of deliberative and effective decision-making is the inclusion of diverse perspectives.[148] Currently, however, extractive fishing interests dominate Councils, which further calls into question the Councils' ability to engage in deliberative decision-making.[149] Even if Councils follow

[144] United States v. Mead Corp., 533 U.S. 218, 228 (2001).

[145] *Id.*

[146] *See* 16 U.S.C. § 1852(f)(6) (2006) ("Each Council shall determine its organization, and prescribe its practices and procedures for carrying out its functions under this chapter, in accordance with such uniform standards as are prescribed by the Secretary.").

[147] *Mead*, 533 U.S. at 230.

[148] *See* Eagle et al., *supra* note 67, at 23 ("Research on decision–making has shown that diverse perspectives are extremely valuable in making effective decisions.").

[149] *See* Okey, *supra* note 63, at 195 (noting that the Council structure required by the MSFCMA favors industry interests by requiring the balanced representation of commercial and recreational interests while failing to account for any formal representation of the public/general interest). *See also* 16 U.S.C. § 1852(b)(2)(B) ("The Secretary, in making appointments [of voting members to the Councils] under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council."). Although all regulatory agencies are susceptible to

sufficient formalized procedures, the overrepresentation of commercial and recreational fishing interests on Councils undermines reasoned deliberation and suggests that interpretations and policies adopted by Councils and codified by the Secretary do not carry the force of law.[150]

Furthermore, in *Mead*, the Court announced that particularized interpretations binding only on the parties before the court do not warrant *Chevron* deference.[151] Under the generalized/particularized framework established in *Mead*, only more generalized decisions that bind non-parties receive *Chevron* deference.[152] The eight regional Councils oversee hundreds of marine fisheries in the United States, many of which have individual management plans. Each year, Councils develop multiple amendments and adjustments to the plans to reflect new catch data and scientific information. Interpretations within the plans are heavily influenced by the particular fishery involved and do not represent generally applicable interpretations. Such interpretations within these plans fall somewhere between the generalized decisions in a formal rule and the particularized tariff classification decisions at issue in *Mead*.[153] Interpretations in FMPs and their amendments do not appear to be general enough in nature to warrant *Chevron* deference under the particular/general framework discussed in *Mead*.

capture, some view Councils as particularly prone to capture because of the statutory requirement that the Secretary appoint members who represent commercial and recreational fishing interests. *See* Eagle et al., *supra* note 67, at 27 ("In the case of the councils, there is no concern about capture because the "agency" itself is composed of industry leaders. The councils cannot be captured by industry because their members *are* the industry.").

[150] *See* Eagle et al., *supra* note 67, at 26 (finding that fishing interests "dominate [Councils] to a degree that undermines effective decision–making").

[151] *Mead*, 533 U.S. at 233. *See also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1462–63 (2005) (explaining that in some cases courts interpret *Mead* to only permit *Chevron* deference to apply when the interpretation is produced in an action binding on non-parties).

[152] *See* Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1067 (9th Cir. 2003) (en banc) ("Applying *Mead*, we conclude that this case involves only an agency's application of law in a particular permitting context, and not an interpretation of a statute that will have the force of law generally for others in similar circumstances.").

[153] *See Mead*, 533 U.S. at 233–35 (explaining that Congress would not intend for particularized decisions churned out at rates of thousands per year to carry the force of law).

A somewhat analogous scenario arises under the Clean Air Act. The Clean Air Act requires states to develop Implementation Plans (SIPs) to attain air quality consistent with the National Ambient Air Quality Standards. SIPs contain regulations that apply only to one state (just as FMPs contain regulations that apply only to one fishery) and are not binding on other states or their SIPs (just as one Council's FMP is not binding on another Council's FMP). Furthermore, in approving SIPs, the EPA has limited options (just as the Secretary has limited options when approving FMPs). The Ninth Circuit held that non-binding interpretations within SIPs do not carry the force of law and do not receive *Chevron* deference.[154] The similarities between SIPs and FMPs, especially in their tailoring to a particular regionalized environmental problem, suggests that interpretations in FMPs, like those in SIPs, are not generalized enough to warrant *Chevron* deference.

B. Chevron *Deference Should Not Apply to Interpretations Within Council-Developed FMPs and FMP Amendments.*

Chevron has been criticized for granting too much authority to administrative agencies. Under *Marbury v. Madison*, the judicial branch declares the meaning of the law.[155] By requiring deference to reasonable agency interpretations of legal ambiguities, *Chevron* deference seems to allow agencies to declare the meaning of the law rather than the courts.[156] *Chevron* only conforms to *Marbury* if one accepts that under *Chevron* courts still define the law, but define the law to require deference because Congress implicitly delegated this authority to the agencies in the law.[157] Although this theory resolves the conflict between *Chevron* and *Marbury*, it

[154] *Hall v. EPA*, 273 F.3d 1146, 1155–56 (9th Cir. 2001) ("[T]he SIP's reach extends only to those it directly regulates, and does not have "force of law" constituting binding precedent for future SIP revisions. Interpretations of the [Clean Air Act] set forth in such non-precedential documents are not entitled to *Chevron* deference.") (citing *Mead*, 533 U.S. at 231–32).

[155] 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[156] *See generally* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2637 (2003) (summarizing the argument that characterizes *Chevron* as counter-*Marbury*); Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006) (characterizing *Chevron* as counter-*Marbury*).

[157] Garrett, *supra* note 156, at 2638.

relies on the legal fiction that silence or ambiguity represents Congress's intent to delegate interpretive authority to agencies.[158] Without this legal fiction, *Chevron* appears to grant too much power to administrative agencies.

Applying *Chevron* deference to Council interpretations takes this legal fiction one step further and assumes that silence in the MSFCMA indicates intent to delegate interpretive authority to Councils appointed by agency officials. Such an assumption stretches the legal fiction nearly beyond limit. Councils, composed primarily of representatives of commercial and recreational fishing interests, do not seem qualified to clarify the meaning of the law. They lack both the political accountability and high level of expertise that justify the legal fiction as applied to centralized agencies.[159] Accordingly, courts should not read silence in the MSFCMA as indicating intent to delegate interpretive authority to councils.

Other critiques of *Chevron* have attempted to limit its application to ensure alignment with the original justifications for the deferential standard of review. Professor David J. Barron and then-Professor Elena Kagan argue that the application of *Chevron* deference should depend on *who* within the agency made the interpretation as opposed to the processes through which the interpretation was developed.[160] Barron and Kagan emphasize the hierarchies within an administrative agency and conclude that decisions made by high-level officials differ greatly from decisions made by low-level officers.[161] Although courts may reasonably find that silence or ambiguity within a statute reflects Congress's desire to allow the agency to fill in the gaps, Barron and Kagan insist there are limits to who within the agency can exercise this gap-filling authority. Given that decisions by high-level officials

[158] *See* Sunstein, *supra* note 156, at 2589–91 (describing the legal fiction of implied congressional delegation as a justification for *Chevron*).

[159] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (relying on the greater political accountability and expertise of agencies to justify the highly deferential standard of review). This greater political accountability and expertise of agencies compared to courts supports deference to agencies' reasonable interpretations as opposed to courts' substitution of their own judgment in areas beyond their knowledge and experience.

[160] David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 202, 234–36 (2001).

[161] *Id.*

will reflect greater accountability and more disciplined policymaking, Barron and Kagan argue that *Chevron* deference should only apply when the statutory designee actually made the interpretation in question.[162] To determine if a particular interpretation meets these requirements, Barron and Kagan suggest that courts look to see whether the statutory designee issued the interpretation under his name prior to its final issuance and whether the designee issued the interpretation after meaningful review by the designee's advisors.[163] Only in such cases should *Chevron* deference apply.

Under the framework proposed by Barron and Kagan, Council-developed interpretations most likely would not receive *Chevron* deference.[164] Although the MSFCMA designates the Councils as the bodies responsible for developing FMPs, the statute designates the Secretary, acting through the NMFS, as the ultimate enforcer and regulator under the statute. The statute envisions the Secretary as overseeing the actions of the Councils and rigorously ensuring that proposed FMPs and regulations comply with all legal requirements. The Secretary also implements the Councils' proposed plans and any legal challenges to FMPs are brought against the Secretary and NMFS rather than the Councils.[165] The eight Councils create a diffuse system of policymaking and the Councils lack many of the features that Barron and Kagan cite that make statutory designees superior interpretive decision-makers: councilmembers lack the political accountability of high-level statutory designees; councilmembers are appointed by the Secretary rather than the President or Senate;[166] and, unlike most statutory designees, councilmembers are not likely to meet with Congress on policy matters or appear publicly.[167] The geographic dispersal of the Councils and their

[162] *Id.* at 238–39.

[163] *Id.* at 239–40.

[164] *See id.* at 238–39 (arguing that only interpretations made by the statutory designee should receive *Chevron* deference).

[165] *See* Eagle et al., *supra* note 67, at 36 (describing the lack of accountability for Councils, including the lack of legal accountability).

[166] *See* Barron & Kagan, *supra* note 160, at 243 (stating that statutory designees typically receive their position as a result of actions by both the President and the Senate, which increases political accountability).

[167] *See id.* (explaining that statutory designees are more likely to appear before Congress and give testimony on policy matters and have greater visibility in the public eye, both of which increase political accountability).

members decreases their ties to the President, who is highly politically accountable. These features, or lack thereof, decrease the overall accountability of councilmembers and, under the Barron and Kagan framework, suggest *Chevron* deference should not apply.

Furthermore, several of the initial justifications for *Chevron* deference do not apply to Council-developed interpretations. First, the decreased political accountability of Councils makes one of the original justifications for *Chevron* deference inapplicable. In *Chevron*, the Court expressed a desire to delegate gap-filling interpretive authority to a more politically accountable body than the courts.[168] As discussed above, centralized administrative agencies, with their ties to the President, have greater political accountability than the courts. In contrast, the eight regional Councils face little political accountability for their actions given their geographic dispersal. In addition, the Secretary, who has statutory authority to oversee the Councils, provides little federal oversight of Council actions in practice. The MSFCMA provides the Secretary with the authority to disapprove Council FMPs and FMP amendments that fail to comply with statutory mandates.[169] However, NMFS rarely exercises this authority and approves over ninety percent of management plans submitted by Councils.[170] Accordingly, even though the MSFCMA establishes federal oversight of the diffuse Council system, in practice, these statutory measures do little to increase the political accountability of the Councils. The structural problems discussed above as well as the lack of federal oversight suggest that Councils lack the requisite political accountability to justify a judicial review standard as deferential as the *Chevron* standard.

Conversely, Councils have technical expertise and regulate a highly complex area, which supports deferring to their interpretations. In *Chevron*, the Court cited the technical expertise

[168] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (justifying deference because of the greater political accountability and technical knowledge of agencies).

[169] 16 U.S.C. § 1854(a)(3) (2006).

[170] *See* Eagle et al., *supra* note 67, at 32 (presenting the results of an analysis of the frequency of NMFS disapproval of Council-submitted FMPs and finding "disapprovals of council management measures are rare. Between 1980 and 2000, NMFS partially disapproved only 62 of approximately 860 proposed plans, amendments, or annual specifications — resulting in a partial disapproval rate of 7 percent.").

of agencies as one of the justifications for deferring to their interpretations; specifically, finding the EPA to be in a much better position than the courts to interpret terminology within the Clean Air Act.[171] The Councils, like the EPA in *Chevron*, appear to have the requisite technical expertise to warrant *Chevron* deference. The Secretary may only appoint individuals to the Councils who have experience with the fishing industry and have "[knowledge] regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned."[172] Accordingly, the regional Council structure reflects technical knowledge and experience, which supports deference to their interpretations under *Chevron*.

However, the Council structure appears particularly prone to capture by industrial fishing interests, which may undermine the ability of Councils to exercise sound technical judgment. First, the Act requires the Secretary, through his appointments, to ensure a "fair and balanced" representation of commercial and recreational fishing interests on the Councils.[173] The Act fails to require the Secretary to ensure a "fair and balanced" representation of conservationists or the public interest. As a result, the statute seems to promote appointment of individuals with extractive interests and to favor industry interests over the general public interest. In a study of Council membership from 1990 to 2001, members representing commercial fishing interests outnumbered those representing recreational fishing interests and far outnumbered those representing the scientific and conservation communities.[174] This study further revealed that those representing commercial interests on the Councils had experience with industrial commercial fishing—not small scale commercial fishing.[175] In 1999, only one of seventy-one appointed Council members represented the conservation community.[176] Such biased representation on the Councils undermines the benefits of their technical expertise and raises additional questions as to whether Council interpretations should receive *Chevron* deference.

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[171] *See Chevron*, 467 U.S. at 865 (justifying deference in part because of the technical knowledge of agencies).

[172] 16 U.S.C. § 1852(b)(2)(A) (2006).

[173] *Id.* § 1852(b)(2)(B).

[174] *See* Okey, *supra* note 63, at 197–99 (summarizing the study's finding).

[175] *Id.* at 199.

[176] *Id.*

C. *Suggestion: Rigorous* Mead*/Step Zero Analysis Focusing on Process and Participation*

Councils have several characteristics—decreased political accountability, susceptibility to capture, and regionalization—that cast doubt on the effectiveness of Council-developed policies and suggest that Council-developed interpretations should not survive *Chevron* Step Zero. Nevertheless, courts generally ignore the Step Zero analysis when reviewing Council-developed interpretations and proceed with a traditional *Chevron* analysis.[177] As a result, courts may defer to interpretations deemed reasonable by the court but promulgated pursuant to processes that generally would not receive *Chevron* deference under the *Mead* framework. To comport with the original justifications for *Chevron* deference, courts must apply a rigorous Step Zero inquiry when analyzing interpretations in Council-developed FMPs and FMP amendments, which will benefit fisheries management.

First, the Step Zero inquiry allows courts to ensure that Council decision-making includes public participation, which is both statutorily required and beneficial to reasoned decision-making.[178] In applying *Mead*, courts must examine the formality of the agency's decision-making process, which includes examining the degree and quality of public participation.[179] Public participation exposes Councils to various perspectives on the issue before them and ensures a more deliberative process.[180] By examining the quality and quantity of public participation before applying *Chevron* to Council-developed interpretations, courts will create incentives for Councils to promote public participation, which in turn will promote more reasoned decision-making, and, ideally, more effective policies.

Second, the *Mead*/Step Zero analysis allows courts to examine the composure of Councils, as it affects the expertise, deliberation, and persuasiveness of Council-developed interpretations.[181] The composure of a decision-making body

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[177] *See supra* Part III.

[178] *See* Eagle, *supra* note 67, at 34 (discussing problems with public participation as a factor undermining effective fisheries management).

[179] *See* Bressman, *supra* note 151, at 1459 (explaining that the determinative factor in the *Mead* analysis is deliberation in the decision-making process as indicated by public participation).

[180] *Id.*

[181] United States v. Mead Corp., 533 U.S. 218, 228 (2001) (listing

affects the validity of its reasoning, which impacts its persuasiveness and is therefore relevant when evaluating the Council's expertise.[182] Hence, when evaluating whether Council-developed interpretations carry the force of law, courts may examine whether various interests were represented on the Council, including the public interest and the interests of the conservation community.[183] Furthermore, courts may consider whether councilmembers faced conflicts of interest during decision-making, as such conflicts also affect the validity of reasoning and its persuasiveness.[184] Recent studies indicate that many councilmembers have a financial interest in the resources regulated by the Councils because of their involvement in the commercial or recreational fishing industries.[185] The fact that Councils may be captured by extractive interests and have members with significant conflicts of interest is relevant to the *Mead*/Step Zero inquiry given the effect of capture on reasoned decision-making. Capture also undermines "careful consideration," a factor included in the Step Zero analysis in *Barnhart*.[186] Courts need not apply *Chevron* when Councils appear captured or affected by conflicts of interest. If courts utilize *Mead*/Step Zero to prevent the application of *Chevron*

"formality," "relative expertness," and "persuasiveness" as relevant factors in determining whether an action carries the force of law and is entitled to *Chevron* deference).

[182] *See* Eagle et al., *supra* note 67, at 23 ("Research on decision-making has shown that diverse perspectives are extremely valuable in making effective decisions. Groups with diverse perspectives on an issue tend to look at and consider a broader set of information in making their decisions.").

[183] *See* Svein Jentoft, *Legitimacy and Disappointment in Fisheries Management*, 24 MARINE POL'Y 141, 145 (2000) ("In areas where fisheries play an important role in the local . . . regional . . . or national . . . economy, there is a public interest in fisheries management. When resource crises hit, the entire society is affected.").

[184] *See* Eagle et al., *supra* note 67, at 27–28 (explaining that "[a]voidance of conflicts of interest has long been a hallmark of good government" because such conflicts undermine the idea of equal treatment for equal claims, undermine the integrity of government policymaking, lead to inefficient regulations, and undermine public confidence in governmental institutions).

[185] *See id.* at 29 (finding that 60% of appointed council members report having a direct financial interest in the fisheries that their councils manage and regulate based on a study of the financial disclosure forms filed by council members).

[186] *See* Barnhart v. Wilson, 535 U.S. 212, 222 (2002) (listing the agency's "careful consideration [of] the question over a long period of time" as a factor in the Step Zero analysis).

deference to policies developed by captured Councils, the courts create incentives to avoid capture and remove councilmembers with conflicts of interest.

The argument that courts should more rigorously apply the *Mead*/Step Zero analysis to Council-developed interpretation does not necessarily mean that courts should never uphold such interpretations. Even if an interpretation does not carry the force of law, the court may adopt the interpretation under the *Skidmore* framework, which allows courts to uphold agency interpretations based on their "power to persuade."[187] Accordingly, under the framework advocated, interpretations developed through fair and deliberative processes should survive Step Zero and receive analysis under *Chevron*; interpretations resulting from less deliberative processes should fail Step Zero, receive analysis under *Skidmore*, and only be adopted by courts to the extent justified by their thoroughness, validity, and consistency.[188]

Applying a more rigorous *Mead*/Step Zero analysis creates incentives that will benefit fisheries management. Fisheries management policies, like all policies, are more fair and effective when all interested parties, including the amorphous public interest, are involved in the policymaking process. As described above, the *Mead*/Step Zero inquiry permits courts to examine the decision-making body and process and withhold *Chevron* deference in the event that the decision-making body appears captured or fails to include public participation. Agencies, including the NMFS, prefer *Chevron* deference to *Skidmore* deference. Although *Skidmore* allows courts to adopt an agency interpretation, it does not produce the same result as that under *Chevron* deference.[189] When an agency interpretation is upheld under *Skidmore* deference, the court, as opposed to the agency, retains interpretive control.[190] Agencies, therefore, have more flexibility, discretion, and authority when their interpretations receive *Chevron* deference. Given these advantages, agencies

[187] Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

[188] *See id.* (listing factors relevant to whether an agency interpretation has the power to persuade).

[189] *See* Bressman, *supra* note 151, at 1466 ("[T]he degree of deference may make a difference in the long run. When an agency commands *Chevron* deference, it retains the ability to change its position in the future.") (citing Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1301 (2002)).

[190] Bressman, *supra* note 151, at 1466–67.

have an incentive to follow procedures and processes that will ensure that their interpretations survive *Mead*/Step Zero and receive *Chevron* deference. If, in reviewing Council-developed interpretations, the courts focus on the interests represented on the Councils and public participation, incentives will develop for the Secretary to appoint members to the Council that reflect a broader array of interests and for the Councils to more effectively involve the public in policymaking. In turn, these procedural shifts should result in more effective fisheries policies.[191]

CONCLUSION

The MSFCMA creates the potential for effective fisheries management. Unfortunately, capture of Councils and overly deferential judicial review have resulted in the continued decline of U.S. fisheries. Rigorously reviewing Council processes before applying *Chevron* deference will create incentives for more deliberative and reasoned decision-making by Councils. Examining the structure of the MSFCMA suggests that interpretations developed by Councils should not fall within the *Mead* safe harbor. However, currently, courts ignore the *Mead*/Step Zero inquiry when examining Council-developed interpretations. This judicial mistake is especially problematic because Councils lack many of the features that warrant applying *Chevron* deference. By utilizing *Mead*/Step Zero to focus on the processes and participation involved in Council decision-making, courts can create incentives for more deliberative decision-making. Ultimately, more deliberative decision-making will result in more effective fisheries management policies.

[191] *See* Eagle et al., *supra* note 67, at 23 (explaining that public participation and the inclusion of diverse perspectives result in more effective decision-making).