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THE FEDERAL REGIONAL FISHERY MANAGEMENT COUNCILS: A NEGOTIATED RULEMAKING APPROACH TO FISHERIES MANAGEMENT

*Shepherd R. Grimes**

I. INTRODUCTION

The administrative structure of federal fisheries management in the United States has evolved to directly represent the interests of user groups that now exert tremendous influence over the management process. Frequently, the involvement of such groups has prevented the effective regulation of federal fisheries. As with many areas of regulatory control, the federal regulating entity for marine fisheries has always had to deal with at least two competing user groups whose interests are more often than not at odds. Like other regulatory entities, the federal administrative process has gone to considerable lengths to involve user groups in the decisionmaking process. However, such involvement has resulted in management that has not been resource minded, for example, management that is best for the continued health of the resource, or management that this article will equate with being in the public interest. Given the difficulty involved with managing vast fishery resources, success in achieving what is best for the resource would be more readily accomplished without user groups exerting excessive control over the decisionmaking process.

This Comment discusses the potential for change in the administrative rulemaking process for federal fisheries management, particularly the regional council approach. After a brief background discussion to highlight concern over the council structure, it begins with a general discussion of negotiated rulemaking and its role in administrative government, including some popular criticisms of the concept. Next, this Comment briefly outlines the authority delegated to the Regional Fishery Management Councils [hereinafter Councils] and the structure established by federal law, detailing the required representation of regulated interests as

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voting members of the Councils in attempt to demonstrate their similarity to negotiated rule-making committees. It then turns to a more pragmatic discussion of how the evaluation and criticism of negotiated rulemaking applies to the Councils. This Comment concludes with an evaluation of how such criticisms might lead to improvements in the enabling legislation and consequently the rulemaking process for federal fisheries management. Specifically, how restructuring the Councils to preclude voting membership for user group representatives would provide more effective "resource minded" management.

II. BACKGROUND

Beginning in the 1950s in the Atlantic and the 1960s in the Pacific, foreign fishing pressure began to increase rapidly as other countries began to exploit the largely untapped fishery resources off U.S. coastlines.¹ As a result, Congress passed the Fishery Conservation and Management Act² (Act) in 1976 to establish federal fisheries management of all fishery resources located beyond state jurisdiction,³ but within the U.S. exclusive economic zone extending 200 miles from all U.S. coastlines. The Act has been said to reflect considerable interplay between disparate interests and was eventually passed as an instrument arrived at by compromise between groups.⁴ Since its passage there has been considerable doubt regarding the effectiveness of the regulatory scheme it created, or at least regarding the quality of regulation spawned by the legislation. Its most recent reauthorization, the 1996 Sustainable Fisheries Act⁵ (SFA), included numerous substantive amendments that many hailed as a victory for conservation and ecosystem preservation.⁶ The new provisions added by the SFA covered both policy and scientific considerations, including a new requirement to ensure that membership on regional councils is fair and balanced.⁷

1. See generally DANIEL A. WALDECK & EUGENE H. BUCK, CONGRESSIONAL RESEARCH SERVICE DRAFT REPORT, THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT: REAUTHORIZATION ISSUES FOR THE 106TH CONGRESS 4 (May 31, 1999).

2. See 16 U.S.C. §§ 1801-1883 (1976 & Supp. IV 1998). Now known as the Magnuson Stevens Fishery Conservation and Management Act, referred to hereinafter as the MSFCMA or the Act.

3. See *id.*

4. See Shi-Ling Hsu & James E. Wilen, *Ecosystem Management and the 1996 Sustainable Fisheries Act*, 24 *ECOLOGY L.Q.* 799, 800 (1997).

5. See Pub. L. No. 104-297, 110 Stat. 3559 (1996).

6. See Hsu & Wilen, *supra* note 4, at 799.

7. See WALDECK & BUCK, *supra* note 1, at 6. Other new provisions provided for requirements to: 1) conserve fish stocks and restore overfished populations; 2) impose a moratorium on the creation of new individual fishing quota programs; 3) increase emphasis on social

As reauthorization again looms on the horizon, the Congressional Research Service queried a number of groups historically involved with fisheries management issues in an attempt to determine what potential issues concerned them regarding the impending reauthorization.⁸ Those contacted included commercial harvesters, recreational fishermen, fishery managers, fishery scientists, fish processors, fishery unions, and environmental organizations.⁹ In response to the inquiry, contacted individuals indicated they wanted the Act to ensure that regional council decisions are fair and balanced.¹⁰ The changes made in the 1996 amendments and issues currently concerning interested groups, at least in recent years, reflect a continuing concern over the regional councils. Specifically of concern is how to ensure that their decisions are fair and balanced, or similarly that their membership is fair and balanced.

III. NEGOTIATED RULEMAKING

Recommendations prepared for the Administrative Conference of the United States¹¹ (ACUS) regarding procedures for negotiating proposed regulations are cited as providing the first real description of a negotiated rulemaking process.¹² In more recent years it has been said that negotiated

benefits that might better preserve traditional small fishermen; and 4) strengthen provisions to minimize bycatch and restore and protect habitat. *See id.* The prohibition on the use of individual transferable quota systems until the year 2000 was unfortunate. These quotas, while a politically controversial management tool, are thought by many to provide a solution to many of the nation's fishery management ills. However, since Congress chose to prevent further use of such quotas as a management technique and failed to institute other changes that might help remedy the situation, federal management has continued to do a less than ideal job of protecting the nation's fishery resources.

8. *See id.* at i.

9. *See id.*

10. *See id.* Additionally, those queried wanted to see the Act address: 1) whether to rescind the present moratorium on individual quota management programs; 2) how to implement and finance fishing capacity reduction programs; 3) whether to require or designate marine protected areas; 4) whether to further specify approaches to address bycatch and bycatch mortality; and 5) whether to authorize user fees and other charges which could be used for conservation, management, and enforcement. *See id.*

11. The Administrative Conference of the United States was an independent advisory committee created in 1968 to study U.S. administrative processes and recommend improvements to Congress and federal agencies. From 1968 to 1995, when its funding was terminated, the ACUS issued approximately 200 recommendations, most of which have been at least partially implemented. Prior to its termination in 1995, ACUS's recommendations were published periodically in the Code of Federal Regulations.

12. *See* 1 C.F.R. § 305.83-4 (1993); *See also* William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 55 (1987) (suggesting that aside from any benefits claimed by regulatory

rulemaking "appears by most accounts to have come of age[,]""¹³ having been officially endorsed by Congress via the Negotiated Rulemaking Act of 1990¹⁴ (NRA). In formally accepting this approach, the NRA established a framework for negotiated rulemaking conducted by federal agencies. This framework, which is similar to that originally described for the ACUS, gives agencies the option of supplementing the notice and comment procedures required for informal rulemaking,¹⁵ with the use of a negotiated rulemaking committee. The committee may be formed when the agency head, with the assistance of a convener¹⁶ if desired, determines that the use of the committee is in the public interest.¹⁷ The committee constitutes the heart of the negotiation process and is to consist of no more than twenty-five members.¹⁸ The members are to represent interests that are likely to be significantly affected by the proposed rule,¹⁹ and at least one person representing the agency.²⁰ Such committees, with the administrative support of agency staff,²¹ are to consider the matter proposed by the agency in an attempt to reach consensus²² concerning the proposed rule.²³ A

negotiation, it substitutes bargaining between private interests for a reasoned search for the public interest); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1381 (1997) (stating that negotiated rulemaking and the incentives behind it undermine the principles underlying traditional administrative law by elevating the importance of consensus among the parties above the law, facts, and any notion of the public interest); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 42-112 (1982) (suggesting a detailed negotiated rulemaking process). Harter's work was originally available as a draft report for the Administrative Conference of the United States (ACUS).

13. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (arguing that negotiated rulemaking has not resulted in reducing the time required for or the amount of litigation arising from traditional notice and comment rulemaking).

14. See 5 U.S.C. §§ 561-570 (1990).

15. See 5 U.S.C. § 553 (1998).

16. A convener is defined by 5 U.S.C. § 562(3) (1998) as, "a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking[.]" *Id.*

17. See 5 U.S.C. § 563(a). This section identifies a number of criterion that the agency head is to consider in making the determination that the procedure would be in the public interest, but overall the decision is committed to the discretion of the agency head. See *id.*

18. See 5 U.S.C. § 565(b). This section does allow the agency head to exceed the 25 member limit where she determines "that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership." *Id.*

19. See *id.* § 564(b).

20. See *id.* § 565(b).

21. See *id.* § 565(c).

22. See *id.* § 562(2). Consensus is defined as "unanimous concurrence among the interests represented" on the committee unless the committee agrees that it shall mean "a

committee that reaches a consensus on a proposed rule is required to transmit a report containing the proposed rule to the head of the agency that established the committee. A committee that does not reach consensus may, but is not required to, transmit a similar report to the agency head indicating any areas where the committee did reach consensus.²⁴ Although agencies are encouraged to engage in negotiated rulemaking via this process,²⁵ there is nothing in the statute indicating that agencies are bound to accept the consensus of the committee. The underlying hope, at least as indicated by Congress, is that the process will "increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court . . . [and] also [potentially shorten] the amount of time needed to issue final rules."²⁶

Professor William Funk has provided one of the most insightful critiques of the negotiated rulemaking process, concluding that the theory and principles underlying regulatory negotiation were inconsistent with the theory and principles underlying the Administrative Procedures Act²⁷ (APA), and resulted in the subversion of the public interest.²⁸ Specifically, he contends that implicit in the APA is the notion of the rule of law, where agencies are to carry out the specific or general statutory directions provided by the legislature which serve to legitimize and justify the very existence of the agency.²⁹ To the contrary, parties to negotiation are not serving the law where the outcome is legitimized by the service to the law, rather the resulting regulation is legitimized by the agreement of the parties to the negotiation.³⁰ As a result, he claims that "law becomes nothing more

general but not unanimous concurrence; or agrees upon another specified definition[.]" *Id.*

23. *See id.* § 566(a).

24. *See id.* § 566(f). A "committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date or the agency, after consulting with the committee, or the committee itself specifies an earlier termination date." *See id.* § 567.

25. *See id.* § 569(a).

26. *See id.* § 561 (Congressional Findings (5)), Pub. L. No. 101-648, § 2.

27. *See* 5 U.S.C. §§ 551-559, 701-706 (1998).

28. *See* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L. J. 1351, 1374-1375 (1997).

29. *See id.* at 1374.

30. *See id.* at 1375. As Funk noted, supporters of negotiated rulemaking would not likely encourage or even support negotiations that bargained for outcomes beyond the scope of statutory authority, but theory and practice confirms a subtle dynamic in the process "that diminishes the sanctity of the law as both the source of agency law and its limit." This concern would seem particularly applicable where legislation is more general and issues are more complex, often involving tradeoffs among factors listed by congress for the agency to consider in promulgating regulations. Statutes such as the MSFCMA would fit this

than the expression of private interests mediated through some governmental body [where public choice theory becomes the norm]."³¹

Secondly, Funk discusses the agency's role as a responsible actor rather than a mediator as a central aspect of the APA.³² Under the APA, the agency is the authority empowered to implement the statutory scheme and the entity ultimately responsible for it. The Second Circuit has stated that the agency's "role does not permit it to act as an umpire blindly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection."³³ However, in negotiated rulemaking the agency is reduced to a mere participant where it is denied responsibility beyond effectuating the consensus among group members.³⁴ Furthermore, such agency involvement is not a result of its being viewed as responsible for the rulemaking, but because "the agency is indisputably a party in interest and . . . would be eligible for participation in negotiations."³⁵ In effect, this means that the agency "should bargain and trade its interests (the public interest) in the same way that the other participants may trade their interests."³⁶ Thus, rather than being involved in negotiations to ensure that the public interest is paramount and that all other participants appreciate this role for the agency, in actuality, it is no different from any other participant and can exert no more influence over the eventual outcome.

Funk also points out that negotiated rulemaking conflicts with the APA's requirement,³⁷ and the Supreme Court's interpretation of the requirement,³⁸ that agencies engage in reasoned decisionmaking.³⁹ In

description. *See id.*

31. *Id.*

32. *See Funk, supra* note 29, at 1376; *see also* 5 U.S.C. §551(1) (A)-(D) (1998) (defining agency in part as the "authority of the Government").

33. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965).

34. *See Funk, supra* note 28, at 1376. Although this is not entirely correct where agencies are not bound to accept the consensus (majority agreement in the case of the MSFCMA) one could argue the reality is that agencies more often than not accept these determinations. However, Funk was largely addressing Harter's argument that courts reviewing regulations should defer to the parties' agreement. *See also Harter, supra* note 12, at 102-104.

35. Harter, *supra* note 12, at 57.

36. *See Funk, supra* note 28, at 1377.

37. *See* 5 U.S.C. §§ 556, 557 (requiring rules to be supported by reliable, probative, and substantial evidence and for there to be findings of fact, conclusions of law, and statements of reasons therefore).

38. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (the arbitrary and capricious standard of review for agency decisions requires that courts look at whether the agency's decision was based on the relevant factors and whether there was a

regulatory negotiation, this plays a much less important role because “the facts don’t matter as long as everyone is happy.”⁴⁰ Under this theory, an agency need not support its decision with any findings or reasoned analysis, in fact the agency need not even show that a problem existed, much less the feasibility of the proposed solution.⁴¹

Finally, what appears to be at the heart of his argument and underlying all of his other criticisms is that negotiated rulemaking prevents the agency from searching for what is truly in the public interest.⁴² Underlying the APA and all other statutes delegating to agencies the authority to promulgate regulations is the notion that the agency will act in the best interest of the public as a whole, that is, the public interest. As he points out, the public interest may not always be clearly defined, if at all defined by the authorizing legislation. Regardless of whether it is precisely defined by the statute or left largely to agency discretion, Congress presumes that the agency will exercise its discretion and judgment to further the public interest.⁴³ However, under a negotiated paradigm the goal is to achieve consensus among substantially affected parties who are likely to challenge the regulation, not promote any notion of the public interest. While it is true that other forms of modern rulemaking, such as notice and comment under the APA⁴⁴ and the National Environmental Policy Act’s notice and comment procedure for environmental impact statements,⁴⁵ encourage enhanced participation by affected interests, they do not “[substitute the participation requirements] for the agency’s responsibility to engage in reasoned decisionmaking in search of the public interest.”⁴⁶

clear error of judgment— reasoned decision).

39. See Funk, *supra* note 28, at 1379–1380.

40. *Id.* at 1381. Also, recall that the underlying theory is that the legitimacy of such regulations is derived from the consensus among the parties and not its conformity with the rule of law.

41. Realistically, this would appear to be of little concern in most areas, especially in fisheries management. The likelihood of all interests reaching consensus on a proposed regulation of any consequence with so little factual or analytical support is about as close to zero as one could possibly imagine.

42. See Funk, *supra* note 29, at 1382–1387. He defines the public interest as that which is in “the best interests of the nation, the people, the body politic.” *Id.* at 1383.

43. See generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992) (describing civic republicanism as the view that government decisions should be the “product of deliberation that respects and reflects the values of all members of society”).

44. See 5 U.S.C. § 553.

45. See 40 C.F.R. § 1503.1(a)(4) (1998).

46. Funk, *supra* note 29, at 1385.

Other commentators have examined negotiated rulemaking to see how well the process accomplishes its stated objectives of increasing the acceptability of rules, improving their substance, reducing likelihood that affected parties will resist rules or challenge them in court, and decreasing the amount of time required for promulgation. In particular, Professor Cary Coglianese performed "an empirical assessment of the impact of negotiated rulemaking on two of its principal goals: reducing overall rulemaking time and decreasing the number of judicial challenges to agency rules." He assembled and analyzed a dataset of "all negotiated rulemakings across all federal agencies"⁴⁷ in order to assess how well negotiated rulemaking had achieved these goals. He concluded, to the surprise of many, that the process did not appear to be more capable of limiting the time required to promulgate regulations nor did the process avoid subsequent litigation of rules more than the regular notice and comment procedures required by the APA.⁴⁸ In fact, his results indicated that the Environmental Protection Agency (EPA), which utilized the procedure the most, had not realized any decrease in the time required for promulgation compared to its notice and comment rules, and had actually seen a higher rate of litigation of negotiated rules than other significant rules promulgated via notice and comment alone.⁴⁹ In explanation of his findings, Professor Coglianese proposes that they may be due to the fact that for the negotiation process to be successful agencies must both secure and maintain consensus among parties involved which often proves very difficult.⁵⁰ Furthermore, the problem of consensus is additionally complicated by the multiple avenues of input and oversight in the regulatory process which increase the likelihood of changes in policy that alter the previous agreements or negotiations.⁵¹

IV. FEDERAL FISHERIES MANAGEMENT

Under the current regime for federal fisheries management, the Magnuson-Stevens Fishery Conservation and Management Act⁵² (MSF-CMA) establishes eight Regional Fishery Management Councils⁵³

47. See Coglianese, *supra* note 13, at 1273.

48. See *id.* at 1335.

49. See *id.* He notes that these results are particularly surprising given "that agencies have deliberately selected rules for formal negotiation in order to ensure the procedure's success." *Id.*

50. See *id.*

51. See *id.*

52. See 16 U.S.C. §§ 1801-1883 (1994).

53. See *id.* § 1852(a).

(Councils). The Councils are quite similar to negotiated rulemaking committees in terms of their membership, and their considerable responsibility in the rulemaking process. Although Council decisions are subject to the approval of the Secretary of Commerce⁵⁴ (Secretary), the MSFCMA delegates to each Council the authority to submit to the Secretary a fishery management plan for its region and any necessary amendments to such plan upon which federal regulations will be based.⁵⁵ In addition to outlining with some detail the required and discretionary contents of fishery management plans,⁵⁶ the MSFCMA authorizes the Councils to propose regulations it "deems necessary or appropriate for the purposes of implementing a fishery management plan or plan amendment . . . and making modifications to regulations implementing a fishery management plan or plan amendment[.]"⁵⁷ Although they are subject to the approval of the Secretary,⁵⁸ it is fair to say that fishery management plans, as developed by the Councils, represent the foundation upon which federal management is based. This system has resulted in the decentralization of the U.S. fisheries policy allowing great discretion to the regional councils.⁵⁹

More importantly for the purposes of this Comment, the MSFCMA specifies in some detail the required membership for voting Council members.⁶⁰ Although the number of voting members on each Council varies considerably,⁶¹ each must contain:

54. *See id.* § 1854(a).

55. *See id.* § 1852(h). Additionally this section grants Councils the authority to: prepare comments on any application for foreign fishing or plan amendment submitted to it; conduct public hearings, submit periodic reports to the secretary; review and revise assessments required in formulating the plans; and conduct other activities which are "necessary and appropriate" to carrying out a foregoing function. *See id.*

56. *See* 16 U.S.C. § 1853(a) (containing an extensive laundry list of required provisions for fishery management plans prepared by any Council); 1853(b) containing a somewhat shorter list of provisions that may be included pursuant to the Council's discretion).

57. 16 U.S.C. § 1853(c) (Supp. IV 1998).

58. *See* 16 U.S.C. § 1854(a) (1994 & Supp. IV 1998).

59. *See* Hsu & Wilen, *supra* note 4, at 802.

60. *See* 16 U.S.C. § 1852(b). Section 1852(c) specifies the non voting members of the Councils which include: the regional or area director of the United States Fish and Wildlife Service for the area concerned; the Commander of the Coast Guard district for the area concerned; the executive director of the Marine Fisheries Commission for the area concerned; and one representative from the Department of State designated by the Secretary of State, or any designee of one of the above (the Pacific Council has one additional non voting member appointed by the Governor of Alaska). *See id.* § 1852(c).

61. *See id.* § 1852(a). The sizes of the Councils vary from seven voting members on the Caribbean Council to 21 voting members on the Mid-Atlantic Council.

the principal state official with marine fishery management responsibility and expertise in each constituent state[,] . . . the regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee . . . [individuals appointed by the Secretary] who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned.⁶²

The state and federal administrative officials are clearly specified, their membership on the Councils does not require the Secretary's independent approval and in theory they represent more of an objective interest than those members appointed to the Councils by the Secretary.

Of particular interest to this Comment are those voting members appointed to the Council by the Secretary. The MSFCMA further specifies that,

[t]he Secretary shall appoint the [remaining] members of each Council from a list of individuals submitted by the Governor of each applicable constituent state. A Governor may not submit the names of individuals to the Secretary for appointment unless the Governor has determined that each such individual is qualified under the requirements [of the previous paragraph] and unless the Governor has to the extent practicable, first consulted with representatives of the commercial and recreational fishing interests of the state regarding those interests.⁶³

Also, "[t]he Secretary, in making appointments under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council."⁶⁴ Pursuant to this directive, the Secretary must file annual reports with Congress regarding "actions taken by the Secretary to ensure that such fair and balanced apportionment is achieved."⁶⁵ Thus, it is apparent that the MSFCMA goes to considerable lengths to ensure

62. *Id.* § 1852(b). Also, this subsection specifies that the Secretary "shall, by regulation, prescribe criteria for determining whether an individual satisfies the requirements of the subparagraph." *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

traditional fishing interests are well represented on the Councils. In effect, this places a great deal of influence on the regulatory process in the hands of those groups sought to be regulated under the MSFCMA, specifically recreational and commercial fishing interests.⁶⁶

V. ANALYSIS

The similarities between the processes established by the NRA, and the MSFCMA are obvious. Under both statutes, a body of individuals is given the primary responsibility for preparing proposed rules subject to the approval of an agency head who is at least to some extent subject to political oversight.⁶⁷ Both bodies, the committee under the NRA and the Council under the MSFCMA, are composed largely of representatives of regulated interests, with some representatives from the agency itself.⁶⁸ While there are also obvious differences between the processes established by the NRA and the MSFCMA, such as the fact that the NRA seeks consensus among interested parties where the MSFCMA does not do so *per se*,⁶⁹ both are based on bargaining between interested parties. Given that

66. While a reading of the statute indicates that the Secretary is not bound to appoint only representatives of fishing interests, section 1852(b) also includes those knowledgeable regarding conservation and management, as we will see in the case of the Gulf Council, that is often the way it turns out.

67. With the occasional exception of independent agencies which may utilize negotiated rulemaking, the agency head is typically appointed by the President of the United States, and thus is to some extent subject to the oversight of a politically accountable office. Also, the agency is subject to the oversight of Congress via the budgetary process. See generally Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997) (addressing legislative oversight as a means to limit agency discretion); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (addressing the role of legislative and executive oversight even with regard to independent commissions); Paul Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (stating that agencies' work is centrally managed by executive).

68. Although the regional councils are composed of proportionally fewer representatives of regulated interests than Harter likely intended for negotiated rulemaking committees, they are much like the framework created by the NRA. See 5 U.S.C. §§ 565(b), 566(b) (1998) (specifying that there is to be at least one representative of the agency on a committee, and that such representative(s) are to participate with the same rights and responsibilities as other committees). While the MSFCMA specifies that a greater number of agency representatives must be voting members on the Council, the members represent both state and federal regulatory interests, and the difference of one extra specified member seems inconsequential. See 16 U.S.C. § 1852(b).

69. Pursuant to 5 U.S.C. Section 1852(e)(1), Council actions are approved by majority vote of those present and voting, but depending on the Council and the numerical strength of affected interests, it may be possible for an interest to prevent Council approval of

the similarities lie at the core of the problem, many of the criticisms of negotiated rulemaking are equally applicable to the quasi-negotiated approach taken by the MSFCMA.

As this Comment will indicate, both processes result in regulations that promote regulated interests over any notion of the public interest. It is important to note once again that for the purposes of this Comment the term public interest shall be equated with that which promotes the long term health and stability of the resource, or "resource minded management." This definition conforms to the concept of the public interest as used by Funk, in that the long term health of fishery resources is certainly in the "best interest of the nation, the people, the body politic."⁷⁰

Due to differences between the Council system and the negotiated rulemaking structure established by the NRA, Funk's criticisms overstate some of the problems as they relate to allowing affected interests having voting representation on the regional councils. However, just because they are potentially less problematic does not mean that the issues are not still of concern. As a result of these differences, it would be useful to first lay out the current membership of a Council and use it to consider the potential applicability of Funk's criticisms of negotiated rulemaking. The Gulf of Mexico Fishery Management Council, for example, is composed of seventeen voting members, of which only six represent related interests of administrative government. Further diluting the interests of agencies is the fact that each of the six representatives actually represents the interests of a different agency, one from each member state's agency⁷¹ and one from the National Marine Fisheries Service. The remaining eleven members of the Gulf Council are those appointed by the Secretary pursuant to section 1852(b)(2), six of whom represent recreational fishing interests with the remaining five representing commercial fishing interests.⁷² Thus, recre

proposed rules. As previously noted, 5 U.S.C. § 562(2) allows a negotiated rule-making committee to define consensus as a simple majority, making them even more analogous to the regional councils.

70. See Funk, *supra* note 28, at 1283.

71. The state agencies represented on the Gulf of Mexico Council are the Florida Fish and Wildlife Conservation Commission, Alabama Department of Conservation and Natural Resources, Mississippi Department of Marine Resources, Louisiana Department of Wildlife and Fisheries, and Texas Parks and Wildlife Department. Although ideally each state agency should represent some notion of the public interest (pursuing resource use that protects resources for future generations) each represents more of a state public interest. More than likely, each state has a slightly different agenda given that each faces potentially different issues, for example a state with predominantly recreational interests would face different pressures and issues than a state with predominantly commercial interests.

72. See *How to Contact the Gulf of Mexico Fishery Management Council* (visited Nov. 5, 1999) <<http://www.gulfcouncil.org/contact.html>> (listing the names, addresses, etc., of

ational interests alone have a voting power equal to that of all the state and federal regulatory interests combined, and when added to commercial representation, user groups have almost a two to one voting advantage over those intended to protect the public interest.

The notion that the rule of law is subverted through the final outcome being mainly an expression of mediated private interests rather than a legitimate interpretation of the statutory direction has a valid basis in the Council system. The MSFCMA provides lengthy direction regarding what Councils are to include in their fishery management plans (on which regulations are based), but like many other statutes they are not in the form of specific instructions. For example, the MSFCMA requires that all plans "contain the conservation and management measures . . . which are necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long term health and stability of the fishery[.]"⁷³ While this section clearly requires a Council to prevent overfishing, protect and restore stocks, etc., it makes the final determination subject to what is reasonable and appropriate. This is the classic role for agencies where, as previously mentioned, agencies are thought to exercise such discretion in an attempt to further the public interest.⁷⁴ Thus, in determining exactly what is necessary and appropriate an agency would try to determine what outcome would best serve the aggregate interest of the public at large, there-by effectuating the rule of law intended in the statute. However, given that it is not just the agency that determines what is necessary and appropriate, but a combination of it and those interests represented by the Council as a whole, the final outcome is less likely to be an interpretation that reflects a consistent and public spirited notion of the rule of law. It is more likely to result in what best serves the aggregate interest of those special interests with voting membership on the Council. Consequently, the statutory direction is not defined in terms of the public interest, and the rule of law is subject to the changing interpretations of special interests represented on the Council.

Related to this notion is the concept of the public interest being subverted through agencies bargaining with, rather than searching for, the

Council members and the sector that they represent). Although it may be debatable whether the appointed individuals actually represent the interests they were appointed to represent, presumably the Secretary who appointed them and the Governor who recommended them felt that they would act as such. For purposes here it is necessary that this author assumes these members represent those interests they were appointed to represent.

73. 16 U.S.C. § 1853(a)(1) (1994 & Supp. IV 1998).

74. See generally Seidenfeld, *supra* note 43, at 1514.

public interest that the authorizing legislation arguably intends.⁷⁵ Given that affected interests have greater representation on the Council, the agency is forced to bargain with the public interest in order to achieve some meaningful regulation. Either the agency goes in with a notion of what should be done and bargains down to some acceptable level below what is truly in the public interest, or it comes in taking a position that is well above that which they have objectively ascertained to be in the public interest, and bargains down to some position approximating the public interest. Regardless, given that the agency's membership is a minority one in comparison to the combined strength of other represented interests, it has less bargaining power and will almost certainly have to give in to positions that favor special interests. As a result, the public interest will be bargained in a similar manner as any special interest represented on the Council.

The concern that the agency's duty to engage in reasoned decision-making is undermined by the regulatory negotiation process⁷⁶ is also valid within the Council system. Given the difficulty in accurately assessing the status of, and potential impacts to, vast fishery resources, there is little scientists can do to assure others that such findings are accurate. Represented interests may contest the findings reported by the agency representatives, supporting their own determinations with reported personal experiences. Consequently, such interests may endorse less restrictive alternatives. As a result of this complexity and uncertainty, it is difficult to determine whether a decision was reasoned beyond ensuring that all relevant considerations were raised (not necessarily sufficiently addressed) in the deliberations, and the court's review may be limited as such.

As all the previous criticisms help illustrate, the eventual outcome is that the Councils are prevented from searching for that which is truly in the public interest. Through special interest participation in the process, Councils may be forced to exercise their discretion to promote special interests. With the agency serving as a mediator of sorts among the voting interests and only as a minority voter, the outcome is more likely to represent a dominant interest or a coalition of represented interests than that of an overall public interest. As Judge Posner wrote of negotiated rule-making, "[i]t sounds like the abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the 'capture' theory of administrative regulation."⁷⁷

75. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-420 (1971).

76. See *Funk*, *supra* note 28; *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965); see also 5 U.S.C. §§ 551(1) (A)-(D) (1998).

77. *USA Group Loan Services, Inc. v. Riley*, 82 F.3d 708, 714 T.1 (7th Cir. 1996).

Coglianese's findings and hypotheses regarding the success of the negotiated rulemaking approach in achieving the stated objectives⁷⁸ appear equally applicable to the Regional Council system. Given the previously noted tendency of most fishermen to oppose any and all regulations aimed at limiting their activities, it would seem difficult to imagine their reaching anything resembling a consensus with agency staff, and even more difficult to imagine with members representing a truly adverse interest. Although the MSFCMA does not require Councils to reach a consensus to approve proposed rules, agency staff are not ordinarily strong enough in numbers to get proposals approved,⁷⁹ thus they must always get the support of at least some of the representatives of the affected interests. Even more relevant are the multiple opportunities for input and oversight after agreement, i.e., all Council actions are subject to review by the Secretary, which realistically equates to a high level of input from the agency as a whole.

VI. CONCLUSION

Substantially affected interests should have their voting membership on the Councils greatly reduced if not eliminated entirely, and in attempt to mitigate for lost representation, such interests should also have their non-voting membership increased. Fisheries management is a difficult process that should be based largely on science and technology determining what must be done to promote the long term health and viability of the nation's fishery resources. This would be more efficiently accomplished by experienced, technically competent and objective personnel that are more insulated from the desires of special interests who seek to exploit the resource. Admittedly, affected persons are useful in helping to make allocation decisions, and their participation as nonvoting members would still allow them to contribute to such decisions without providing them the opportunity to determine quotas and other decisions that are more science or technology based. The management process sometimes requires that difficult decisions be made, and in order to make the best decisions under

78. Coglianese suggested that the apparent failure of the negotiated rulemaking process to reduce both the time to promulgate rules and the number of legal challenges brought against agency proposals was due to difficulty in obtaining consensus and the numerous avenues for changing proposals after consensus is achieved. See Conglianese, *supra* note 13, at 1321-30.

79. It is certainly possible that a quorum could exist where all agency representatives were attending and enough other representatives were absent that the agency people could have sufficient numbers on their own to constitute a majority of those present. However, this is undoubtedly a highly unlikely scenario.

complicated and politically tense circumstances, decision makers need to be as objective as possible. Although some may argue that agencies are not as objective as they are given credit for being, it is difficult to imagine an agency being less objective than a group of regulated persons who represent only a portion of the population, many of whom make their living through the exploitation of a resource that they are entrusted with regulating. It seems to be a shirking of regulatory responsibility to allow regulated interests to have such significant input, if not effective control of the regulatory process.

While it is apparent that resource users should have some input into the regulatory process to ensure that it accounts for their well being and that regulations effectively regulate their activity, it should not be at such a high level. Special interests should still retain some representation on the Councils to champion their views, and may still avail themselves of the traditional informal means of special interest influence with which they have been so successful historically. In fisheries management, all regulations are subject to the approval of the Secretary of Commerce, who is appointed by the President, and is to some extent politically accountable⁸⁰ for agency actions. In fact, some might argue that the influence of presidential political oversight extends much further down the chain of command. Further, Congress, whose members are certainly politically accountable, has a great deal of influence over the agency via the budgetary process and more informal oversight. These multiple avenues of oversight help ensure some level of significant accountability that is sufficient to protect the legitimate interests of affected persons without forcing the agency to engage in bargaining with the best interests of the public in exchange for concessions from special interests with a strangle hold on the regulatory process.

Finally, if one assumes that Coglianese's findings are accurate and equally applicable to the regional councils, that is, that rules promulgated by the Councils do not save time or result in fewer challenges than they would if affected interests were not allowed voting membership, there would appear to be no benefit to utilizing the current structure. Given the realities of more modern issue networks⁸¹ and interest in fisheries manage

80. Politically accountable refers to accountability to the public at large, or at least the electorate, so that if decisions made by the individual are unpopular they must answer to the voters or in this case to another individual who must in turn answer to the voters. Further, most would agree that such appointed agency heads are politically accountable to a great extent due to the nature of their relationship with the President and Congress.

81. The term issue network refers to the concept that was originally described by Hugh Heclo. See Hugh Heclo, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM*, 87, 103-104 (Anthony King ed., 1978). Central to this notion

ment, it is more than likely that his findings hold just as true here. Not only does the inclusion of such members on the Council require more negotiation and inevitably slow the rulemaking process, it is doubtful that their representation actually reduces the number of regulations challenged in court. The days of the recreational/commercial dichotomy have changed and continue to change as more organized interests begin to form and realize their stake in the well being of the country's fishery resources.⁸² Why should only recreational and commercial users be allowed representation? Why are divers, swimmers, and preservationists or other environmentally oriented interests not represented *per se*? Given the diverse interests that can claim to be substantially affected by regulating marine fishery resources, it would be hard to imagine that there was not an interest group in the United States ready and willing to challenge a regulation promulgated by a Council. However, it would be very difficult to include all such interests. It is unlikely that trying to include all potentially affected interests on the Councils in an attempt to reduce the number of challenges from excluded interests would succeed. While such an effort might result in negotiated rules that more accurately reflected what was in the public interest it would not likely result in fewer challenges from user groups and

is the observation that participation in public policy making within the United States is not limited to the traditional concept of iron triangles composed of executive agencies, congressional committees, and interest groups with a stake in the regulation. Instead of iron triangles solidified around specific policy areas, issue networks, defined as shared knowledge groups having to do with some aspect of public policy, are composed of members with potentially more diverse interests that fade in and out of specific issue areas pursuant to changes in interests, agendas, and other ties to a specific issue. In this context it refers to the involvement of conservation, marine mammal protection, or other environmental groups in fisheries management issues when the management issues at hand also concern or touch on an issue related to the group and its membership. Comparatively, an iron triangle would only include interests that represented user groups such as recreational or commercial fishermen and this would remain constant with all management issues being addressed.

82. It is still a reality that the majority of lawsuits brought against the National Marine Fisheries Service are from user groups or organizations that represent the interests of user groups. However, there is evidence that this fact is changing as a variety of organizations that do not represent consumptive user group interests are increasingly involved in challenges to federal fisheries regulatory decisions. Groups such as Greenpeace, Sierra Club, Massachusetts Audubon Society, and others have become more active in this regard. See *Greenpeace v. National Marine Fisheries Service*, 55 F. Supp. 2d. 1248 (W.D. Wash. 1999); *Earth Island Institute v. Daley*, 48 F. Supp. 2d. 1064 (CIT 1999); *Massachusetts Audubon Soc., Inc. v. Daley*, 31 F. Supp. 2d. (D. Mass. 1998); *American Rivers v. National Marine Fisheries Service*, No. 94-940-MA, 1995 WL 464544 (D. Or. 1995). These suits involve a variety of groups allied only temporarily around an issue, and although the challenges do not all relate specifically to council decisions, they at least indicate a willingness on the part of the groups to take action against the agency for management related decisions.

would very possibly only increase the difficulty in negotiating rules. Accepting that very little can be done to reduce the number of challenges, especially from user groups, the only feasible alternative is to eliminate interested parties from being represented on the Councils in the hope that the rules will at least be more scientifically founded, better represent the public interest, and the process itself will not be unnecessarily bogged down by contentious negotiations.