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# **POLICY FORMULATION VERSUS POLICY IMPLEMENTATION UNDER THE MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT: INSIGHT FROM THE NORTH PACIFIC CRAB RATIONALIZATION**

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MONICA ROTH & RITCHIE EPPINK\*

**Abstract:** The Magnuson-Stevens Fishery Conservation and Management Act (MSA) governs management of fisheries located three to 200 miles off the coast of the United States. The MSA is unique in administrative law in that it devolves policy formulation to eight Regional Fishery Management Councils rather than to a federal agency. That agency, the National Marine Fisheries Service (NMFS), is relegated primarily to developing regulations that implement the councils' policies. NMFS can review the councils' policies only to ensure that they are consistent with existing laws. NMFS has no authority to revise policy to suit its own preferences, or to write regulations that undercut council policy intent, except when conflicts with other applicable laws arise. The MSA's legislative history reveals NMFS routinely undercuts this special administrative process through the regulations it writes. We review a recent example in which NMFS attempted to undermine the North Pacific Fishery Management Council's crab rationalization policy through the regulation-writing process. We offer a simple solution to help avoid future abuse of administrative authority. This solution may have utility in other areas of administrative law in which authority to formulate policy is separated from the power to implement it.

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## INTRODUCTION

The Magnuson-Stevens Fishery Conservation and Management Act (MSA)<sup>1</sup> governs management of fisheries<sup>2</sup> within the Exclusive Economic Zone (EEZ) of the United States, which includes waters three to 200 miles off the nation's coasts.<sup>3</sup> The centerpiece of the MSA's fishery management framework is devolution of fishery policy to local stakeholders and experts—those most familiar with the unique circumstances and needs of local and regional fisheries—through the establishment of eight Regional Fishery Management Councils.<sup>4</sup> The councils, which are required to seek broad public input from individuals with local knowledge and interest in the fisheries,<sup>5</sup> are unique in the federal regulatory system.<sup>6</sup>

The MSA grants the councils enormous authority over federal fisheries management, bestowing on them the primary responsibility for developing and amending fishery management plans (FMPs) for each fishery in the council's jurisdiction that requires management.<sup>7</sup> In addition, the MSA grants councils the authority to propose regulations to implement each FMP.<sup>8</sup> Under the MSA management framework, an FMP and the regulations that implement it go hand-in-hand.<sup>9</sup> The FMP serves as a foundational policy document, setting out the basic policies that will govern the fishery,<sup>10</sup> while the implementing regulations give the force of law to those policies.<sup>11</sup>

Although the MSA does not grant the councils authority to actually promulgate regulations, it contemplates only limited agency review of

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<sup>1</sup> 16 U.S.C. §§ 1801–1883 (2000 & Supp. IV 2004). The MSA was reauthorized in legislation enacted in January 2007. Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 (2007).

<sup>2</sup> *Id.* § 1802(13)(A). A “fishery” under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) is a stock of fish that is treated as a unit, based on geographical, scientific, technical, recreational, and economic characteristics. *Id.*

<sup>3</sup> *Id.* §§ 1802(11), 1811(a); Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

<sup>4</sup> 16 U.S.C. §§ 1801(b)(5), 1852(a).

<sup>5</sup> *See id.* § 1852(h)(3).

<sup>6</sup> H.R. REP. NO. 104-171, at 45 (1995). The Department of Justice (DOJ), in a 1995 letter to the House Resources Committee, described the councils as “unique creations within the federal government [that] present very difficult constitutional questions regarding their structure and functions.” *Id.*

<sup>7</sup> 16 U.S.C. § 1852(h)(1).

<sup>8</sup> *Id.* §§ 1853(c), 1854(b).

<sup>9</sup> *See id.* § 1854(b).

<sup>10</sup> William R. Rogalski, *The Unique Federalism of the Regional Councils Under the Fishery Conservation and Management Act of 1976*, 9 B.C. ENVTL. AFF. L. REV. 163, 171 & n.44, 172 (1980).

<sup>11</sup> *See* 16 U.S.C. § 1854(b); Rogalski, *supra* note 10, at 166 n.14.

the policy determinations, FMPs, FMP amendments, and proposed regulations developed by the councils.<sup>12</sup> The U.S. Secretary of Commerce, who has delegated his review authority under the MSA to the National Marine Fisheries Service (NMFS)<sup>13</sup>—a division of the National Oceanic and Atmospheric Administration—ultimately promulgates management measures and regulations. NMFS's review is limited by statute to ensuring that each FMP, FMP amendment, and proposed regulation is consistent with the MSA and other applicable laws.<sup>14</sup> NMFS has no authority to revise a council-submitted FMP, amendment, or proposed regulation to suit its own policy preferences, or to write regulations that undercut council policy intent, except when they conflict with other applicable laws.<sup>15</sup> Nevertheless, NMFS has demonstrated either a misunderstanding of this special administrative process, or has attempted to seize traditional, lead-agency federal regulatory powers not accorded it under the MSA.<sup>16</sup> The MSA's legislative history reveals several attempts by Congress to address NMFS's usurpation of council authority.<sup>17</sup> None of Congress's efforts has eliminated the problem.<sup>18</sup>

The tendency of NMFS to overstep its authority was made abundantly clear when it recently failed to follow council policy decisions, even when explicitly directed by Congress to adopt a particular council-

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<sup>12</sup> See 16 U.S.C. § 1854(b).

<sup>13</sup> See *id.* §§ 1802(34), 1854(a), (b); NAT'L MARINE FISHERIES SERV., DEP'T OF COMMERCE, OPERATIONAL GUIDELINES: FISHERY MANAGEMENT PLAN PROCESS A-61 (1997), available at [http://www.nmfs.noaa.gov/sfa/domes\\_fish/guidelines.pdf](http://www.nmfs.noaa.gov/sfa/domes_fish/guidelines.pdf) [hereinafter FMP GUIDELINES].

<sup>14</sup> See 16 U.S.C. § 1854(a), (b). The National Marine Fisheries Service (NMFS) may make "technical changes as may be necessary for clarity" to proposed regulations submitted by a council, but must publish in the Federal Register an explanation of any changes made. *Id.* § 1854(b)(1)(A).

<sup>15</sup> See *id.* § 1854. In practice, the fishery management plan (FMP) and proposed regulation process is decoupled. Telephone Interview with Chris Oliver, Executive Dir., N. Pac. Fishery Mgmt. Council (Aug. 11, 2006) [hereinafter Interview with Oliver]. Councils typically defer the proposed regulation writing to NMFS. *Id.* Limited council budgets and staffing, and the fact that NMFS ultimately must enforce the regulations, underpins this convention. *Id.*

<sup>16</sup> See *Oceana, Inc. v. Evans*, No. 04-0811, 2005 U.S. Dist. LEXIS 3959, at \*92 (D.D.C. Mar. 9, 2005); *Associated Fisheries of Me., Inc. v. Evans*, 350 F. Supp. 2d 247, 253 (D. Me. 2004).

<sup>17</sup> See H.R. REP. NO. 97-549, at 8-9, 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 4320, 4322, 4341; H.R. REP. NO. 97-438, at 8 (1982).

<sup>18</sup> See *Oceana*, 2005 U.S. Dist. LEXIS 3959, at \*92 ("In light of the Secretary's improper substitution of his own recommendation in place of the Council's, the Court is constrained to hold that the [provision] was adopted in violation of the MSA and therefore cannot be enforced."); *Associated Fisheries*, 350 F. Supp. 2d at 253 ("The Court is troubled by the Government's clear and inexplicable failure to comply with the procedural requirements of . . . the Magnuson-Stevens Act . . .").

approved management program.<sup>19</sup> Following unanimous approval<sup>20</sup> of a Bering Sea and Aleutian Islands (BSAI) crab rationalization<sup>21</sup> program by the North Pacific Fishery Management Council (North Pacific Council)<sup>22</sup>—which, among other elements, envisioned the use of both Fishermen’s Collective Marketing Act (FCMA)<sup>23</sup> and non-FCMA cooperatives—Congress and the President enacted a January 2004 appropriations rider instructing the Secretary of Commerce to implement “all parts of the Program.”<sup>24</sup> Ten months later, NMFS issued a proposed rule that deviated from the policy embodied in the program that the North Pacific Council had approved and that Congress had directed NMFS to implement.<sup>25</sup> Only after a nearly unprecedented, thorough review and comment by the North Pacific Council and stakeholders in the fishery, and ultimately a letter to NMFS from Senator Ted Stevens, did the agency correct the rule to conform to the council motion.<sup>26</sup>

This Article uses the BSAI crab rationalization program to examine NMFS’s apparent confusion over the MSA’s subtle, but clear, distinction between policy formulation (which lies with the councils) and policy implementation (which lies with the Secretary, acting through

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<sup>19</sup> See 15 U.S.C. § 521 (2000); 16 U.S.C. §§ 1852(a)(1)(G), 1862(j)(1), (2) (Supp. IV 2004).

<sup>20</sup> N. PAC. FISHERY MGMT. COUNCIL, 157TH PLENARY SESSION MINUTES 38 (June 2, 2002), available at <http://www.fakr.noaa.gov/npfmc/minutes/Council602.pdf>.

<sup>21</sup> “Rationalization” is a term used to describe many different dedicated access management approaches to fishery management, but primarily refers to market-based programs involving individual transferable quotas or fishery cooperatives. See Shellfish Fisheries of the Exclusive Economic Zone Off Alaska, 69 Fed. Reg. 63,260, 63,262 (Oct. 29, 2004) (to be codified at 50 C.F.R. § 680.2).

<sup>22</sup> The North Pacific Council has authority over fisheries in the Bering Sea, the Pacific Ocean seaward of Alaska, and the Arctic Ocean. 16 U.S.C. § 1852(a)(1)(G).

<sup>23</sup> 15 U.S.C. § 521. The Fisherman’s Collective Marketing Act (FCMA) grants a limited antitrust exemption to fishing industry cooperatives that meet certain requirements. See *id.*

<sup>24</sup> 16 U.S.C. § 1862(j)(1), (2).

<sup>25</sup> See Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. 63,199, 63,200 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680); N. Pacific Fishery Mgmt. Council, *Draft Council Motion for BSAI Crab Rationalization*, in NAT’L MARINE FISHERIES SERV., DEP’T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE BERING SEA ALEUTIAN ISLANDS KING AND TANNER CRAB FISHERIES app. 4-1, at 1 (2004), available at [http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/AppendixI\\_1.pdf](http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/AppendixI_1.pdf) [hereinafter *Council Motion*]; Letter from Stephanie Madsen, Council Chair, N. Pac. Fisheries Mgmt. Council, to Sue Salvesson, Assistant Reg’l Adm’r, Alaska Region NMFS (Dec. 2004) (on file with author), available at [http://www.fakr.noaa.gov/npfmc/current\\_issues/crab/crabcomments1204.pdf](http://www.fakr.noaa.gov/npfmc/current_issues/crab/crabcomments1204.pdf) [hereinafter *Madsen Letter*].

<sup>26</sup> See Letter from Ted Stevens, Senator, to Conrad Lautenbacher, Adm’r, Nat’l Oceanic & Atmospheric Admin. (Dec. 13, 2004) (on file with author) [hereinafter *Letter from Stevens*]. See generally *Madsen Letter*, *supra* note 25.

NMFS). The result is a council-agency relationship that frustrates the Act's philosophy of devolving policy formation to local stakeholders and experts familiar with unique fishery circumstances.<sup>27</sup> Following an overview of some of the major differences between NMFS's proposed rule and the North Pacific Council's motion, we speculate about whether the deviation between the motion and the proposed rule was inadvertent, or the result of confusion about whether NMFS's responsibility is only to implement policy or also extends to reformulating policy established by regional councils.<sup>28</sup> We conclude that regardless of the reason(s), legislative adjustments—possibly through MSA reauthorization—should confront this issue squarely, with the ancillary benefit of lessening the risk of subsequent litigation.

Part I of this Article reviews the legislative history of the council-NMFS relationship under the MSA, focusing on the procedures for NMFS's review of FMPs, FMP amendments, and implementing regulations.<sup>29</sup> Part II juxtaposes the North Pacific Council's BSAI crab rationalization motion with NMFS's proposed rule, first setting out the major elements and policy intent of the motion and then highlighting four major points of deviation between the twenty-six page motion and the 398-page, double-spaced proposed rule.<sup>30</sup> Part III discusses NMFS's unwillingness to heed the councils' policymaking authority. Finally, the Recommendation and Conclusion section proposes legislative additions to improve congruence of policy and regulation under the MSA regional council system.<sup>31</sup> The proposal can be used in other administrative law regimes that separate the power to formulate policy from the power to implement it.

## I. THE COUNCIL-NMFS RELATIONSHIP

Congress has maintained an abiding confidence in the regional council management scheme for our nation's federal fisheries, beginning with the passage of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) in 1976 and continuing throughout the past thirty years.<sup>32</sup> The original act unilaterally and instantaneously declared federal management authority over a zone running from three

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<sup>27</sup> See 16 U.S.C. 1852(h)(3).

<sup>28</sup> See discussion *infra* Part II.C.

<sup>29</sup> See discussion *infra* Part I.B.

<sup>30</sup> See discussion *infra* Part II.

<sup>31</sup> See discussion *infra* Recommendation and Conclusion.

<sup>32</sup> See 16 U.S.C. §§ 1801–1883; Fishery Conservation and Management Act of 1976, § 101, 90 Stat. 331, 336 (1976) (codified as amended at 16 U.S.C. §§ 1811(a)).

miles offshore to 200 miles offshore,<sup>33</sup> leaving the nation with over two million square miles of fisheries to manage.<sup>34</sup> In 1976, Congress faced the problem of comprehensively managing this vast new fisheries jurisdiction, and sought to enlist federal resources while simultaneously gaining the cooperation of fishermen, consumers, and members of the general public—all groups more sensitive to local issues than a federal agency based in Washington, D.C.<sup>35</sup> Congress's solution was the regional fishery management councils,<sup>36</sup> an attempt "to balance the national perspective with that of the individual States," determined to be "the best hope we can have of obtaining fishery management decisions which in fact protect the fish and which, at the same time, have the support of the fishermen who are regulated."<sup>37</sup>

### A. *The Current Relationship*

The current relationship between the councils and the National Marine Fisheries Service (NMFS), in place since 1996,<sup>38</sup> is the product of twenty years of congressional tinkering, and both unmistakably and tightly limits the scope of NMFS's review of council determinations.<sup>39</sup> Under the MSA, policy to govern a particular fishery can be made or changed in only three ways: (1) the issuance or amendment of a fishery management plan (FMP) for the fishery;<sup>40</sup> (2) promulgation of regulations to implement a new FMP or FMP amendment;<sup>41</sup> or (3) amendment of existing regulations governing a fishery without a corresponding change in the FMP.<sup>42</sup> In each case, the current MSA process contemplates

<sup>33</sup> Fishery Conservation and Management Act of 1976 § 101, 90 Stat. at 336.

<sup>34</sup> OFFICE OF TECH. ASSESSMENT, 95TH CONG., ESTABLISHING A 200-MILE FISHERIES ZONE 24 (1977).

<sup>35</sup> FEDERAL FISHERIES MANAGEMENT: A GUIDEBOOK TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT 43 (Jon Jacobson et al. eds., rev. ed. 1985).

<sup>36</sup> Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 302, 90 Stat. 347-51 (codified as amended at 16 U.S.C. § 1852).

<sup>37</sup> Senate Debates and Passage of H.R. 200, 122 CONG. REC. 114, 115 (1976) (statement of Sen. Magnuson), reprinted in STAFF OF S. COMM. ON COMMERCE, 94TH CONG., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 455 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY].

<sup>38</sup> Sustainable Fisheries Act, Pub. L. No. 104-297, §§ 108-110, 110 Stat. 3559, 3574-3592 (1996). Congress has made no major changes to the FMP and regulatory review process since 1996, when it overhauled the process. *See id.*

<sup>39</sup> *See id.*

<sup>40</sup> *See* 16 U.S.C. §§ 1852(h)(1), 1853(c) (2000 & Supp. IV 2004).

<sup>41</sup> *See id.* § 1853(d)(5).

<sup>42</sup> *See id.* § 1852(h)(5).

that the initiator and formulator of policy change should be a regional council.<sup>43</sup>

### 1. FMPs and FMP Amendments

FMPs and FMP amendments, which set the foundations for policy in a particular fishery, are the core function of the regional councils.<sup>44</sup> Councils submit FMPs and FMP amendments to NMFS, which must immediately begin reviewing the FMP or amendment, provide a sixty-day public comment period, and then approve, disapprove, or partially approve the FMP or amendment within thirty days of the end of the comment period.<sup>45</sup> NMFS must fully approve an FMP or amendment, unless it discovers a clear inconsistency with the MSA or other applicable law.<sup>46</sup> If it extends less than full approval, it must allow the submitting council to try again with a revised FMP or amendment, after giving the council a detailed “notice of disapproval” specifying the inconsistencies, and recommending actions that the council could take to gain approval.<sup>47</sup> Moreover, NMFS has no “pocket veto”—if it does not validly act on an FMP or amendment within thirty days of the end of the comment period, the FMP or amendment will take effect as if NMFS had approved it.<sup>48</sup>

Except in an emergency, NMFS may prepare its own plan only if the relevant council fails to develop a needed FMP or amendment within a reasonable time.<sup>49</sup> If NMFS does so, it must hold local public hearings<sup>50</sup> and submit its proposed FMP or amendment to the public and the relevant council for a sixty-day comment period.<sup>51</sup> Furthermore, NMFS cannot repeal or revoke an FMP without three-quarters majority approval from the relevant council.<sup>52</sup>

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<sup>43</sup> See *id.* §§ 1852(h), 1853(d).

<sup>44</sup> *Id.* § 1852(h)(1).

<sup>45</sup> *Id.* § 1854(a).

<sup>46</sup> 16 U.S.C. § 1854(a)(1)(A); see H. REP. NO. 97-549, at 28 (1982), as reprinted in 1982 U.S.C.A.N. 4320, 4341 (“The Secretary can disapprove a plan only if it is found to be in clear violation of the national standards or a clear violation of law.”).

<sup>47</sup> 16 U.S.C. § 1854(a)(3), (4).

<sup>48</sup> *Id.* § 1854(a)(3).

<sup>49</sup> *Id.* § 1854(c)(1)(A), (B); see *id.* § 1855(c). NMFS may also prepare its own plan with respect to certain fisheries over which Congress has given the Secretary of Commerce primary authority. *Id.* § 1854(c)(1)(C); see *id.* § 1854(g).

<sup>50</sup> *Id.* § 1854(c)(2)(A).

<sup>51</sup> *Id.* § 1854(c)(4). Furthermore, NMFS cannot include any limited access system in an FMP or FMP amendment it prepares itself unless it obtains majority approval from the appropriate council. *Id.* § 1854(c)(3).

<sup>52</sup> *Id.* § 1854(h).



As a practical matter, however, the FMP and FMP amendment process has become a closely collaborative one, involving both the council and NMFS throughout preparation and review.<sup>53</sup> Conceivably, NMFS could exploit this cooperation to influence council policy decisions. But the more likely area where NMFS might influence policy is in the development of implementing regulations. NMFS has greater familiarity with the regulatory process, in part because it assumes subsequent enforcement responsibility; it also has a much larger staff, including members of the National Oceanic and Atmospheric Administration's General Counsel Office, and it controls the budgets of regional fishery management councils.<sup>54</sup>

## 2. Implementing Regulations and Regulatory Amendments

Whenever a council submits an FMP or FMP amendment to NMFS, the council must simultaneously submit proposed regulations to implement the FMP or amendment.<sup>55</sup> In practice, the regulations are drafted by NMFS and submitted by the council as part of the package.<sup>56</sup> Also, if a council determines that an existing regulation requires amendment without a corresponding change in the underlying FMP, the council can submit a standalone regulatory amendment to NMFS, or ask NMFS to prepare the regulatory amendment and submit that to NMFS.<sup>57</sup> In either case, the scope of NMFS's review (or drafting of the proposed regulation) is strictly limited, just as with FMPs and FMP amendments.<sup>58</sup> Upon submission by the council, NMFS must immediately begin evaluating the proposed regulation or regulatory amendment and must approve it within fifteen days unless it is inconsistent with the underlying FMP, the MSA, or other applicable law.<sup>59</sup> If NMFS disapproves the regulation or amendment as inconsistent with applicable law, NMFS must provide a notice specifying the inconsistencies, recommending revisions,

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<sup>53</sup> See FMP GUIDELINES, *supra* note 13, at A-22 ("Close cooperation between the Councils and NMFS during [FMP preparation] is essential to reduce the risk of disapproval or partial approval during [the formal review phase]."); see also NAT'L MARINE FISHERIES SERV., DEP'T OF COMMERCE, DRAFT OPERATIONAL GUIDELINES FOR THE DEVELOPMENT AND IMPLEMENTATION OF FISHERY MANAGEMENT ACTIONS 6 (2005), available at [http://www.nmfs.noaa.gov/sfa/domes\\_fish/OperationalGuidelines/DraftOGs\\_082405.pdf](http://www.nmfs.noaa.gov/sfa/domes_fish/OperationalGuidelines/DraftOGs_082405.pdf); Rogalski, *supra* note 10, at 178 n.82 ("[NMFS] participates in this process throughout . . .").

<sup>54</sup> See NOAA Fisheries Service, <http://www.nmfs.noaa.gov/> (last visited Mar. 4, 2007).

<sup>55</sup> 16 U.S.C. § 1853(c)(1).

<sup>56</sup> Interview with Oliver, *supra* note 15.

<sup>57</sup> 16 U.S.C. § 1853(c)(2).

<sup>58</sup> H.R. REP. NO. 97-438, at 8 (1992).

<sup>59</sup> 16 U.S.C. § 1854(b)(1).

and giving the submitting council an opportunity to resubmit.<sup>60</sup> If NMFS approves the submission, it must publish the proposed regulation or amendment for a fifteen- to sixty-day public comment period.<sup>61</sup> NMFS may not make any substantive changes to the council's submission without council approval.<sup>62</sup> Before publication of the proposed regulation or amendment for public comment, NMFS may not change the council's proposed regulation or amendment except to make "technical changes as may be necessary for clarity."<sup>63</sup> Even subsequent to the public comment period, NMFS may make changes to the council's submission only after consulting with the council.<sup>64</sup> In both cases, NMFS must publish an explanation of the changes.<sup>65</sup>

The councils seem to be due great deference in proposing federal rules; one court noted that NMFS's review "is not *de novo* . . . but analogous to an 'abuse of discretion' or 'clear error' standard."<sup>66</sup> In practice, however, nearly all regulations and regulatory amendments are drafted by NMFS after the council formulates the policy.<sup>67</sup> The councils simply do not have enough staff to adequately prepare federal regulations.<sup>68</sup> Since 2001, NMFS has exercised its budgetary control over councils to require that councils notify NMFS before seeking legal advice, and to prohibit them from retaining continuing counsel.<sup>69</sup> In addition, NMFS has argued with mixed success that loopholes in the MSA allow NMFS to make and modify fishery management rules on its own, out of whole cloth and without council involvement.<sup>70</sup>

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<sup>60</sup> *Id.* § 1854(b)(1)(B), (2).

<sup>61</sup> *Id.* § 1854(b)(1)(A).

<sup>62</sup> *Id.* § 1854(b)(3).

<sup>63</sup> *Id.* § 1854(b)(1)(A).

<sup>64</sup> *Id.* § 1854(b)(3).

<sup>65</sup> 16 U.S.C. § 1854(b)(1)(A), (3).

<sup>66</sup> *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1159 (E.D. Va. 1995).

<sup>67</sup> Interview with Oliver, *supra* note 15. One exception is the Gulf of Mexico Fishery Management Council, which contracts for regulation drafting with a former NMFS staff member. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Regional Fisheries Management Council's Employment Practices, 50 C.F.R. § 600.120(g) (2005); see Magnuson-Stevens Act Provisions, 66 Fed. Reg. 57,885, 57,887 (Nov. 19, 2001).

<sup>70</sup> In *Oceana, Inc. v. Evans*, for instance, the Secretary of Commerce relied on 16 U.S.C. § 1855(d)—which authorizes him to "promulgate such regulations . . . as may be necessary" to carry out FMPs and FMP amendments—to justify a substantive addition NMFS made to a council-submitted proposed regulation. No. 04-0811, 2005 U.S. Dist. LEXIS 3959, at \*87-89 (D.D.C. Mar. 9, 2005). The court rejected the Secretary's argument, saying that the MSA "is clear that when the Secretary is presented with proposed amendments and regulations, he does not have the independent authority to, *sua sponte*, add a regulation that is inconsistent with the proposal from the Council." *Id.* at \*89. (quoting Con-

Any significant influence that NMFS might obtain over councils' decisions is contrary to the intent of the MSA to devolve federal fisheries policymaking to regional experts.<sup>71</sup> The legislative history of the FMP and regulation review process only reinforces this conclusion, as it reveals a series of efforts by Congress to tighten and close loopholes in the original MSA that have allowed NMFS to circumvent council policymaking.<sup>72</sup>

### B. *Legislative History of the Relationship*

From the MSA's outset, Congress has made it clear that the councils were to be independent, and function as the policymakers in federal fisheries management. Senator Warren Magnuson, a sponsor of the original MSA in the Senate, described the councils as unique and "relatively independent" institutions whose "powers are derived from the constitutional authority of the federal government, yet . . . are self-determinant in their own affairs."<sup>73</sup> And although the 1976 act gave NMFS—as the delegate of the Secretary of Commerce<sup>74</sup>—the ability to approve or disapprove any council FMP,<sup>75</sup> prepare its own FMP when councils failed to prepare their own,<sup>76</sup> and promulgate its own regulations to implement plans,<sup>77</sup> nothing in the legislative record suggests that Congress intended NMFS to use that power to infect the councils'

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necticut v. Daley, 53 F. Supp. 2d 147, 160–61 (D. Conn. 1999), *aff'd*, 204 F.2d 413 (2d Cir. 2000)).

In another case, the Secretary argued for authority to "clarify" what he characterized as a "clerical error" in a council's proposed regulation. Associated Fisheries of Me., Inc. v. Evans, 350 F. Supp. 2d 247, 251–52 (D. Me. 2004). The court noted that the MSA "gives the Secretary certain powers that allow him to influence policy," but emphasized that "he is generally obliged to implement and enforce the management plans and amendments designed by the regional councils." *Id.* at 253. It went on to reject the Secretary's "clarification" argument, saying that "the [MSA's] statutory scheme, taken as a whole, strongly suggests that while Congress wished the Secretary to have the power to prod the Council to remedy mistakes or address issues, it generally left the power to craft solutions to the Council itself." *Id.* On the other hand, NMFS and the Secretary have had greater success in relying on the MSA's emergency regulation provisions. *See* Parravano v. Babbitt, 70 F.3d 539, 544–46 (9th Cir. 1995).

<sup>71</sup> *See infra* Part I.B.

<sup>72</sup> *See infra* Part I.B.

<sup>73</sup> Warren G. Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 436 (1976).

<sup>74</sup> *See* FMP GUIDELINES, *supra* note 13, at A-61.

<sup>75</sup> Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 304(a), 90 Stat. 331, 352 (1976).

<sup>76</sup> *Id.* § 304(c), 90 Stat. at 353.

<sup>77</sup> *Id.* § 305(a), 90 Stat. at 354.

policymaking with its own agenda. First, as to whether the FMPs or the implementing regulations were to be the principal policy document for fisheries management, the conference committee made it clear: “[T]he fishery management plan is the comprehensive statement of how the fishery is to be managed . . . ‘Regulations’, as used in this Act, means the regulations promulgated to implement what is contained in the fishery management plan.”<sup>78</sup> And the House Merchant Marine and Fisheries Committee, once “mak[ing] it clear” in its report on the MSA legislation “that the final decision as to . . . whether [an FMP] will enter into force and effect rests with the Secretary,” went on to declare its expectation “that, in most cases, after a plan has been thoroughly considered by a Council and there appears to be justification for such a plan, the Secretary will adopt the plan.”<sup>79</sup> Echoing the House committee’s view, Senator Magnuson, Commerce Committee chair, reported on the Senate floor that the committee “feel[s] that use of the veto by the Secretary of Commerce would be rare and that for the most part, primary management decisions would be lodged in the regional councils.”<sup>80</sup> A Senate colloquy later that day made it clear that the legislation’s proponents intended the council’s will to be circumvented only in emergency cases.<sup>81</sup>

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<sup>78</sup> S. REP. NO. 94-711, at 54 (1976), as reprinted in 1976 U.S.C.C.A.N. 660, 678, and in LEGISLATIVE HISTORY, *supra* note 37, at 90; see also H. REP. NO. 94-445, at 67 (1975), as reprinted in 1976 U.S.C.C.A.N. 593, 635, and in LEGISLATIVE HISTORY, *supra* note 37, at 1051, 1120 (“The Committee would like to encourage to the maximum extent possible Council participation in the development of proposed regulations which involve a fishery with which it is concerned.”).

<sup>79</sup> H. REP. NO. 94-445, at 68 (1975), as reprinted in 1976 U.S.C.C.A.N. 593, 636, and in LEGISLATIVE HISTORY, *supra* note 37, at 1051, 1121; see also *id.* at 61 (“[T]he Committee expects the Councils, to the maximum extent possible, to be utilized by the Secretary.”).

<sup>80</sup> 122 CONG. REC. 114, 115 (1976) (statement of Sen. Magnuson), reprinted in LEGISLATIVE HISTORY, *supra* note 37, at 455. The sentiment was the same on the House floor, where Representative Robert Leggett reported for the House Committee on Merchant Marine and Fisheries:

[B]efore exercising [the] veto authority or drawing up a management plan, on his own initiative, the committee intends for the Secretary of Commerce to make every effort to see that whenever possible the views of the States or the Councils are honored. It is only in these unusual situations, where the fishery concerned would be substantially and adversely affected, that the Secretary would not honor such views or recommendations.

121 CONG. REC. 32,532, 32,541 (1976), reprinted in LEGISLATIVE HISTORY, *supra* note 37, at 846.

<sup>81</sup> Senator Mike Gravel queried Senator Ted Stevens: “Can the Secretary disregard all other actions of the council or should we pass a technical amendment here that would require any decision made by the Secretary to first receive approval of the council?” Stevens replied: “Normally, if the Secretary does not agree he must send it back. But in an emergency

Yet, before the 1970s were over, Congress was hearing testimony that NMFS was routinely circumventing the will of the councils.<sup>82</sup> The executive director of the Mid-Atlantic Council testified, succinctly, that “[i]t seems the result of every plan we send through is either a change [in] the policy, clarification of policy, or a new policy is established.”<sup>83</sup> This and similar comments from the councils and stakeholders prompted congressional reports strongly emphasizing the councils’ independence and NMFS’s limited role in formulating fishery management policy,<sup>84</sup> which culminated in the 1983 enactment of amendments overhauling the MSA FMP review process.<sup>85</sup> This rewrite of the council-NMFS relationship aggressively protected the councils’ policymaking authority by: (1) requiring NMFS to “immediately” commence review of all council-submitted FMPs;<sup>86</sup> (2) requiring NMFS to provide a specific explanation of all problems with any FMP it rejected;<sup>87</sup> (3) providing for automatic approval of an FMP if NMFS did not approve or disapprove it within certain short deadlines;<sup>88</sup> (4) giving councils a longer

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there is an opportunity for the Secretary to promulgate ad hoc, temporary short-term type regulations.” 122 CONG. REC. 114, 129 (1976), *reprinted in* LEGISLATIVE HISTORY, *supra* note 37, at 494.

<sup>82</sup> See *Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 96th Cong. 1 (1979).

<sup>83</sup> *Id.* at 589 (statement of John Bryson, Executive Director, Mid-Atlantic Regional Fishery Management Council); see also *id.* at 238 (statement of Richard N. Sharood, National Federation of Fishermen) (testifying that “there has been a lot of backdoor rejection of plans as when the Fishery Service will tell the council members off the record, do not submit that plan” and that “[v]irtually nothing is done by the Fishery Service today to implement a management plan that is not done on an alleged emergency basis”), 592–93 (statement of Clement Tillion, Chairman, North Pacific Regional Fishery Management Council) (“Our biggest problem is some of the nitpicking by NMFS . . . We have very little difficulty conforming to the [MSA], but not necessarily to the wishes of NMFS.”).

<sup>84</sup> See, e.g., H.R. REP. NO. 97-438, at 9 (1982) (“The fact that the Secretary would have reached a different conclusion on how to manage a fishery does not justify the Secretary in substituting his judgment for that of the Council and disapproving the plan. The Councils, not the Secretary, are to manage fisheries within their respective areas.”). In a later report, the House Merchant Marine and Fisheries Committee stated that it was responding to “concern that the federal review of management decisions taken by the Councils too often resulted in undesirable alterations to those decisions” and “re-emphasized that the Secretary is not to substitute his judgment for that of the Councils regarding how to manage a fishery. The Secretary can disapprove a plan only if it is found to be in clear violation of the national standards or a clear violation of law.” H.R. REP. NO. 97-549, at 9, 28 (1982), as *reprinted in* 1982 U.S.C.C.A.N. 4320, 4322, 4341.

<sup>85</sup> Pub. L. No. 97-453, § 7, 96 Stat. 2481 (1983).

<sup>86</sup> *Id.* § 7(a)(1), 96 Stat. at 2487.

<sup>87</sup> *Id.* § 7(a)(1)(C)(2), 96 Stat. at 2488.

<sup>88</sup> *Id.* at § 7(b)(1)(A), 96 Stat. at 2489.

time to review FMPs that NMFS prepared on its own;<sup>89</sup> (5) requiring NMFS to publish an explanation of any substantive changes to implementing regulations proposed by councils;<sup>90</sup> and (6) granting each council authority to require NMFS to adopt emergency management regulations.<sup>91</sup> These provisions were enacted despite specific and general objections from the Department of Commerce.<sup>92</sup> Coupled with three more minor changes enacted in 1986,<sup>93</sup> they show that Congress's confidence in the regional council strategy persisted well into the 1980s and provide a strong indication of congressional intent on the balance of policymaking power between the councils and NMFS.

After 1983, Congress made no significant changes to the MSA council-NMFS relationship until reauthorization in 1996.<sup>94</sup> By that time, however, the legislative record manifested a growing concern over whether the regional councils were representing the broad public interest.<sup>95</sup> Congress responded to the concern with amendments to improve

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<sup>89</sup> *Id.* § 7(a)(2)(B), 96 Stat. at 2489.

<sup>90</sup> *Id.* § 7(a)(1), 96 Stat. at 2487.

<sup>91</sup> Pub. L. No. 97-453, § 8(3), 96 Stat. at 2490.

<sup>92</sup> See H.R. REP. NO. 97-549, at 37, 44-46 (1982), as reprinted in 1982 U.S.C.C.A.N. 4320, 4350, 4357-59.

<sup>93</sup> Congress added a preliminary review phase to the FMP review process in 1986, requiring NMFS to make an immediate determination on the likelihood of approval for a council-submitted FMP. Act of Nov. 14, 1986, Pub. L. No. 99-659, § 106(1)(C), 100 Stat. 3706, 3712 (1986). In the same round of amendments, Congress also granted councils authority to comment on and demand a response concerning actions by federal and state agencies that could affect fish habitats, and mandated that NMFS cooperate with the councils on fishery research. *Id.* §§ 104(b)(2), 106(4), 100 Stat. at 3710, 3713.

<sup>94</sup> See Sustainable Fisheries Act, Pub. L. No. 104-297, §§ 108-110, 110 Stat. 3559, 3574-92 (1996).

<sup>95</sup> For example, Representative Jolene Unsoeld placed these extended remarks in the Congressional Record in 1994:

Mr. Speaker, over the past 18 months our Fisheries Management Subcommittee has held numerous oversight hearings on our Federal fisheries management system in anticipation of reauthorization of the [MSA]. Numerous witnesses—representing every aspect of the Council management spectrum—testified before our committee. Nearly all suggested some type of reform was needed to restore the credibility of the decisions made by the Councils. Some suggested that allowing industry representatives to manage themselves creates a system rooted in conflicts of interests. An editorial in the Anchorage Daily News summed up this concern this way: “The Council system is ethically bankrupt. We don’t let Exxon, ARCO, and BP run the Alaskan State Department of Environmental Conservation. We don’t put people from phone and electric companies in charge of the state public utilities commission. We shouldn’t turn federal fisheries over to fishermen whose decisions directly affect their personal fortunes.”

the MSA's provisions governing council composition, member selection, and conflicts of interest.<sup>96</sup> Although Congress also substantially streamlined the FMP review process, it by and large did not heed calls to centralize fishery management in NMFS.<sup>97</sup> The amendments gave NMFS management authority over highly migratory fish in the Atlantic,<sup>98</sup> but otherwise the councils retained all of the policymaking authority they had always enjoyed, and even gained additional protections against NMFS usurpation, again over executive branch objection.<sup>99</sup> Most notably, the amendments included provisions expressly giving councils authority to propose regulatory amendments<sup>100</sup> and strictly limiting NMFS's scope of review over all proposed regulations and amendments submitted by councils.<sup>101</sup>

Since Congress's last MSA reauthorization and amendments in 1996, calls to strip councils of their near-plenary policymaking authority have continued.<sup>102</sup> Congress, however, has not changed its regional fishery management philosophy, and congressional testimony from council members suggests that Congress could further improve the MSA to pre-

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140 CONG. REC. 15,433, 15,433 (1994); see also Glenn Boledovich, *Magnuson Fishery Conservation and Management Act: Congress Debates Amendments as Deadlines Approach for 1994 Reauthorization*, OCEAN & COASTAL L. MEMO, Aug. 1994, available at <http://oceanlaw.uoregon.edu/memos/issue42.html> ("Critics of the historical makeup of the regional councils suggest that fishing industry representatives have controlled policy, been shortsighted, and often lined their own pockets after being appointed to the regional councils and various advisory committees.").

<sup>96</sup> Sustainable Fisheries Act, Pub. L. No. 104-297, § 107, 110 Stat. 3559, 3570-74 (1996).

<sup>97</sup> See Boledovich, *supra* note 95 ("Such proposals have not gotten strong support, probably because the apparent intent of Congress in creating regional councils was to decentralize fishery management by giving regional councils (and the states that appoint the members) the primary role in designing FMPs.").

<sup>98</sup> § 109(g), 110 Stat. at 3585-86.

<sup>99</sup> See Statement by President William J. Clinton on Signing S. 39, 32 WEEKLY COMP. PRES. DOC. 2040 (Oct. 11, 1996), as reprinted in 1996 U.S.C.C.A.N. 4120, 4120-21.

<sup>100</sup> § 108(d), 110 Stat. at 3576.

<sup>101</sup> § 109(b), 110 Stat. at 3581-82. Also enacted with the 1996 amendments were provisions preventing NMFS from repealing or revoking an FMP without three-quarters majority approval from the involved council, and requiring NMFS to hold local hearings before adopting an FMP on its own. § 109(a), (i), 110 Stat. at 3582, 3587.

<sup>102</sup> See EUGENE H. BUCK & DANIEL A. WALDECK, *THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT: REAUTHORIZATION ISSUES* 34-35 (Feb. 7, 2005), available at <http://ncseonline.org/NLE/CRSreports/05feb/RL30215.pdf>; PEW OCEANS COMM'N, *AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE* 44-48 (2003), available at [http://www.pewtrusts.com/pdf/env\\_pew\\_oceans\\_final\\_report.pdf](http://www.pewtrusts.com/pdf/env_pew_oceans_final_report.pdf).

vent NMFS from improperly interfering with the councils' intended autonomy.<sup>103</sup>

The recent legislative and regulatory repartee among Congress, NMFS, and the North Pacific Fishery Management Council over Alaska's crab fisheries illustrates how inconsistent the real-life council-NMFS relationship is with the MSA. NMFS balked at its restricted role even after explicit congressional directive and congressional reinforcement of its limited role throughout the thirty-year history of the MSA.

## II. BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION

Nothing in the MSA, of course, prevents Congress from using the councils and NMFS outside of the ordinary fishery management process by mandating them to develop and implement specific management measures, and that is exactly what Congress did in this case of the Bering Sea and Aleutian Islands (BSAI) crab fisheries rationalization.<sup>104</sup> After six years in development by the North Pacific Fishery Management Council (North Pacific Council), Congress and President George W. Bush enacted an amendment to the MSA mandating "the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Council."<sup>105</sup> NMFS's response to this mandate—proposal of a regulation that differed substantively and significantly from the program passed by the North Pacific Council—is pointed evidence that NMFS is unwilling to accept its limited role under the MSA.<sup>106</sup>

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<sup>103</sup> See *Operations of the Regional Fishery Management Councils and the Reauthorization of the Magnuson-Stevens Fishery Conservation Act: Hearing Before the H. Comm. on Resources*, 109th Cong. (2005) (statement of Sean Martin, Vice Chair, Western Pacific Fishery Management Council), 2005 WL 2844860 (F.D.C.H.); *Hearing on S. 2066 Before the Subcomm. on Oceans, Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, & Transportation*, 108th Cong. (2004) (statement of Stephanie Madsen, Chair, North Pacific Fishery Management Council), 2004 WL 2067979 (F.D.C.H.).

<sup>104</sup> See *Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources*, 69 Fed. Reg. 63,199, 63,200 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680); *Council Motion*, *supra* note 25, at 1.

<sup>105</sup> 16 U.S.C. § 1862(j) (1) (Supp. IV 2004).

<sup>106</sup> See *Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources*, 69 Fed. Reg. at 63,200; see also discussion *infra* Part II.C.



### A. Background

Shortly after a 1998 instruction from Congress to recommend management measures for BSAI crab fisheries off the coast of western Alaska,<sup>107</sup> the North Pacific Council sponsored industry development of a policy to rationalize those fisheries.<sup>108</sup> By May 2000, the industry committee had settled on a solution involving allocation of separate harvesting (fishing) and processing rights and explicit community protection elements.<sup>109</sup> That fall, more than half of the BSAI crab fleet petitioned Congress to pass emergency legislation that “authorizes the [North Pacific Council] to adopt by September 1, 2001, individual fishing quotas (IFQs) for BSAI crab fishermen . . . and individual processing quotas (IPQs) for BSAI crab processors.”<sup>110</sup> Congress responded by instructing the North Pacific Council to “analyze individual fishing quotas, processor quotas, cooperatives, and quotas held by communities” and directing that “[t]he analysis should include an economic analysis of the impact of all options on communities and processors as well as the fishing fleets.”<sup>111</sup> On June 10, 2002, the North Pacific Council voted unanimously in favor of a so-called “three-pie voluntary coop-

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<sup>107</sup> Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 211(c)(2)(B), 112 Stat. 2681, 2681-634 (1999).

<sup>108</sup> Following implementation of the American Fisheries Act (AFA) and the September 8, 1999 announcement of severely depressed crab stocks, an ad hoc industry group met in Seattle on September 17, 1999, to discuss the possible application of AFA-cooperatives to rationalize crab fisheries. During the October 1999 North Pacific Council meeting, Rick Lauber (the Council Chairman) appointed two members as North Pacific Council liaisons to facilitate subsequent workshops and meetings. The ad hoc industry meetings were formalized under the North Pacific Council mantle on April 26, 2000 as the “Bering Sea Aleutian Islands (BSAI) Crab Co-op Committee.” See generally NAT’L MARINE FISHERIES SERV., BEARING SEA ALEUTIAN ISLANDS CRAB FISHERIES, FINAL ENVIRONMENTAL IMPACT STATEMENT, at app. 1-1 (Aug. 2004), available at [www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Appendix1\\_1.pdf](http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Appendix1_1.pdf) (detailing the creation of the committee).

<sup>109</sup> Professor Matulich was invited by three harvester associations to present an industry-wide seminar on May 11, 2000, at Lief Erikson Hall in Ballard, WA, regarding the economics of “a two-pie allocation of [individual fishing quotas (IFQ)] and [individual processing quotas (IPQ)].” One week later (May 18, 2000), the BSAI Crab Co-op Committee abandoned cooperatives in favor of IFQs and IPQs, and also accepted the St. Paul regionalization proposal.

<sup>110</sup> See Petition for Emergency Legislation (n.d.) (emphasis omitted) (on file with author). The initial 131 petitioners were subsequently joined by an additional twenty-four vessel owners. Letter from Brent Paine, Executive Dir., United Catcher Boats, to Sen. Slade Gorton (Sept. 25, 2000) (on file with author).

<sup>111</sup> Act of Dec. 21, 2000, Pub. L. No. 106-554, § 144(b), 114 Stat. 2763A, 2763A-238 (2000).

erative” approach to crab fishery rationalization<sup>112</sup> that was designed to benefit crab harvesters, processors and fishery-dependent coastal communities—a win-win-win policy intent. Members of industry took the unanimous council policy recommendation, embodied in a motion by the council, to Congress for immediate legislation.<sup>113</sup>

In January 2004, Congress enacted legislation that explicitly instructed the Secretary of Commerce to implement the North Pacific Council’s motion through an amendment to the MSA:

By not later than January 1, 2005, the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003.<sup>114</sup>

Congress further stated that “[n]othing in this Chapter shall constitute a waiver, either express or implied, of the antitrust laws of the United States.”<sup>115</sup> NMFS published a proposed rule for public comment on October 29, 2004,<sup>116</sup> and it deviated substantially from the North Pacific Council’s motion and policy intent.

### B. Council Intent

Kevin Duffy, North Pacific Council member and then-Deputy Commissioner of the Alaska Department of Fish & Game, articulated the intent of the council’s motion when he introduced it to the full council:

Rationalization is the path to re-vitalize the economic health of [Alaska crab fisheries] . . . provided the policy recognizes this partnership among harvesters, processors and communities is like a three-legged stool. Cut out any leg and the stool tips over.

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<sup>112</sup> NAT’L MARINE FISHERIES SERV., BEARING SEA ALEUTIAN ISLANDS CRAB FISHERIES FINAL ENVIRONMENTAL IMPACT STATEMENT, Executive Summary, at ES-4 (Aug. 2004), available at [www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/ExecSummary.pdf](http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/ExecSummary.pdf) [hereinafter NMFS, Executive Summary]; see *Council Motion*, *supra* note 25, at 1.

<sup>113</sup> See 16 U.S.C. § 1862(j) (1) (Supp. IV 2004).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* § 1862(j) (6).

<sup>116</sup> Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. 63,199, 63,200 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680).

The solution is to ensure that any rationalization program maintains the integrity of this partnership by providing an incentive for all parties to work toward a mutually beneficial goal . . . . This motion advances a voluntary three-pie cooperative, designed to recognize the prior economic interests and importance of the partnership . . . . The plan . . . addresses conservation and management issues associated with the open access fishery . . . . It includes mechanisms to reduce the excess harvesting and processing capacities of the industry. It increases economic returns and hence, stability for harvesters, processors and communities. It enhances efficiencies by encouraging voluntary industry cooperation, because each of the three partners looks beyond simple self-interest to the synergistic benefits of mutual interests.<sup>117</sup>

The integrated motion comprises several key elements: quota share allocations to harvesters and processors, regional landing and processing requirements, voluntary cooperative formation, a binding arbitration system (BA), and community protection measures such as community development quota (CDQ).<sup>118</sup> The initial allocation of harvester quota shares (QS)—in the form of individual fishing quotas (IFQ)—and processor quota share (PQS)—in the form of individual processing quotas (IPQ)—represents an exclusive but revocable privilege to harvest or process a history-based percentage of the total allowable catch for each fishery.<sup>119</sup> Fully transferable IFQ is allocated annually and designated by north or south landing region, and as Class A or Class B quota.<sup>120</sup> Class A IFQ (ninety percent of the catch history) requires delivery to processors holding uncommitted IPQ in the designated region.<sup>121</sup> Class B IFQ (ten percent of the catch history) has no delivery requirement.<sup>122</sup> This unbalanced quota allocation between sectors was fiercely negotiated and intended to give harvesters ex-vessel

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<sup>117</sup> Audio tape: Kevin Duffy, Deputy Commissioner, Alaska Department of Fish & Game, Statement for the Record After Making the Council Motion (June 8, 2002) (North Pacific Fisheries Management Council) [hereinafter Duffy Speech]; see *Bering Sea/Aleutian Island Crab Rationalization Plan: Hearing on S.R. 253 Before the S. Comm. on Commerce, Science, & Transportation*, 108th Cong. (2003) (testimony of Kevin Duffy, Commissioner, Alaska Department of Fish & Game), available at [http://commerce.senate.gov/hearings/testimony.cfm?id=768&wit\\_id=2107](http://commerce.senate.gov/hearings/testimony.cfm?id=768&wit_id=2107).

<sup>118</sup> See *Council Motion*, *supra* note 25, at 2–5, 6, 11, 18–20; Duffy Speech, *supra* note 117.

<sup>119</sup> See *Council Motion*, *supra* note 25, at 1–3.

<sup>120</sup> See *id.* at 2.

<sup>121</sup> See *id.*

<sup>122</sup> *Id.*

price negotiating leverage over processors, while allowing both sectors and fishery-dependent communities to benefit from rationalization.<sup>123</sup> Use caps are imposed to prevent excessive consolidation of QS and PQS.<sup>124</sup>

To assure broad distribution of rationalization benefits across harvesters, processors and communities, the North Pacific Council envisioned two types of cooperatives: (1) price bargaining cooperatives, which seek limited antitrust exemption under the Fishermen's Collective Marketing Act (FCMA);<sup>125</sup> and (2) operational cooperatives, which seek no limited antitrust exemption but are intended to improve operational efficiencies across multiple species, multiple harvesters and even multiple processors.<sup>126</sup>

BA is included in the North Pacific Council's motion, at the insistence of harvesters.<sup>127</sup> BA is conceived as a voluntary framework of last resort to resolve any outstanding price and/or delivery disputes between harvesters and processors.<sup>128</sup> The BA process is built on distinct, independent arbitrations, so as to prevent behavior that could violate antitrust laws.<sup>129</sup>

Community protection is vital to the State of Alaska and arises in three elements of the North Pacific Council's motion.<sup>130</sup> It was apparent to everyone involved that fishery-dependent communities on the doorstep of the historically largest license-limited access crab fishery (the opilio snow crab fishery) would be rendered inefficient and redundant under rationalization.<sup>131</sup> Yet, these are communities with a single eco-

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<sup>123</sup> See NAT'L MARINE FISHERIES SERV., BERING SEA ALEUTIAN ISLANDS CRAB FISHERIES FINAL ENVIRONMENTAL IMPACT STATEMENT 4-147, 4-162 (Aug. 2004), available at [www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Chapter4.pdf](http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Chapter4.pdf) [hereinafter NMFS, ch. 4]; NMFS, Executive Summary, *supra* note 112, at 4.

<sup>124</sup> See *Council Motion*, *supra* note 25, at 23-24.

<sup>125</sup> 15 U.S.C. § 521 (2000).

<sup>126</sup> See *Council Motion*, *supra* note 25, at 20; Letter from David Bedford, Deputy Comm'r, Alaska Dep't of Fish & Game, to Sue Salveson, Assistant Reg'l Adm'r, Alaska Region, Nat'l Marine Fisheries Serv. 2 (Dec. 12, 2004) (on file with author) [hereinafter Dec. 12 Bedford Letter]. See generally Mark Fina, *Rationalization of the Bering Sea and Aleutian Islands Crab Fisheries*, 29 MARINE POL'Y 311, 315-16 (2005) (describing the benefits of processor-associated cooperatives).

<sup>127</sup> See NAT'L MARINE FISHERIES SERV., BERING SEA ALEUTIAN ISLANDS CRAB FISHERIES FINAL ENVIRONMENTAL IMPACT STATEMENT app. 1, at 397 (Aug. 2004), available at [www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Appendix1\\_RIR.pdf](http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Appendix1_RIR.pdf) [hereinafter NMFS, app. 1].

<sup>128</sup> See *id.*; *Council Motion*, *supra* note 25, at 12-13.

<sup>129</sup> See *Council Motion*, *supra* note 25, at 12-13.

<sup>130</sup> See *id.* at 15-16.

<sup>131</sup> See Duffy Speech, *supra* note 117.

conomic base, dependent almost exclusively on crab processing.<sup>132</sup> For example, the Pribilof Islands communities of St. George and, more importantly, St. Paul, are located in the middle of the Bering Sea, adjacent to the principal opilio fishing grounds.<sup>133</sup> Approximately forty percent of the opilio crab are landed in these two island communities.<sup>134</sup> Processors located there because it was an efficient location under license-limited access derby conditions.<sup>135</sup> By eliminating the race-for-fish and the consequential race-to-process, the license-limited access location advantage would be lost to more distant ports like Dutch Harbor, threatening community viability.<sup>136</sup> Variable processing costs are much lower in Dutch Harbor and Akutan, more than offsetting the \$0.10 per pound cost of a roundtrip from the fishing grounds.<sup>137</sup>

The first element of community protection is to mirror historic north-south landings by tagging IFQ and IPQ with regional designations<sup>138</sup> for the purpose of protecting the only two northern communities: St. George and St. Paul.<sup>139</sup> The second element allocates ten percent of all QS to eligible Alaska-native CDQ communities as community development quota.<sup>140</sup> In so doing, it encourages investment in vessels. The third element encourages communities to maintain their PQS, in the event a processor wishes to leave.<sup>141</sup> A right of first refusal is given to the community to purchase PQS that arose in that community.<sup>142</sup> For those communities where a CDQ group exists, the CDQ group is given the right of first refusal; otherwise a governmental entity is given the entitlement.<sup>143</sup>

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<sup>132</sup> See NAT'L MARINE FISHERIES SERV., BEARING SEA ALEUTIAN ISLANDS CRAB FISHERIES FINAL ENVIRONMENTAL IMPACT STATEMENT app. 3, at 11 (Aug. 2004), available at [www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Appendix3.pdf](http://www.fakr.noaa.gov/sustainablefisheries/crab/eis/final/Appendix3.pdf) [hereinafter NMFS, app. 3].

<sup>133</sup> See *id.* at 151.

<sup>134</sup> See NMFS, app. 1, *supra* note 127, at 362 tbl.3.6-1.

<sup>135</sup> See *id.* at 39.

<sup>136</sup> See Letter from David Benton, Chairman, N. Pac. Fishery Mgmt. Council, to Congress (Aug. 5, 2002) [hereinafter Aug. 5 Benton Letter]. Regionalization was based on avoiding adverse community impacts by protecting historical landings. See *id.* There are only two communities in the northern region—St. Paul and St. George. See NMFS, app. 3, *supra* note 132, at 17–21. The north/south region designation was designed primarily to benefit the Pribilofs Islands, of which St. Paul is the largest. See NMFS, app. 3, *supra* note 132, at 156.

<sup>137</sup> See NMFS, ch. 4, *supra* note 123, at 4-167 to 4-169.

<sup>138</sup> See *Council Motion*, *supra* note 25, at 2.

<sup>139</sup> See NMFS, app. 3, *supra* note 132, at 17–21.

<sup>140</sup> See *Council Motion*, *supra* note 25, at 18–19.

<sup>141</sup> See *id.* at 16–18.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 16–17.

### C. North Pacific Council's Motion Versus NMFS Proposed Rule

After NMFS published its proposed rule in October 2004,<sup>144</sup> the North Pacific Council, in a rare action, conducted a very thorough review of the proposed rule.<sup>145</sup> An extensive review was deemed necessary by the State of Alaska and a broad cross-section of industry, after concern arose that the NMFS's proposed rule might undermine the policy embodied in the North Pacific Council's motion.<sup>146</sup> In particular, there was concern that the proposed rule would vitiate the intended purpose of PQS.<sup>147</sup> The North Pacific Council staff, the State of Alaska, and members of the public contributed extensive comments.<sup>148</sup> This subsection addresses the four most important and fundamental inconsistencies between the proposed rule and the North Pacific Council motion—those that would impair the North Pacific Council's win-win-win intent.<sup>149</sup> These four issues were identified in comments prepared by the authors and directly incorporated into the State of Alaska's comments to the NMFS.<sup>150</sup> Similar comments from three associations are included: the North Pacific Crab Association, an association of crab processors; the Central Bering Sea Fishermen's Association, a CDQ group from St. Paul; and the Alaska Crab Coalition, the oldest associa-

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<sup>144</sup> Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. 63,199, 63,200 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680).

<sup>145</sup> See Dec. 12 Bedford Letter, *supra* note 126, at 1.

<sup>146</sup> See *id.* Kevin Duffy, Deputy Commissioner of the Alaska Department of Fish & Game, directed Scott Matulich to conduct a comprehensive review of the proposed rule on September 9, 2004.

<sup>147</sup> *Id.*

<sup>148</sup> Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 70 Fed. Reg. 10,174, 10,174 (Mar. 2, 2005) (to be codified at 15 C.F.R. pt. 902 and 50 C.F.R. pts. 679, 680). NMFS received forty-nine letters of public comment on the proposed rule. *Id.* Those letters were summarized into 234 distinct comments that NMFS responded to in the preamble to the final rule. See *id.* at 10,179–226.

<sup>149</sup> Dec. 12 Bedford Letter, *supra* note 126, at 1.

<sup>150</sup> See *id.*

tion of North Pacific crab harvesters.<sup>151</sup> Each of the three groups did not comment on all four issues.<sup>152</sup> The four central issues are:

- The definition, and limited scope, of cooperatives;
- the incorrect application of the affiliation standard, particularly as it pertains to B-shares;
- potential antitrust and anti-competitiveness issues related to the design of binding arbitration and sharing of data and other information; and
- a flaw in the right of first refusal design.

### 1. Cooperatives

The proposed rule took a conservative, zero-risk approach to anti-trust that was inconsistent with council intent.<sup>153</sup> In so doing, the proposed rule defined the entire universe of cooperatives as only program-compliant FCMA (bargaining) cooperatives that need limited antitrust exemption.<sup>154</sup> For example, “[a] crab harvesting cooperative is a group of crab QS holders who have chosen to form a cooperative under the 1934 Fisherman’s Collective Marketing Act (15 U.S.C. 521) in order to combine and collectively manage their crab IFQ through a crab cooperative IFQ permit issued by NMFS.”<sup>155</sup>

Yet, the North Pacific Council also envisioned non-FCMA operational cooperatives comprised of non-processor affiliated vessels, processor-affiliated vessels and one or more processors.<sup>156</sup> Both cooperative structures were envisioned as essential “to maximize operational efficiencies and net national benefits, and to broadly distribute those rationalization benefits across harvesters, processors and fishery-depend-

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<sup>151</sup> See Letter from the Cent. Bering Sea Fishermen’s Ass’n, to Sue Salveson, Assistant Reg’l Adm’r, Alaska Region, Nat’l Marine Fisheries Serv. (Dec. 13, 2004) (on file with author) [hereinafter Dec. 13 CBFSFA Letter]; Letter from John Iani, Executive Dir., N. Pac. Crab Ass’n, to Sue Salveson, Assistant Reg’l Adm’r, Alaska Region, Nat’l Marine Fisheries Serv. (Dec. 13, 2004) (on file with author) [hereinafter Dec. 13 Iani Letter]; Letter from Arni Thomson, Executive Dir., Alaska Crab Coal., to Sue Salveson, Assistant Reg’l Adm’r, Alaska Region, Nat’l Marine Fisheries Serv. (Dec. 9, 2004) (on file with author) [hereinafter Dec. 9 Thomson Letter]. See generally Madsen Letter, *supra* note 25.

<sup>152</sup> See Dec. 13 CBSFA Letter, *supra* note 151; Dec. 13 Iani Letter, *supra* note 151; Dec. 9 Thomson Letter, *supra* note 151.

<sup>153</sup> Dec. 12 Bedford Letter, *supra* note 126.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (quoting Bering Sea and Aleutian Islands Crab Fishery Resources, 69 Fed. Reg. 63,199, 63,286 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680)).

<sup>156</sup> *Id.*

ent Alaska coastal communities—the centerpiece of the motion.”<sup>157</sup> “Cooperatives may be formed through contractual agreements among fishermen who wish to join into a cooperative associated with one or more processors . . . .”<sup>158</sup> Non-FCMA operational cooperatives need no limited antitrust exemption because they involve neither market segmentation nor price formation and they pose no significant anti-competitiveness risk of violating antitrust laws of the United States.<sup>159</sup> The U.S. Department of Justice (DOJ) and National Oceanic and Atmospheric Administration (NOAA) general counsel ruled that vertically integrated factory trawlers in the Pacific Whiting fishery are allowed to form a non-FCMA cooperative for the purpose of improving operational efficiency.<sup>160</sup> The Pacific Whiting Cooperative only needed to file a Business Review letter with DOJ.<sup>161</sup> American Fisheries Act (AFA) cooperatives were similarly justified; section 210(b) of the AFA permitted processor-affiliated vessels to participate in AFA-authorized fishery cooperatives.<sup>162</sup> The justification in both contexts is identical to that of North Pacific crab rationalization—improving operational efficiency.<sup>163</sup>

NOAA general counsel received numerous complaints that its narrow interpretation that all crab cooperatives must be limited antitrust-exempt cooperatives under the FCMA was untenable and fundamentally undermined the North Pacific Council’s intent.<sup>164</sup> Nearly one month after the proposed rule was released to the public and just nine days prior to the end of the public comment period, NOAA general counsel for the Alaska Region released an opinion that non-FCMA cooperatives intended by the North Pacific Council motion were not ille-

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<sup>157</sup> *Id.*

<sup>158</sup> *Council Motion, supra* note 25, at 20.

<sup>159</sup> See Dec. 12 Bedford Letter, *supra* note 126; see also RANDOLPH D. MOSS, PARTICIPATION BY PROCESSOR-OWNED CATCHER VESSELS IN INSHORE COOPERATIVES UNDER THE AMERICAN FISHERIES ACT OF 1998: MEMORANDUM OF OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF COMMERCE (1999), available at <http://usdoj.gov/olc/pollockopinionfinal.htm>.

<sup>160</sup> See JOSEPH M. SULLIVAN, HARVESTING COOPERATIVES AND U.S. ANTITRUST LAW: RECENT DEVELOPMENTS AND IMPLICATIONS 8 (Jul. 10, 2000), available at <http://oregonstate.edu/dept/HFET/2000/papers/sullivan.pdf>.

<sup>161</sup> See *id.*

<sup>162</sup> See American Fisheries Act, Pub. L. No. 105-277, § 210(b), 112 Stat. 2681-621, 2681-629 (1998).

<sup>163</sup> See Fisheries of the Exclusive Economic Zone Off Alaska: Allocating Bering Sea and Aleutian Island King and Tanner Crab Fishery Resources, 70 Fed. Reg. 10,174, 10,174 (Mar. 2, 2005) (to be codified at 15 C.F.R. pt. 902 and 50 C.F.R. pts. 679, 680).

<sup>164</sup> *Id.*; Memorandum from Lisa L. Lindeman, Reg’l Council, Alaska Region, Nat’l Oceanic and Atmospheric Admin., to James W. Balsiger, Adm’r, Alaska Region, Nat’l Marine Fisheries Serv. (Dec. 3, 2004) (on file with author) [hereinafter Lindeman Memorandum].



gal.<sup>165</sup> Thus, their exclusion could not be justified as necessary to ensure that the program proposed by the council complied with relevant laws.<sup>166</sup> Unequal application of the law in the whiting and crab contexts was even more egregious.<sup>167</sup> Market segmentation in the form of crab IFQ and IPQ occurred by statute in the North Pacific crab rationalization.<sup>168</sup> Market segmentation in the Pacific Whiting Cooperative—issuance of IFQ to vertically integrated factory trawlers—was conditional on the formation of a non-FCMA cooperative and subject only to filing a Business Review letter with DOJ.<sup>169</sup>

The North Pacific Crab Association raised a related concern with the proposed rule's description of cooperatives:

The proposed regulation limits a holder of QS from joining more than one crab-harvesting cooperative. ([§] 680.21(b)(4) and (5)). Instead the holder of QS must either join only one cooperative or not participate at all in cooperative operation. We believe this is inconsistent with Council intent and will greatly hinder the ability to achieve the maximum operational efficiencies available to harvesting cooperatives. All of the vessels receiving QS will receive differing amounts of species and regional designations. The limitation to only a single cooperative will require a high number of intercooperative transfers to match up species and regional designations with appropriate locations of PQS holders. This will significantly add to the burden of managing these transfers.<sup>170</sup>

The Alaska Crab Coalition offered a similar comment:

There is no evidence of intent on the part of the Council that a QS holder be prohibited from simultaneous membership in more than one cooperative. Restricting flexibility to transfers among coops would not be as efficient as also allowing QS holders to join more than one coop . . . .

. . . The final regulations should allow QS holders to be members, simultaneously, of different coops in different fisheries or in the same fisheries, and of different kinds of coops

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<sup>165</sup> Lindeman Memorandum, *supra* note 164.

<sup>166</sup> *Id.*

<sup>167</sup> See Dec. 12 Bedford Letter, *supra* note 126.

<sup>168</sup> *Id.*

<sup>169</sup> See SULLIVAN, *supra* note 160, at 5.

<sup>170</sup> Dec. 13 Iani Letter, *supra* note 151.

(FCMA and non-FCMA), in order to maximize economic efficiency and achieve other benefits.<sup>171</sup>

Prohibiting non-FCMA cooperative formation would have undermined the North Pacific Council's explicit intent to benefit harvesters, processors and fishery-dependent communities.<sup>172</sup> Any holder of IPQ or any harvester affiliated with an IPQ holder would be prohibited from participating in operational cooperatives, thereby denying roughly half of the BSAI crab industry the safety and operational efficiencies that voluntary non-FCMA cooperatives provide.<sup>173</sup>

## 2. Affiliation

Affiliation with a processor became the source of enormous confusion, in part because the North Pacific Council motion used a context-specific definition.<sup>174</sup> Affiliation with a processor was defined according to a ten percent ownership standard in the context of QS leasing,<sup>175</sup> ownership caps,<sup>176</sup> and price bargaining and binding arbitration.<sup>177</sup>

However, the motion applied a different, less determinate standard to define "processor affiliation" in the context of who is to be denied the more valuable B-shares:

Independent (non-affiliated) harvesters will receive class B IFQ pro rata, such that the full class B QS percentage is allocated to them in the aggregate. "Affiliation" will be determined based on an annual affidavit submitted by each QS holder. *A person will be considered affiliated, if an IPQ processor controls delivery of a QS holder's IFQ.*<sup>178</sup>

The council adopted a control-of-delivery standard, not ten percent ownership, in this context presumably because the purpose of B-shares was to provide harvesters ex-vessel price leverage through the ability to move fish to a higher price offer.<sup>179</sup>

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<sup>171</sup> Dec. 9 Thomson Letter, *supra* note 151, at 4.

<sup>172</sup> Dec. 12 Bedford Letter, *supra* note 126.

<sup>173</sup> Dec. 9 Thomson Letter, *supra* note 151, at 2.

<sup>174</sup> Dec. 13 CBSFA Letter, *supra* note 151.

<sup>175</sup> Council Motion, *supra* note 25, at 5.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 11.

<sup>178</sup> *Id.* at 5 (emphasis added).

<sup>179</sup> See Madsen Letter, *supra* note 25, at 12.

NMFS's proposed rule, however, provided a single, ten percent ownership definition of processor affiliation, rather than following the council's context-specific intent:

Affiliation means a relationship between two or more entities in which one directly or indirectly owns or controls a 10-percent or greater interest in, or otherwise controls another, or a third entity directly or indirectly owns or controls a 10-percent or greater interest in, or otherwise controls both.<sup>180</sup>

Thus, the proposed rule failed to ensure broad distribution of rationalization benefits.<sup>181</sup>

Applying the ten percent ownership standard across the board would have several unintended, adverse effects.<sup>182</sup> First, it would deny crew on processor-affiliated vessels a share of the greatest possible B-share price, or alternatively it would cause vertically owned vessels to become less competitive.<sup>183</sup> Vertically owned vessels would be obliged to offer higher crew shares in order to mitigate lost crew payments.<sup>184</sup> Second, processor-affiliated vessels would have every incentive to maximize rents by releasing control of B-share deliveries to the skipper, and the skipper would have the incentive to seek the highest possible B-share price.<sup>185</sup> Only one other instance of "affiliation" can be found in the motion.<sup>186</sup> A ten percent ownership standard (with a harvester) was used to clarify the rules on cooperative formation.<sup>187</sup>

Each of the three industry associations had similar comments on this point. The Alaska Crab Coalition, for example, highlighted how the proposed rule's ten percent affiliation standard needed to change to conform to the motion's intent:

The Proposed Rule should allow for affiliated QS holders to participate in non-FCMA "operational cooperatives" for purposes of economic efficiency, but affiliated QS holders should

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<sup>180</sup> Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. 63,199, 63,261 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680) (emphasis omitted).

<sup>181</sup> Dec. 12 Bedford Letter, *supra* note 126, at 3.

<sup>182</sup> *Id.* at 4.

<sup>183</sup> *See id.*

<sup>184</sup> *See id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Council Motion*, *supra* note 25, at 5.

<sup>187</sup> *Id.* at 26.

be prohibited from participation in price formation negotiations.<sup>188</sup>

This association of harvesters also noted:

An affidavit requirement [should be] set forth in the Proposed Rule as a criterion for the issuance of B shares, as specified in the Council motion (at 1.6.4) and is an important element of accountability and enforceability of the system devised by the Council, and should be preserved.<sup>189</sup>

Communities echoed the comments by the Alaska Crab Coalition. CDQ communities, in particular, saw the narrow affiliation interpretation as an explicit denial of program benefits intended for CDQ groups.<sup>190</sup>

### 3. Binding Arbitration

Fleetwide arbitration was considered and rejected by the North Pacific Council in favor of a “last best offer” system built on distinct, independent arbitrations.<sup>191</sup> Yet, NMFS’s proposed rule allowed a binding arbitration (BA) system that mirrors fleetwide arbitration, thereby violating council intent concerning the sharing of confidential data.<sup>192</sup> The motion unambiguously stated:

Subject to limitations of antitrust laws and the need for proprietary confidentiality, all parties to an arbitration shall have access only to information provided to the arbitrator(s) or panel for that arbitration directly by the parties to that arbitration.<sup>193</sup>

And the motion also stated:

Data collected in the data collection program may be used to verify the accuracy of data provided to the arbitrator(s) in an arbitration proceeding. . . . Any data verification will be un-

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<sup>188</sup> Dec. 9 Thomson Letter, *supra* note 151, at 2.

<sup>189</sup> *Id.* at 2–3.

<sup>190</sup> See *infra* Part II.C.4.

<sup>191</sup> See *Council Motion, supra* note 25 at 13–15.

<sup>192</sup> See Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. 63,199, 63,203 (proposed Oct. 29, 2004) (to be codified at 50 C.F.R. pts. 679, 680).

<sup>193</sup> *Council Motion, supra* note 25, at 12.

dertaken only if the confidentiality protections of the data collection program will not be compromised.<sup>194</sup>

Yet sharing of BA data was manifest in the proposed rule.<sup>195</sup> For example, the contract arbitrator was allowed to share information with parties other than those engaged in the BA, violating the North Pacific Council's unambiguous confidentiality requirements.<sup>196</sup> In fact, the proposed rule *required* the contract arbitrator to provide NMFS with:

[a] copy of any information, data, or documents given by the Contract Arbitrator to any person who is not a party to the particular arbitration for which that information was provided. The Contract Arbitrator must identify the arbitration to which those information, data, or documents apply, and the person to whom those information, data, or documents were provided.<sup>197</sup>

Furthermore, the proposed rule provided that the contract arbitrator "must receive and consider all data submitted by the parties," including data that are not germane to the bilateral dispute.<sup>198</sup> This requirement provided compelling economic incentive for harvesters to structure a fleet-wide system of mandatory binding arbitration in order to capture cost of production data from all processors.<sup>199</sup> The North Pacific Crab Association commented, "Although an FCMA cooperative is allowed under the antitrust laws to negotiate prices collectively, the FCMA does not condone all activity that might otherwise be in violation of the antitrust statutes."<sup>200</sup> Fleetwide arbitration posed serious antitrust and anti-competitiveness risks and clearly violated the North Pacific Council's intent that binding arbitration was the last resort "to resolve failed price negotiations."<sup>201</sup>

In sum, the proposed rule allowed and promoted: (1) fleetwide BA that was rejected by the Council; (2) sharing of proprietary and

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<sup>194</sup> *Id.*

<sup>195</sup> See Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. at 63,285.

<sup>196</sup> *Id.* at 63,203.

<sup>197</sup> *Id.* at 63,285.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

<sup>200</sup> Dec. 13 Iani Letter, *supra* note 151, at 8.

<sup>201</sup> Council Motion, *supra* note 25, at 11; see Letter from R. Hewitt Pate, Assistant Attorney Gen., U.S. Dep't of Justice, to James R. Walpole, Gen. Counsel, Nat'l Oceanic and Atmospheric Admin. (Aug. 27, 2003) (on file with author) [hereinafter Aug. 27 Pate Letter].

confidential data that posed serious antitrust and anti-competitiveness risks; and (3) dispute resolution between two parties based on information regarding disputes between other parties.<sup>202</sup>

#### 4. Community Protection

The North Pacific Council motion gave CDQ communities explicit protections in the form of both CDQs<sup>203</sup> and the right of first refusal.<sup>204</sup> The first encouraged investment in the harvesting sector,<sup>205</sup> and the second encouraged retention of community-based processing.<sup>206</sup> However, the narrow, ten percent ownership standard of “affiliation” in the proposed rule deprived the dual community protection benefits intended by the North Pacific Council.<sup>207</sup> As the Central Bering Sea Fishermen’s Association commented:

It was the Councils [sic] intent to allow CDQ groups the ability to purchase both harvest[ing] assets and—as a [form] of community protection—to enter into Rights of First Refusal (ROFRs) for processor quota that originated in our communities.<sup>208</sup>

Thus, the proposed rule created a Gordian knot: if any CDQ community were to exercise the right of first refusal, it could do so only by devaluing its CDQ crab harvesting quota; exercising its ROFR would render the CDQ group affiliated, requiring it to give up the more valuable B-shares, in exchange for A-shares.<sup>209</sup>

### III. NMFS FAILURE TO RESPECT MSA’S DEVOLUTION POLICY

Complex policies, like the North Pacific Fishery Management Council’s (North Pacific Council) crab rationalization motion, often

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<sup>202</sup> See Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 69 Fed. Reg. at 63,199, 63,203, 63,285.

<sup>203</sup> Council Motion, *supra* note 25, at 18.

<sup>204</sup> *Id.* at 16.

<sup>205</sup> See *id.* at 18.

<sup>206</sup> See *id.* at 16.

<sup>207</sup> See *supra* Part II.C.2.

<sup>208</sup> Letter from Steve Minor, Cent. Bering Sea Fishermen’s Ass’n, to Sue Salvesson, Assistant Reg’l Adm’r, Alaska Region, Nat’l Marine Fisheries Serv. (Dec. 13, 2004) (on file with author).

<sup>209</sup> Cf. Dec. 12 Bedford Letter, *supra* note 126 (making substantially the same observation as is made in the text).

create unintentional ambiguity. This ambiguity leaves the regulatory agency with the job of ferreting out policy intent and drafting regulations to advance intent, while conforming to federal laws. Some minor inconsistencies will naturally arise due to these ambiguities. The role of public debate is to help formulate policy intent and policy detail; public comment on the proposed rule—among other things—helps assure congruence between policy intent and regulations.

In one sense, the process appears to work. Following public comment and the uncharacteristically detailed North Pacific Council review, National Marine Fisheries Service's (NMFS) final rule<sup>210</sup> embraced all but one of the major concerns raised above, along with countless lesser concerns. Yet, in another sense, the fact that the proposed rule deviated so fundamentally from the North Pacific Council's motion, despite Congress's unambiguous direction to implement the motion, raises a serious question about administrative process. The review conducted by the North Pacific Council, the State of Alaska, and members of industry was unprecedented. It was done because the proposed rule deviated in fundamental ways from specific council policy intent.

It would appear that National Oceanic and Atmospheric Administration (NOAA) and Department of Justice (DOJ) attorneys overstepped their limited policy implementation responsibilities and inserted themselves as policymakers. Nothing in the North Pacific Council's motion could be construed as limiting cooperatives to only Fishermen's Collective Marketing Act (FCMA) cooperatives. Nothing in the motion could be construed as limiting B-shares only to those vessels having no more than ten percent ownership affiliation with a processor.<sup>211</sup> Nothing in the motion could be construed as requiring mandatory, fleetwide binding arbitration or as providing anything less than strict confidentiality of cost data. Nothing in the motion could be construed as depriving community development quota (CDQ) groups the dual community protection benefits of quota ownership, including B-

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<sup>210</sup> Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Island King and Tanner Crab Fishery Resources, 70 Fed. Reg. 10,174, 10,174 (Mar. 2, 2005) (to be codified at 15 C.F.R. pt. 902 and 50 C.F.R. pts. 679, 680).

<sup>211</sup> Interestingly, the North Pacific Council was silent on this issue during its review and comments to NMFS. Madsen Letter, *supra* note 25 (lacking any mention of this issue). The Final Rule ultimately denied B-shares to owners of vessels in excess of the ten percent vertical integration standard. Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Island King and Tanner Crab Fishery Resources, 70 Fed. Reg. at 10,175. Ambiguity of motion language, or at least the existence of a context-specific ownership standard, appears to lie at the heart of the decision. *See id.* at 10,182–83.

shares, and the ability to retain community-based processing. And nothing in the motion was determined by NOAA General Counsel to be in violation of federal law.

Yet, each of the four major instances in which the proposed rule deviated from the motion potentially undermined the North Pacific Council's win-win-win policy intent. This potential effect should have been obvious to NMFS. In particular, the deviations undermined the North Pacific Council's intent of broadening the distribution of rationalization benefits through the use of transferable processing quota where the North Pacific Council had found no other vehicle to accomplish this distributional goal. The proposed rule denied rationalization benefits to processing quota holders and processor affiliates. Without the ability to protect and benefit all stakeholders, rationalization could not proceed.

In a pointed letter to NOAA Administrator Conrad Lautenbacher sent the day the public comment period closed, Senator Ted Stevens expressly concluded that NMFS overstepped its straightforward policy implementation responsibility by failing to implement the Council's motion:

It has been brought to my attention that the proposed regulations published by NMFS deviates substantially from the program crafted by the North Pacific [Fishery Management] Council . . . . I specifically referenced the North Pacific Council's program in the law and directed NMFS to implement "all parts of the Program." It was the North Pacific Council that had the expertise to develop such a comprehensive rationalization program and the regulations should closely reflect their intent and purpose.<sup>212</sup>

It is not surprising that NOAA General Counsel or DOJ raised concerns over the innovative use of processing quota<sup>213</sup>—Congress had singled out antitrust concerns when it stated that "[n]othing in this Act shall constitute a waiver, either express or implied, of the antitrust laws of the United States."<sup>214</sup> A zero-risk approach, however, was not necessary to comply with this admonition, and is an extraordinary application of antitrust law.<sup>215</sup>

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<sup>212</sup> Letter from Stevens, *supra* note 26.

<sup>213</sup> Aug. 27 Pate Letter, *supra* note 201, at 7–8.

<sup>214</sup> 16 U.S.C. § 1862(j)(6) (2000).

<sup>215</sup> It was not necessary for the DOJ's Antitrust Division to "urge [the National Oceanic and Atmospheric Administration] to request that the Council develop a rationalization



Ignoring or changing policy intent outside of the council process, however, raises the obvious question: who has authority to make federal fishery policy? The MSA and its legislative history make it clear that Congress has not intended—except in extraordinary circumstances—for NMFS to change unilaterally the management tacks set by the regional management councils.<sup>216</sup> This is especially true, as in the Bering Sea and Aleutian Islands (BSAI) crab rationalization case, when Congress and the President explicitly direct NMFS to implement particular, council-developed policies. Moreover, policy revision by NMFS after council deliberation undermines the public participation components of the regional council process and the Administrative Procedure Act, exposing NMFS and the Secretary of Commerce to a risk of litigation.<sup>217</sup>

The complexity of the real life of federal administrative agencies makes it difficult to determine why NMFS has not respected the MSA's devolution philosophy. We wonder, however, whether the regional councils are so unique that NMFS is unwilling to accept the concept of policy formulation occurring outside of Washington, D.C. Regardless, it seems that the agency is having a hard time adjusting to its limited role.<sup>218</sup> Representative Gerry Studds, primary sponsor of the original MSA in 1976, articulated this suspicion during Congress's first round of oversight hearings on the new regional councils:

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plan that does not include IPQs or arbitration" in order to reasonably avoid antitrust risk. Aug. 27 Pate Letter, *supra* note 201. IPQs are fully transferable and consolidation is limited by use caps. Fisheries of the Exclusive Economic Zone Off Alaska; Allocating Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources, 70 Fed. Reg. at 10,175. Precedent exists for binding arbitration, for example, in major league sports and labor union wage negotiations. Nor was it appropriate for NMFS to craft the proposed rule only in the context of FCMA cooperatives, which undercut operational efficiencies envisioned by the North Pacific Council through the formation of voluntary, non-FCMA cooperatives. Aug. 5 Benton Letter, *supra* note 136. It also undercut the practical viability of IPQs. *Id.* Nine days prior to the end of the public comment period, NMFS General Counsel deemed non-FCMA cooperatives legal, posing no significant antitrust risk. See Lindeman Memorandum, *supra* note 164.

<sup>216</sup> See *supra* Part II.

<sup>217</sup> See *Associated Fisheries of Me. v. Evans*, 350 F. Supp. 2d 247, 253–54 (D. Me. 2004) (“Significant changes to a rule after the comment period can deprive the public of meaningful participation in the rulemaking process.”).

<sup>218</sup> It is a principle of administrative law that federal agencies make policy. See, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (“[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”) (internal quotations omitted); *Mistretta v. United States*, 488 U.S. 361, 378 (1989) (recognizing that delegation of rulemaking power to federal agencies may carry with it “the need to exercise judgment on matters of policy”).

[I]t seems to me the inevitable is happening, given the institutional makeup of this city, this Government, which is to say, "Well, nobody's looking, let's just creep out there and get a hold of this one and that one and bring them all back in here and make it fit." And we are going to end up . . . with a nice convenient, conventional pattern of people working for the Department of Commerce, or whatever its name is, at any given time.

That is not what we intended in the Congress. And I think that from time to time it has been necessary for the councils particularly, and some members of this committee, to point out to the National Marine Fisheries Services . . . that in our judgment you have strayed from time to time or somehow lost sight of the overriding intention of this committee and of the Congress . . . to do something new under the Sun. We did not intend to establish yet another set of traditional bureaucratic procedures.

. . . [T]here is an innate, given the nature of the beast of this Government in Washington . . . almost unconscious, irresistible urge to reach out and pull back in and regularize . . . and to make these creatures recognizable and conventional and just nice, the way everything is supposed to fit in little boxes around here. They do not. The act was not written that way . . . .<sup>219</sup>

Even if, as is likely, the problem is not so straightforward, legislative adjustments that seek to focus NMFS's attention on the councils' policy intentions could go a long way toward alleviating longstanding legal tension in the council-NMFS relationship.

#### RECOMMENDATION AND CONCLUSION

This tension, between policy formulation and policy implementation, challenges the very core of the MSA: devolution of policymaking to regional fishery management councils. That core MSA principle might be better served if all proposed rules were required to begin with a general statement of council intent underlying the motions. Then, an explanation of how each element of the proposed rule implements the

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<sup>219</sup> *Fishery Conservation and Management Act: Hearings Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. On Merchant Marine and Fisheries, 96th Cong. 448-51 (1979) (statement of Rep. Gerry Studs).*

element-specific council intent should occur in the proposed rule preamble. Such a requirement would also serve to lessen the government's exposure to potential litigation.

Currently, the MSA does not require NMFS to publish a comparison of proposed rules and associated policies—it only requires explanations of any differences between the proposed and final regulations that it publishes.<sup>220</sup> Even though an explanation of policy changes would only appear in the preamble, this simple addition might remind NMFS that Congress has not empowered it to change council policies and help the councils and public participants identify unauthorized revisions. But the recommendation is a double-edged sword—councils should also be required to clearly articulate both broad policy intent and element-specific intent.<sup>221</sup>

Ambiguity is never likely to disappear from complicated policies, such as crab rationalization. But there should be little reason for such conflict between policy formulation and policy implementation.

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<sup>220</sup> 16 U.S.C. § 1854(b)(3) (2000).

<sup>221</sup> This requirement should be added to the Councils' existing obligation to keep detailed records of their proceedings. *See* 16 U.S.C. § 1852(i)(2)(E) ("Detailed minutes of each meeting of the Council, except for any closed session, shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all statements filed.").