# The NMFS's National Standard Guidelines: Why Judicial Deference May Be Inevitable

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# The NMFS's National Standard Guidelines: Why Judicial Deference May Be Inevitable

Lindsay J. Nichols

*In* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., *the Supreme Court held that courts must sometimes defer to administrative agencies' reasonable interpretations of ambiguous statutory provisions. Recently, in* United States v. Mead Corp., *the Court held that an agency's interpretation of a statute qualifies for* Chevron *deference only if it was created pursuant to congressionally delegated authority to make rules "carrying the force of law." This Comment examines the effect of the Court's decision in* Mead *on judicial deference to agency guidelines and similar documents. It focuses specifically on the National Standard Guidelines (Guidelines) promulgated by the National Marine Fisheries Service (NMFS). Despite a statutory provision stating that these Guidelines "shall not have the force and effect of law," certain rules of administrative law have prevented the courts from scrutinizing the Guidelines. Using this example, this Comment illustrates that because of these other administrative law doctrines, the Court's decision in* Mead *is not likely to cause a significant decrease in the overall amount of deference given to agency interpretations. While this result may be proper for the NMFS's Guidelines, its appropriateness for other agency interpretations remains open to question.*

## INTRODUCTION

Doctrines of judicial deference to administrative agencies serve two worthy goals: the avoidance of unnecessary and costly litigation, and the avoidance of judicial second-guessing of executive expertise.[1] These are indeed worthy goals because many executive agencies are facing costly and time-consuming challenges by litigants with increasing frequency. Doctrines of judicial deference have therefore become the bases for staple arguments that these agencies use whenever they are in court.

One federal agency that has recently found itself the defendant in frequent litigation is the National Marine Fisheries Service (NMFS), the

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1. *See, e.g.*, Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 308-14 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514.

agency within the Commerce Department that oversees the management of our nation's fisheries.[2] The NMFS is now finding itself subject to frequent challenges based on, among other things, the alleged insufficiency of the science it uses to make decisions about how our fisheries should be managed.[3] The difficulty posed by such challenges is that, because more scientific research is always possible, litigants can always rightfully claim that, in some sense, the science the NMFS has used to make its decisions is incomplete.[4]

Despite the incompleteness of its science, the NMFS is often justified in making decisions about how fisheries should be managed because of the "precautionary principle." The precautionary principle is an internationally recognized principle that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty [should] not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[5] To implement the precautionary principle, the NMFS has often invoked doctrines of judicial deference to rebut challenges to its decision making.[6]

The central case on the topic of judicial deference to administrative agencies is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[7] In *Chevron*, the Supreme Court held that when an agency has been charged with the administration of a statute, a court must defer to the agency's reasonable interpretation of an ambiguous statutory provision.[8] Recently, however, in *United States v. Mead Corp.*, the Supreme Court held that the "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force

2. OCEAN STUDIES BD., NAT'L RESEARCH COUNCIL, SCIENCE AND ITS ROLE IN THE NATIONAL MARINE FISHERIES SERVICE 44-45 (2002). The NMFS governs fisheries in the "Exclusive Economic Zone" of the United States, which is the area that extends from 3 to 200 miles offshore. *Id.* at 1.

3. *See, e.g.*, N.C. Fisheries Ass'n v. Evans, 172 F. Supp. 2d 792, 803 (E.D. Va. 2001); Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150, 167 (D.D.C. 2000); A.M.L. Int'l, Inc. v. Daley, 107 F. Supp. 2d 90, 101 (D. Mass. 2000); *see also* OCEAN STUDIES BD., *supra* note 2, at 26.

4. *See* OCEAN STUDIES BD., *supra* note 2, at 16 ("The science and management of marine fisheries can be improved as more data are collected, but uncertainty will still exist because of the nature of the system."); Christopher J. Carr and Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 55 (2002) ("The uncertainty inherent in fisheries science exacerbates the confrontations of divergent views that typically pit industry scientists against government scientists.").

5. *Rio Declaration on Environment and Development*, June 13, 1992, Principle 15, 31 I.L.M. 874, 879. *See also* Harry N. Scheiber, *From Science to Law to Politics: An Historical View of the Ecosystem Idea and its Effect on Resource Management*, 24 ECOLOGY L.Q. 631, 649-51 (1997) (arguing that the precautionary principle is a necessary component to ecosystem management).

6. *See, e.g.*, Natural Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 754 (D.C. Cir. 2000); S. Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998), *injunction granted* 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

7. 467 U.S. 837 (1984).

8. *Id.* at 843.

of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[9] The Court in *Mead* further held that when a particular form of agency action fails to qualify for analysis under *Chevron*, the agency's interpretation of the statute may still qualify for a lesser degree of deference under *Skidmore*.[10]

This Comment argues that, because of other administrative law doctrines, the Court's decision in *Mead* is not likely to cause a significant decrease in the overall amount of deference given to agency interpretations of statutes. To demonstrate this, this Comment focuses on the NMFS and its interpretations of the Fisheries Conservation and Management Act, now known as the Magnuson Stevens Act (Magnuson Act).[11] The continuing implementation of the Magnuson Act by the NMFS serves as a particularly appropriate case study in this regard because it involves many of the issues that were relevant to the Court's decision in *Mead* and that concern a broad array of administrative agencies: notice and comment procedures, implementing regulations, National Standards, and, most importantly, administrative Guidelines that officially do not carry the weight of law. The status of the NMFS's National Standard Guidelines (Guidelines) is not unlike the status of many documents and reports created by other administrative agencies, both inside and outside the context of fisheries management. Thus, the issue of whether courts should defer to the Guidelines has wide relevance.

The NMFS promulgated the Guidelines in response to section 301 of the Magnuson Act. This section requires the Secretary of Commerce to "establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans."[12] Given the explicit statement that the Guidelines "shall not have the force and effect of law" in this provision, it seems apparent that the Guidelines promulgated by the NMFS are not directly entitled to *Chevron* deference pursuant to *Mead*. The Guidelines may, however, still be entitled to *Skidmore* deference. This Comment will argue that even though the Guidelines may only be entitled to this lesser degree of deference, the interpretations of the Magnuson Act contained within the Guidelines are unlikely to be successfully challenged in court. Thus, because of other administrative law doctrines, the Court's decision in

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9. 533 U.S. 218, 226-27 (2001).

10. *Id.* at 234-35 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)). As explained in Part I.A below, the Court in *Skidmore v. Swift & Co.* set forth a flexible, multi-factor test for deference to administrative agencies based on such factors as "specialized experience and broader investigations and information" available to the agency. 323 U.S. at 139.

11. Magnuson-Stevens Fishery and Conservation and Management Act of 1976, 16 U.S.C. §§ 1081-1882 (2000).

12. 16 U.S.C. § 1851(b).

*Mead* is unlikely to result in a multitude of court decisions refusing deference to the Guidelines or similar agency interpretations.

As this Comment will argue, this result is appropriate in the context of the Magnuson Act because the Guidelines include important substantive interpretations that greatly further the Magnuson Act's ecological goals. However, whether courts should defer to other agency interpretations of statutes depends on the strength of the particular agency interpretations at issue. Thus, while this Comment makes a persuasive argument with respect to the Guidelines, its main focus is a predictive judgment applicable to a broad variety of agency documents.

Part I of this Comment explores the traditional doctrines of judicial deference to the interpretations of statutes by administrative agencies. Part II examines what the Court's decision in *Mead* means for these doctrines. Part III explores the role of the Guidelines in the context of the Magnuson Act and the interpretations of the Magnuson Act that are contained in the Guidelines. Part IV discusses the possible application of the rule set forth in *Mead* to the Guidelines. Finally, Part V sets forth the reasons why, despite *Mead*, a court is unlikely to strike down the Guidelines' interpretations of the Magnuson Act's National Standards. Part V also discusses why the Guidelines should now be treated as settled law. This Comment concludes with a brief discussion of the implications of its findings for other areas of environmental and administrative law.

## I
## JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES

### A. *The Common Law of Deference to Agency Decision Making*

A primary feature of administrative law over the last century has been the ongoing tension between the judicial and executive branches over who has the greater authority in interpreting statutes passed by Congress.[13] Since *Marbury v. Madison*, the courts have always considered themselves the constitutionally assigned interpreters of the laws.[14] Moreover, section 706 of the Administrative Procedures Act (APA), the statute passed in 1946 to govern the procedures of federal agencies, states: "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory

13. RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 168-71 (3d ed. 1998).

14. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ("It is emphatically the province and duty of thc judicial department to say what the law is.").

provisions."[15] This indicates that courts, rather than agencies, should make determinations of statutory meaning.[16]

On the other hand, the Supreme Court has clearly indicated that a determination of law or an interpretation of a congressionally enacted statute by an administrative agency is entitled to some weight.[17] In *Skidmore v. Swift & Co.*, for example, the employees of a packing plant brought an action against their employer under the Fair Labor Standards Act (FLSA).[18] The employees intended to recover compensation for remaining in their place of employment beyond their normal working hours to answer fire alarms.[19] The Court held that such "waiting time" might be work for which overtime compensation was due under the FLSA.[20] In so holding, the Court paid particular attention to the interpretation of the FLSA by its Administrator.[21] This interpretation was embodied in an interpretative bulletin and in informal rulings.[22] The Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[23]

Thus, in *Skidmore*, the Court set forth a test for whether to defer to an agency's interpretation of a statute that depended on a number of factors, such as the "specialized experience and broader investigations and information" available to the agency.[24] This test was moderately deferential to agencies and allowed for significant flexibility in its application.

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15. 5 U.S.C. § 706 (2000). *See generally* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 9-11 (1996).

16. *See* United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 544 (1940) (stating that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function").

17. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944); Gray v. Powell, 314 U.S. 402, 411-12 (1941); United States *ex rel.* Norwegian Nitrogen Prods. Co. v. United States Tariff Comm'n, 274 U.S. 106, 111-12 (1927).

18. 323 U.S. 134, 135-36 (1944).

19. *Id.*

20. *Id.* at 140.

21. *Id.* at 137-40.

22. *Id.* at 138.

23. *Id.* at 140.

24. *Id.* at 139.

### *B.* Chevron *and the Commentators*

In *Chevron*, the Court was faced with an interpretation of the Clean Air Act Amendments of 1977 by the Environmental Protection Agency (EPA).[25] The EPA issued regulations through notice and comment procedures that interpreted the definition of the term "stationary source" in the Amendments to allow for use of the "bubble concept."[26] The result of this interpretation was that if a plant wished to install or modify a device that did not meet the conditions of the permit issued to it by the EPA, a plant could do so as long as this installation or modification did not increase the total emissions of the plant.[27]

The Court decided that the EPA's interpretation was appropriate:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[28]

Thus, the Court in *Chevron* essentially established a two-step analysis in which the first step focused on whether the statutory language was clear or ambiguous, and the second step focused on whether the agency's interpretation of the statute was permissible. Under *Chevron*, a court is required to defer to an agency's interpretation of a statute if the court finds that the statute is ambiguous under step one,[29] and the interpretation is reasonable (or "permissible") under step two.[30] The test for deference to an agency's

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

26. *Id.* at 840, 859.

27. *Id.* at 840.

28. *Id.* at 842-43.

29. The Court in *Chevron* treated an instance of ambiguity in a statutory provision as an implicit delegation by Congress to the agency. *Id.* at 843-44. Thus, although commentators have frequently argued over the source of *Chevron* deference, most recent commentary, as well as the Court's comments in *Mead*, indicates that *Chevron* deference stems from the theory of congressional intent, rather than federal common law or separation of powers. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 863-72 (2001).

30. The Court in *Chevron* reasoned that a statutory gap or ambiguity indicates that Congress intended to allow the agency, rather than the courts, to reconcile conflicting policies. *Chevron*, 467 U.S. at 843-44. The purpose of *Chevron* deference, therefore, is to allow the agency to reconcile conflicting

interpretation of a statute under *Chevron* is highly deferential to agencies because the standard under step two is simply one of reasonableness.

The Court in *Chevron* did not expressly consider whether Congress intended the agency interpretation at issue to carry "the force of law."[31] On the contrary, a court using the *Chevron* analysis emphasizes only the existence of a particular statutory gap and the reasonableness of the particular interpretation used by the agency to fill that gap.[32]

In the years between *Chevron* and *Mead*, scholars produced an immense amount of literature about the Court's analysis in *Chevron* and its effect on courts and agencies.[33] Certain legal scholars have consistently argued that courts should apply the *Chevron* analysis in some situations and not others.[34] Some have even argued in favor of a rule substantially similar to the rule the Supreme Court later put forth in *Mead*.[35] In 1990, Professor Robert A. Anthony argued that the *Chevron* analysis "unquestionably governs the usual case in which the agency, in pursuance of delegated authority, issues its interpretation through a legislative regulation or other agency action possessing the force of law."[36] For Professor Anthony, the question of which agency interpretations should be granted *Chevron* deference was closely related to the formality of the agency's procedure for promulgating that interpretation.[37] He believed that courts should not feel compelled by *Chevron* to defer to agency

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policies present in the statutory scheme. For this reason, the agency is entitled to deference when it makes a reasonable policy choice to fill the statutory gap or resolve the ambiguity. *Id.* at 845.

31. *See id.*

32. *See id.* at 843-66.

33. For commentary criticizing *Chevron* for affording too much deference to agencies, see, for example, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000); Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071 (1990). For commentary arguing for more deference to agencies, and therefore praising *Chevron*, see, for example, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Pierce, Jr., *supra* note 1; Scalia, *supra* note 1; Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). For commentary attempting to measure empirically the effect *Chevron* has had on the courts, see, for example, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

34. Farina, *supra* note 33, at 465-528 (arguing that separation of powers concerns should dictate when *Chevron* applies); Molot, *supra* note 33, at 69-110 (arguing that *Chevron* should apply only when the agency at issue is politically accountable); Sunstein, *supra* note 33, at 2093-2120 (arguing that factors such as the agency's expertise, agency bias, and consistency should determine whether *Chevron* applies).

35. *See, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5 (3d ed. 1994); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 (1990).

36. Anthony, *supra* note 35, at 3.

37. *Id.* at 36.

interpretations embodied in "informal issuances," such as "an opinion letter, a policy statement, a press release, or an amicus brief," because Congress clearly did not intend such documents to bind the courts.[38] Professor Anthony argued that agencies should use formalized procedures like the notice and comment procedures of section 553 of the APA for all actions that agencies intend to impose prospective obligations or standards upon the public.[39] He further argued that rules that have been made without these procedures should be treated as unworthy of *Chevron* deference by the courts.[40]

As Justice Scalia noted in his dissent in *Mead*, the Supreme Court's decision in that case is based on the work of Professor Anthony.[41] The Court in *Mead* responded to the issue of which agency interpretations should be entitled to analysis under the two-step *Chevron* framework. As we shall see in Part II, the Court's opinion in *Mead* indicates that many agency interpretations are not entitled to this analysis.

## II
## THE SUPREME COURT'S DECISION IN *UNITED STATES V. MEAD CORP.*

### A. *Factual Background and Procedural History*

The specific issue that the Court addressed in *Mead* was the amount of deference due to a ruling letter issued by the Customs Service (Customs) to inform an importer about the classification of merchandise and the tariff that would be due on that merchandise.[42] The ruling letter at issue contained an interpretation of a particular statute, the Harmonized Tariff Schedule of the United States (HTSUS), which sets forth the tariffs applicable to different categories of merchandise.[43]

The Mead Corporation imports "day planners."[44] From 1989 through January 1993, Customs classified these day planners such that they were not subject to a tariff.[45] In January 1993, however, Customs issued a tariff classification ruling letter that reclassified Mead's day planners so that they became subject to a 4% tariff.[46] After Customs rejected Mead's protests, Mead filed suit in the Court of International Trade (CIT) challenging Customs's interpretation of the HTSUS.

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38. *Id.*

39. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1311-88 (1992).

40. Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules And "Spurious" Rules: Lifting The Smog*, 8 ADMIN L.J. AM. U. 1 (1994); Anthony, *supra* note 35, at 3.

41. United States v. Mead Corp., 533 U.S. 218, 256 (2001) (Scalia, J., dissenting).

42. *Id.* at 221-22.

43. 19 U.S.C. § 1202 (2000).

44. *Mead*, 533 U.S. at 224.

45. *Id.* at 225.

46. *Id.*

The CIT held that Customs had properly classified Mead's day planners and they were therefore subject to the 4% tariff.[47] The Court of Appeals for the Federal Circuit reversed.[48] In deciding that Customs's ruling letter was not entitled to *Chevron* analysis, the Court of Appeals noted that the ruling letter at issue in *Mead* did not undergo the procedures of notice and comment.[49] The court noted that such ruling letters "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review."[50] The Court of Appeals therefore refused to give any deference whatsoever to the interpretation of the HTSUS embodied in Customs's ruling letter.[51]

### *B. The Supreme Court Decision*

The United States Supreme Court vacated and remanded the decision.[52] Justice Souter, writing for the eight-member majority, announced the rule that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[53] The Court held that Customs's ruling letter failed to qualify for *Chevron* deference under this test, but might still be worthy of some deference under *Skidmore*.[54]

The Court's reasoning, along with its rule, indicates that the test for an agency interpretation worthy of analysis under the *Chevron* framework has two prongs. The first prong relates to whether Congress intended interpretations like the one at issue to have the force of law. Because the HTSUS did not clearly state whether Congress intended Customs's ruling letters to have "the force of law," the Court examined several other features of the statutory scheme. The Court noted that the statute refers to these ruling letters as "binding" and as having precedential value, but was not convinced that this evinced congressional intent for these ruling letters to have the force of law.[55] The Court also noted the statutory provisions providing for judicial review of these classification rulings by the CIT. These provisions

47. Mead Corp. v. United States, 17 F. Supp. 2d 1004, 1008 (C.I.T. 1998), *rev'd*, 185 F.3d 1304 (Fed. Cir. 1999), *vacated by* United States v. Mead Corp., 533 U.S. 218 (2001).

48. Mead Corp. v. United States, 185 F.3d 1304 (Fed. Cir. 1999), *vacated by* United States v. Mead Corp., 533 U.S. 218 (2001).

49. *Id.* at 1306 (citing 5 U.S.C. § 553 (2000)).

50. *Id.* at 1307.

51. *Id.* The court also emphasized the existence of Federal Circuit precedent refusing to give any deference to Customs's ruling letters. *Id.* at 1306-07 (citing Rollerblade, Inc. v. United States, 112 F.3d 481, 483-84 (Fed. Cir. 1997)).

52. United States v. Mead Corp., 533 U.S. 218, 239 (2001).

53. *Id.* at 226-27.

54. *Id.* at 227.

55. *Id.* at 232.

treat such rulings as equal to other decisions by the Customs Service on issues of limited scope, such as rulings on "valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters."[56] Because these rulings are often made informally, the Court found the fact that Congress grouped classification ruling letters with these rulings to be persuasive evidence that such ruling letters did not carry the force of law or deserve *Chevron* analysis.[57] The Court, however, did not labor long over this point.

Instead, the Court focused on the fact that the delegation to the Customs Service contained in the statute did not call for notice and comment or other formal procedures.[58] The Court made clear that, when a statute authorizes an agency to use notice and comment or other formal procedures to issue an interpretation and the agency does so, courts should analyze that interpretation under *Chevron*.[59] *Chevron* analysis is appropriate in such a case because the Court considers "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings [to be] a very good indicator of delegation meriting *Chevron* treatment."[60] Furthermore, *Chevron* analysis applies in cases involving interpretations produced through formal procedures because Congress intended such interpretations to have the "effect of law."[61] As the Court pointed out, the "overwhelming number" of cases in which *Chevron* has been applied involved interpretations rendered through notice and comment rulemaking or formal adjudication.[62] Thus, it is clear that *Chevron* analysis is generally appropriate when such formal procedures are required and used.

Applying *Chevron* analysis to regulations made through the notice and comment procedures of section 553 of the APA is consistent with the views of Professor Anthony. However, the Court in *Mead* went out of its way to emphasize that the lack of notice and comment is not enough to deprive Customs's ruling letters of *Chevron* analysis. Although the Court did eventually refuse *Chevron* analysis to Customs's interpretation, it stressed that "the want of [notice and comment] here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no administrative formality was required and none was afforded."[63]

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56. *Id.* at 232-33 (citing 28 U.S.C. §§ 1581(h), 2639(b) (2000)).

57. *Id.*

58. *Id.* at 230.

59. *Id.*

60. *Id.* at 229.

61. *Id.* at 230.

62. *Id.*

63. *Id.* at 230-31 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57, 263 (1995)).

How then does a court determine whether *Chevron* analysis is appropriate when an agency issues an interpretation in an informal format? The second prong of the test for an agency interpretation worthy of *Chevron* deference relates to agency practice with reference to interpretations of the same type as the one at issue. The Court in *Mead* focused on Customs's practice in issuing ruling letters containing classifications like the one regarding the Mead Corporation's day planners.[64] The Court first noted that "Customs does not generally engage in notice-and-comment practice when issuing" such letters, but, as noted above, this fact alone was not enough to decide the case.[65]

Certain other features of Customs's practice with respect to classification ruling letters were what finally convinced the Court that an interpretation embodied in one of these ruling letters was not entitled to *Chevron* analysis. First, Customs did not treat its ruling letters as binding on third parties, such as importers other than the one to whom the letter was issued.[66] Second, Customs warned third parties against reliance on ruling letters.[67] Last, the Court mentioned that "46 different Customs offices issue 10,000 to 15,000" ruling letters each year.[68] The Court found this practice irreconcilable with the notion that such ruling letters were meant to have legal force.[69] Because such letters do not have legal force, they do not deserve *Chevron* analysis.[70]

Having found that Customs's ruling letters were not worthy of analysis under *Chevron*, the Court reasoned that they might still be worthy of some deference under *Skidmore*.[71] This deference might be available because of the high degree of detail in the regulatory scheme regarding Customs's classification of merchandise and the specialized experience of the Customs Service in this area.[72] Under these circumstances, the Court found that Customs's classification ruling could claim deference proportional to its persuasive force.[73] The Court therefore remanded the case to the lower courts for an analysis of the ruling letter under *Skidmore*.[74]

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64. *Id.* at 233-34.
65. *Id.* at 233.
66. *Id.*
67. *Id.* ("Other importers are in fact warned against assuming any right of detrimental reliance.").
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 234-35 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
72. *Id.* at 235.
73. *Id.*
74. *Id.* at 239.

## III
## *MEAD'S* POTENTIAL IMPACT: THE NMFS EXAMPLE

The potential impact of *Mead* is significant. Depending on how courts choose to apply the decision, it could affect the manner in which courts review a widc range of agency determinations. One potential area of impact is the NMFS's decision-making process. The Court's response to the issue of which agency interpretations should be entitled to *Chevron* analysis indicates that the Guidelines promulgated by the NMFS may not be entitled to *Chevron* analysis. However, the resolution of this issue as applied to the Guidelines depends on a thorough investigation into the role of the Guidelines in the statutory scheme and the manner of judicial review under the Magnuson Act.

### *A. The Structure of Fisheries Management in the United States*

Enacted in 1976, the Magnuson Act created a comprehensive framework for fisheries conservation and management in the waters of the United States. The Magnuson Act made each of the eight Regional Councils responsible for the fisheries within its geographical area. A Regional Council is required to prepare a fishery management plan (FMP) for any fishery in its jurisdiction that requires conservation and management, and to amend the FMP whenever necessary.[75] The Regional Council must submit every FMP or FMP Amendment to the Secretary of Commerce for approval.[76] Before the Seeretary can approve an FMP or FMP Amendment, he or she must first subject it to notice and comment procedures.[77] The Secretary must take into account the comments received through these procedures, and if the FMP or FMP Amendment fulfills all relevant requirements under the Magnuson Act, the Secretary may approve it.[78]

For an FMP or FMP Amendment to qualify for the Secretary's approval, the Magnuson Act requires it to describe the fishery at issue,[79] and identify the maximum sustainable yield and optimum yield for the fishery.[80] The FMP or FMP Amendment must also specify criteria for identifying when the fishery is overfished.[81] More importantly, any FMP that the Secretary approves must identify the eonservation and management measures that are necessary to prevent overfishing and rebuild overfished stocks.[82] Such eonservation and management measures may include quotas

75. 16 U.S.C. § 1852(h)(1) (2000).
76. *Id.*
77. 16 U.S.C. § 1854(a)(1)(B).
78. *Id.* § 1854(a)(2)-(3).
79. *Id.* § 1853(a)(2).
80. *Id.* § 1853(a)(3).
81. *Id.* § 1853(a)(10).
82. *Id.* § 1853(a)(1)(A).

that limit the amount of fish that can be caught within a specific period of time,[83] the designation of zones where, and times when, fishing is not permitted,[84] and restrictions on the types of fishing gear that may be used.[85]

The Regional Council must also submit to the Secretary of Commerce any regulations that the Council deems necessary and appropriate to implement the FMP.[86] Typically, the Regional Council and the NMFS use implementing regulations to establish which particular conservation and management measures apply to a particular fishery during a particular time period. The implementing regulations set the annual quotas, determine exactly when the fishing season will be in a given year and where fishing may occur, and make any other specifications of the conditions under which fishing may occur for that year. These regulations, like the FMP itself, must undergo the notice and comment procedures before the Secrctary may approve them.[87] The Secretary may approve a regulation implementing an FMP, like an FMP or FMP Amendment, only if the regulation fulfills all relevant requirements under the Magnuson Act.[88]

### *B. The National Standards and the Guidelines*

In addition to the above requirements, the Magnuson Act requires that any FMP, FMP Amendment, or implementing regulation approved by the Secretary be consistent with the ten National Standards set forth in section 301.[89] These National Standards embody a number of important substantive requirements, but they do not provide many details regarding the particular scope and meaning of these requirements. For example, National Standard Two requires that any approved FMP or implementing regulation "be based upon the best scientific information available."[90] This standard, however, does not indicate how the Regional Council should determine which scientific information is "best," what information should be considered "scientific," or how a Regional Council should develop an FMP when scientific information is not available or is inconclusive.

To assist the Regional Councils in the development of FMPs that are consistent with the National Standards, the Magnuson Act requires the Secretary to "establish advisory guidelines (which shall not have the force and effect of law), based on the national standards."[91] The Guidelines originally promulgated by the NMFS pursuant to this provision addressed

83. *Id.* § 1853(b)(3).
84. *Id.* § 1853(b)(2).
85. *Id.* § 1853(b)(4).
86. *Id.* § 1853(c).
87. *Id.* § 1854(b).
88. *Id.* § 1854(b)(1).
89. *Id.* § 1851(a).
90. *Id.* § 1851(a)(2).
91. *Id.* § 1851(b).

some of the important substantive questions left unanswered by the language of the National Standards and the rest of the Magnuson Act. The important substantive interpretations of the Magnuson Act that were contained in the Guidelines greatly furthered the Magnuson Act's ecological and preservationist goals.[92] In 1996, Congress codified a number of the most important provisions of the Guidelines in the Sustainable Fisheries Act (SFA), which significantly amended the Magnuson Act. For example, these amendments codified the definition of "overfishing," which had previously only appeared in the Guidelines.

Despite the SFA's codification of many important substantive provisions that originally appeared in the Guidelines, the Guidelines still contain a number of uncodified substantive interpretations of the National Standards. These interpretations frequently clarify ambiguities in the National Standards in an environmentally friendly manner.[93] For that reason, when a court encounters one of these same ambiguities, whether the court will resolve that ambiguity in an environmentally friendly manner depends to some extent on whether the court is willing to defer to the Guidelines.

The interpretations of the National Standards contained within the Guidelines implicitly adopt the precautionary principle, the internationally recognized principle that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty [should] not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[94] The precautionary principle is a necessary component of ecosystem management.[95] The incorporation of the precautionary principle in the Guidelines thus exemplifies how the Guidelines further environmental principles.

The Guidelines on National Standard One provide an example of how the Guidelines interpret the National Standards to incorporate environmental principles.[96] National Standard One requires that any FMP "prevent overfishing while achieving, on a continuing basis, the optimum yield."[97] The Magnuson Act now contains basic definitions of both "optimum yield" and "overfishing."[98] Both definitions, however, are dependent on the concept of "maximum sustainable yield" (MSY), a term that is still not defined in the Magnuson Act. The Guidelines provide a definition of this term and

92. *See* Marian Macpherson, *Integrating Ecosystem Management Approaches into Federal Fishery Management Through the Magnuson-Stevens Fishery Conservation and Management Act*, 6 OCEAN & COASTAL L.J. 1, 20-26 (2001).

93. *Id.*

94. *Rio Declaration on Environment and Development*, June 13, 1992, Principle 15, 31 I.L.M. 874, 879.

95. Scheiber, *supra* note 5, at 649-51.

96. Macpherson, *supra* note 92, at 20-23.

97. 16 U.S.C. § 1851(a)(1) (2000).

98. *Id.* § 1802(28)-(29).

incorporate into their discussion of MSY a precautionary approach to ecosystem management.[99] The Guidelines define MSY as "the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions."[100] The Guidelincs recognize that any calculation of MSY will "be associated with some level of uncertainty" and "must incorporate appropriate consideration of risk."[101] When data is insufficient, the Guidelines allow for the use of "reasonable proxies" for MSY.[102] Moreover, the Guidelines state that in setting optimum yield, the Regional Councils should adopt a "precautionary approach."[103] The Guidelines declare that criteria used to sct catch levels should be "explicitly risk averse so that greater uncertainty . . . corresponds to greater caution."[104]

The Guidelines also expand thc definition of overfishing in a way that is consistent with the Magnuson Act's goal of fisheries conservation. According to the Magnuson Act, "the terms 'overfishing' and 'overfished' mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis."[105] The NMFS Guidelines clarify this by stating that "the term 'overfished' is used in two senses."[106] The first definition for "overfished" provided by the Guidelines is identical to thc definition in the Magnuson Act. But the Guidelines recognize that the term "overfished" can also be used to refer to "any stock or stock complex whose size is sufficiently small that a change in management practices is required in order to achieve an appropriate level and rate of rebuilding."[107] In this way, the Guidelines on National Standard One expand the concept of overfishing to include not only situations where the rate of fishing mortality is too high for the fishery to produce MSY on a continuing basis, but also situations where the stock size is too low for the achievement of this goal.[108]

The Guidelines interpreting the other National Standards also incorporate principles of ecosystem management in their resolution of ambiguous provisions of the Act. For example, the Guidelines on National Standard Two state that "[t]he fact that scientific information concerning a fishery is

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99. Macpherson, *supra* note 92, at 21-23.
100. 50 C.F.R. § 600.310(c)(1) (2001).
101. *Id.* § 600.310(c)(2)(ii).
102. *Id.* § 600.310(c)(3).
103. *Id.* § 600.310(f)(5).
104. *Id.* § 600.310(f)(5)(iii).
105. 16 U.S.C. § 1802(29) (2000).
106. 50 C.F.R. § 600.310(d)(1)(iii).
107. *Id.*
108. Macpherson, *supra* note 92, at 21-22. *See also* Peter Shelley et al., *The New England Fisheries Crisis: What Have We Learned?*, 9 TUL. ENVTL. L.J. 221, 227-28 (1996) (describing how the Guidelines' requirement that Regional Councils "develop objective and measurable definitions of overfishing" caused the New England Fishery Management Council to admit that the cod, haddock, and yellowtail flounder fisheries were overfished).

incomplete does not prevent the preparation and implementation of an FMP."[109] This indicates that the requirement in National Standard Two that FMPs and regulations implementing FMPs "be based on the best scientific information available"[110] does not prevent a Regional Council and the NMFS from taking action in the absence of complete scientific data.[111] The Guidelines therefore provide an interpretation of the Magnuson Act that allows the NMFS to act to protect fish stocks even when scientific data on the fishery is scarce.

National Standard Eight requires FMPs and the regulations implementing FMPs, "consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), [to] take into account the importance of fishery resources to fishing communities in order to . . . minimize adverse economic impacts on such communities."[112] The language of this Standard does not identify the range of situations in which an FMP should be modified to minimize adverse economic impacts. The Guidelines interpret National Standard Eight to mean only that "where two alternatives achieve similar conservation goals, the alternative that . . . minimizes the adverse economic impacts on [fishing] communities would be the preferred alternative."[113] Thus, the Guidelines make clear that the social and economic goal of minimizing adverse impacts on fishing communities is entirely secondary to the environmental goal of conserving fish stocks.

National Standard Nine requires that an FMP or regulation implementing an FMP "to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch."[114] The Guidelines on National Standard Nine state that the Regional Councils should determine which conservation and management measures best fulfill this requirement by considering ten factors, which include population effects for the bycatch species, ecological effects due to changes in the bycatch for that species, changes in the bycatch of other species and the resulting population and ecosystem effects, and changes in the fishing practices and behavior of fishermen.[115] The use of these ten factors demonstrates an ecosystem-based management approach in that it encourages the Regional Councils to consider the indirect, as well as the direct, effects of changes in the environment on the level of bycatch.[116]

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109. 50 C.F.R. § 600.315(b).
110. 16 U.S.C. § 1851(a)(2).
111. 50 C.F.R. § 600.315(b).
112. 16 U.S.C. § 1851(a)(8).
113. 50 C.F.R. § 600.345(b)(1).
114. 16 U.S.C. § 1851(a)(9).
115. 50 C.F.R. § 600.350(d)(3).
116. Macpherson, *supra* note 92, at 26.

As these examples demonstrate, the Guidelines frequently clarify ambiguities in the National Standards in an environmentally sensitive manner. Thus, when a court encounters one of these same ambiguities, the likelihood of resolving that ambiguity in an environmentally sensitive manner depends at least in part on the level of deference given to the Guidelines.

### C. *Judicial Review under the Magnuson Act*

Any examination of the way courts treat the actions of the NMFS must begin with the judicial review provisions of the Magnuson Act. Section 305(f) provides that "[r]egulations promulgated by the Secretary under this Act . . . shall be subject to judicial review."[117] The language of this provision suggests that Congress only intended to provide for judicial review of regulations implementing FMPs, and not for the FMPs themselves or FMP Amendments.[118] Courts, however, have interpreted the judicial review provisions of the Magnuson Act to allow for judicial review of Amendments to FMPs[119] and to all regulations implementing FMPs, including those setting annual harvest quotas,[120] those allocating fish among different groups,[121] and those setting forth other specifications.[122] It is unclear, however, whether this provision should be read as providing for direct judicial review of the Guidelines.[123]

Section 305(f) of the Magnuson Act also limits judicial review of these regulations to cases where the plaintiff's petition for review was filed within thirty days of the promulgation of the relevant regulation.[124] In *Kramer v. Mosbacher*, the Fourth Circuit enforced this statute of limitations by holding that it prevented the courts from reviewing the Secretary of Commerce's closure of a fishery.[125] The Secretary, through the NMFS, had promulgated a regulation setting the catch limit for the recreational king mackerel fishery and requiring the Secretary to close the fishery when this limit was reached. The Secretary closed the fishery when the limit had been reached pursuant to this regulation and the plaintiff sued. The Fourth Circuit held that it lacked the jurisdiction to review the Secretary's action because thirty days had passed since the Secretary had promulgated the

117. 16 U.S.C. § 1855(f)(1).

118. Comment, *Judicial Review of Fishery Management Regulations Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 599, 631 (1977).

119. *See, e.g.*, Associated Fisheries of Me. v. Daley 127 F.3d 104 (1st Cir. 1997).

120. *See, e.g.*, Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150 (D.D.C. 2000) (reviewing, among others, those regulations setting annual quotas for blue sharks).

121. *See, e.g.*, Midwater Trawlers Coop. v. United States, 282 F.3d 710 (9th Cir. 2002) (reviewing the Secretary's annual allocation of the Pacific Whiting fish among several Native American tribes).

122. *See, e.g.*, Ace Lobster Co. v. Evans, 165 F. Supp. 2d 148 (D.R.I. 2001) (reviewing the Secretary's uniform trap cap regulations for the American lobster fishery).

123. *See infra* Part V.A.

124. 16 U.S.C. § 1855(f)(1) (2000).

125. 878 F.2d 134 (4th Cir. 1989).

original regulation, even though thirty days had not yet passed since the actual closure of the fishery.[126]

In response to *Kramer v. Mosbacher*, Congress amended the Act in 1990 to allow for judicial review of "actions that are taken by the Secretary under regulations which implement an [FMP], including but not limited to actions that establish the date of closure of a fishery."[127] Congress passed this amendment to allow for judicial review within thirty days of any action by the Secretary to implement an FMP, regardless of when the Secretary had promulgated the relevant regulation.[128] This amendment made it clear that Congress intended the thirty-day statute of limitations to be strictly construed, since Congress recognized that affirmative congressional action was necessary to extend it.

Section 305(f) of the Magnuson Act also limits the standard of judicial review under the Act to that authorized by section 706(2)(A), (B), (C), or (D) of the APA.[129] This provision grants a reviewing court the power to hold unlawful agency actions that are: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law."[130]

In the context of fisheries management, as elsewhere, courts often cite *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* for the meaning of the terms "arbitrary" and "capricious" in the APA:[131]

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[132]

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126. *Id.* at 137.

127. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 111, 104 Stat. 4436 (codified at 16 U.S.C. § 1855(f)(2)).

128. *See* Natural Res. Def. Council, Inc. v. Evans, 168 F. Supp. 2d 1149, 1155 (N.D. Cal. 2001) (citing 16 U.S.C. § 1855(f)(2) and S. RPT. No. 101-414 (1989), *aff'd in part, vacated in part by* 316 F.3d 904 (9th Cir. 2003)).

129. 16 U.S.C. § 1855(f).

130. 5 U.S.C. § 706(2)(A)-(D) (2000).

131. *See, e.g.*, Associated Fisheries of Me. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)); Fishermen's Dock Coop., Inc. v. Brown, 75 F.3d 164, 172 (4th Cir. 1996) (citing same); N.C. Fisheries Ass'n v. Evans, 172 F. Supp. 2d 792, 798 (E.D. Va. 2001) (citing same).

132. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Thus, the courts use a relatively deferential standard of review when they review actions of the NMFS and the Secretary pursuant to the Magnuson Act. This deferential standard of review, along with the thirty-day statute of limitations and the uncertainty as to whether the Magnuson Act provides for direct judicial review of the Guidelines, dramatically limits judicial review under the Magnuson Act. As we shall see, these features also suggest that courts are unlikely to address the merits of direct challenges to the Guidelines, even though courts often refer to these Guidelines when they address challenges to other NMFS actions.

### D. *How Courts Treat the Guidelines*

Courts rely heavily on the Guidelines for guidance on the proper interpretations of the National Standards. Courts frequently cite the Guidelines in support of certain environmentally sensitive propositions.[133] Accordingly, the courts have used the Guidelines in two different ways. First, when environmentalists have challenged the NMFS's actions, courts have used the Guidelines to prevent the NMFS from taking actions contrary to these propositions. For example, in *Natural Resources Defense Council, Inc. v. Daley*, the Court of Appeals for the District of Columbia Circuit cited the Guidelines for National Standard Eight for the proposition that the NMFS can take into account adverse economic consequences only when two plans achieve similar conservation goals.[134] The court invalidated the NMFS's quota for the 1999 summer flounder harvest because it failed to satisfy the conservation goals of the Magnuson Act. The court rejected the district court's suggestion that there was a direct conflict between the Magnuson Act's conservation goals and its goal to minimize adverse economic impact.[135]

The other way courts use the Guidelines is to support the NMFS when members of the fishing industry have challenged the NMFS's actions. For

133. *See, e.g., Natural Res. Def. Council, Inc.*, 209 F.3d at 753; *N.C. Fisheries Ass'n*, 172 F. Supp. 2d at 803 (citing 50 C.F.R. § 600.315(b)); Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150, 167 (D.D.C. 2000) (collecting cases); A.M.L. Int'l, Inc. v. Daley, 107 F. Supp. 2d 90, 101 (D. Mass. 2000); Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 220 (D.D.C. 1990).

134. 209 F.3d at 753.

135. *Id.* at 753, 756. Similarly, in *Conservation Law Foundation v. Evans*, the District Court for the District of Columbia quoted the Guidelines for National Standard Nine (citing 50 C.F.R. § 600.350(d)(1)) for the proposition that a review of each FMP was required to determine the amount and type of bycatch in the fishery. 209 F. Supp. 2d 1, 12 (D.D.C. 2001), *vacated by* 211 F. Supp. 2d 55 (D.D.C. 2002) (vacating in favor of the parties' settlement agreement). The court chose to cite the Guidelines for this proposition, even though it is also clearly stated in the Magnuson Act. 16 U.S.C. § 1853(a)(11) (2000). The court stated that the NMFS "failed even to comply with their own" Guidelines by failing to undertake such a review and that the agency's refusal to comply with this requirement was "arbitrar[y], capricious[], and contrary to law." 209 F. Supp. 2d at 13. The court thus used the Guidelines against the NMFS itself and thereby prevented it from failing to take certain conservation measures. *Id. See also* Pac. Marine Conservation Council, Inc. v. Evans, 200 F. Supp. 2d 1194 (N.D. Cal. 2002).

example, members of the fishing industry sometimes challenge the NMFS's actions on the ground that they violate National Standard Two by failing to use the "best scientific information available."[136] In cases of this type, courts often cite the Guidelines for National Standard Two for the proposition that "[t]he fact that scientific information concerning a fishery is incomplete does not prevent the preparation and implementation of an FMP."[137] Courts also frequently cite the Guidelines for this Standard for the proposition that "FMPs must take into account the best scientific information available at the time of preparation."[138] These provisions of the Guidelines are important because they confirm the authority of the NMFS to take action to protect a fishery even before a thorough scientific investigation has been completed. Thus, a court that has chosen to reject an allegation that the NMFS has violated National Standard Two is likely to cite these provisions to uphold an NMFS action that furthers the Magnuson Act's conservationist goals.[139]

Courts also frequently cite the Guidelines when members of the fishing industry challenge the NMFS's use of proxies for maximum sustainable yield (MSY).[140] The Guidelines on National Standard One state that "[w]hen data are insufficient to estimate MSY directly, Councils should adopt other measures of productive capacity that can serve as reasonable proxies for MSY, to the extent possible."[141] Courts frequently cite this provision when they uphold regulations implementing FMPs that use proxies for MSY.[142] The courts' reliance on the Guidelines thus allows the NMFS to act with significantly greater flexibility to protect fish stocks.

Given the significant environmental principles embodied in the Guidelines, it is important to identify the rationale for the courts' extensive reliance on these Guidelines. The Supreme Court's decision in *Mead* suggests that the principles of deference to agency interpretation set forth in *Chevron* do not apply to the Guidelines. However, other features of the Court's analysis in *Mead* and the role that the Guidelines play in judicial review under the Magnuson Act suggest that the lower courts' reliance on the Guidelines is justified.

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136. 16 U.S.C. § 1851(a)(2).

137. *See, e.g.*, N.C. Fisheries Ass'n v. Evans, 172 F. Supp. 2d 792, 803 (E.D. Va. 2001) (citing 50 C.F.R. § 600.315(b)); Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150, 167 (D.D.C. 2000) (collecting cases); A.M.L. Int'l, Inc. v. Daley, 107 F. Supp. 2d 90, 101 (D. Mass. 2000); Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 220 (D.D.C. 1990).

138. *See, e.g.*, *N.C. Fisheries Ass'n*, 172 F. Supp. 2d at 802 (citing 50 C.F.R. § 600.315(b)(2)); *Blue Water Fisherman's Ass'n*, 122 F. Supp. 2d at 166 (citing same).

139. *See, e.g.*, *N.C. Fisheries Ass'n*, 172 F. Supp. 2d at 803; *Blue Water Fisherman's Ass'n*, 122 F. Supp. 2d at 167.

140. *See, e.g.*, *N.C. Fisheries Ass'n*, 172 F. Supp. 2d at 802; *A.M.L. Int'l, Inc.*, 107 F. Supp. 2d at 101.

141. 50 C.F.R. § 600.310(c)(3). *See also id.* § 600.310(d)(3).

142. *See, e.g.*, *N.C. Fisheries Ass'n*, 172 F. Supp. 2d at 802; *A.M.L. Int'l, Inc.*, 107 F. Supp. 2d at 101.

## IV
## THE APPLICATION OF *MEAD* TO THE GUIDELINES

### *A. Reasons* Mead *Might Apply*

After *Mead*, there are several reasons why a court might find that an interpretation of the Magnuson Act embodied in the Guidelines is not entitled to *Chevron* analysis. The most obvious reason is that the section of the Magnuson Act that authorizes the Secretary of Commerce to issue the Guidelines explicitly says that they "shall not have the force and effect of law."[143] This is a clear and unequivocal expression of congressional intent to deprive the Guidelines of the "force of law." Given the Court's holding in *Mead*, this provision makes it unlikely that a court will grant *Chevron* analysis directly to the NMFS's interpretations of the Magnuson Act embodied in these Guidelines.

The second reason why a court faced with this issue is likely to find that the Guidelines do not merit analysis under *Chevron* is that the Magnuson Act does not require the NMFS to use notice and comment procedures when it issues the Guidelines. Whereas the Magnuson Act explicitly requires the NMFS to use notice and comment procedures when it issues FMPs and regulations implementing FMPs,[144] at least one court has expressly noted that the Magnuson Act does not set forth any similar requirements for the Guidelines.[145] According to the Court in *Mead*, the fact that the statute at issue did not require Customs to use notice and comment procedures to issue ruling letters did not alone determine whether Customs's ruling letters deserved analysis under *Chevron*.[146] However, the Court made clear that when a statutc requires the use of notice and comment procedures, agency interpretations made pursuant to these procedures have the force of law and are worthy of *Chevron* analysis.[147] Thus, the fact that the Magnuson Act does not require the NMFS to use notice and comment procedures when it issues the Guidelines supports the argument that the Guidelines do not merit analysis under *Chevron*.

It is also significant that the Magnuson Act refers to the NMFS documents that set forth its interpretations of the National Standards as "guidelines." The Court in *Mead* referred to agency guidelines as one of the typical examples of agency documents that do not merit analysis under

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143. 16 U.S.C. § 1851(b) (2000).

144. *Id.* §§ 1854(a)(1)(B), 1854(b).

145. *See* Tutein v. Daley, 43 F. Supp. 2d 113, 118-19 (D. Mass. 1999), *count dismissed*, 116 F. Supp. 2d 205 (D. Mass. 1999).

146. United States v. Mead Corp., 533 U.S. 218, 230-31 (2001); *see also* Barnhart v. Walton, 535 U.S. 212, 222 (2002).

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

*Chevron*.[148] Moreover, that the Magnuson Act refers to these Guidelines as "advisory" also indicates that they do not have the "force of law."[149]

One last reason a court may refuse to apply *Chevron* to the Guidelines is the legislative history of the 1983 amendment that added the provision stating the Guidelines "shall not have the force and effect of law." The House Report for that amendment stated that it

> clarifies the Committee's intent with respect to the effect of guidelines published by the Secretary of Commerce to assist in the development of FMPs. Thus, the bill adds a new sentence to section 301(b) stipulating that such guidelines shall not have the force and effect of law. The Committee intends that the National Standards themselves, and not the interpretation of such standards as contained in the guidelines, are the basis upon which the adequacy of any particular FMP is to be judged.[150]

This statement provides some insight into why Congress chose to stipulate that the Guidelines lack the force and effect of law. Neither in this statement nor in the amendment itself did Congress explicitly refer to the attitude that it wants courts to take in dealing with the Guidelines. The use of the passive voiee in the last clause of this statement ("to be judged") makes it difficult to determine whether Congress was referring to a reviewing court's judgment as to the consistency of a particular FMP with the National Standards, or to the Secretary's judgment on the same issue.

One might argue that Congress was referring to a court's, rather than the Secretary's, judgment. The Magnuson Act requires the Secretary to set forth his or her interpretation of the National Standards in the Guidelines.[151] It is reasonable to assume that the Secretary will use the same interpretation of the National Standards in deciding whether to approve a particular FMP as the interpretation he or she used in issuing the Guidelines. The Secretary is therefore likely to require that the FMP be consistent with the Guidelines, despite the provision in the Magnuson Act that the Guidelines lack "the force and effect of law." It is therefore unlikely that the amendment was intended to alter the way the Secretary judges an FMP or a regulation implementing an FMP for consistency with the National Standards. Instead, it is much more likely that Congress intended through the amendment to alter the way a reviewing court determines whether an FMP or a regulation implementing an FMP is consistent with the National Standards.

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148. *Id.* at 228 n.9, 229, 234. *See also* Erin R. Englebrecht, *Can Aquaculture Continue to Circumvent the Regulatory Net of the Magnuson-Stevens Fishery Conservation and Management Act?*, 51 EMORY L.J. 1187, 1239 (2002) (arguing that the Magnuson Act's use of the term "guidelines" to refer to the NMFS's Essential Fish Habitat Final Rules means that these Rules are not entitled to *Chevron* analysis pursuant to *Mead*).

149. 16 U.S.C. § 1851(b).

150. H.R. REP. No. 97-549, at 24 (1982).

151. 16 U.S.C. § 1851(b).

If Congress added the provision stating that the Guidelines lack the "force and effect of law" to alter the way a reviewing court determines whether an FMP or a regulation implementing an FMP is consistent with the National Standards, a strong argument exists that Congress intended to deprive the Guidelines of *Chevron* analysis. A court reviewing the Secretary's decision to approve an FMP or a regulation implementing an FMP is free to interpret the National Standards independently without reference to the Guidelines only if the Guidelines are not entitled to *Chevron* analysis. If the Guidelines are entitled to *Chevron* deference, the reviewing court must judge the Secretary's decision to approve the FMP or the regulation implementing an FMP by referring to the interpretations of the National Standards embodied in the Guidelines. Using the Guidelines, however, would contradict the statement in the legislative history that "[t]he Committee intends that the National Standards themselves, and not the interpretation of such standards as contained in the guidelines, are the basis upon which the adequacy of any particular FMP is to be judged."[152] This contradiction suggests that the Guidelines are not entitled to *Chevron* analysis. Under this interpretation, a court can effectuate congressional intent as expressed in the legislative history by refusing to grant *Chevron* analysis to the Guidelines. Strong arguments therefore support the idea that the Guidelines are not entitled to analysis under *Chevron* pursuant to *Mead.*

### B. *Reasons* Mead *Might Not Apply*

On the other hand, certain features of the Court's analysis in *Mead* suggest that a court should be more willing to grant *Chevron* analysis to the Guidelines than it was to grant this analysis to Customs's classification ruling letters. Although it is not required to do so,[153] the NMFS did in fact use notice and comment procedures to issue the Guidelines.[154] Customs, in contrast, is not required to and does not actually use notice and comment procedures to issue ruling letters.[155]

Does an agency interpretation of a statute carry the force of law when the agency used notice and comment procedures to issue it even though it was not required to do so?[156] The Court's bifurcated opinion in *Mead* did

152. H.R. REP. NO. 97-549, at 24.

153. *See* Tutein v. Daley, 43 F. Supp. 2d 113, 118-19 (D. Mass. 1999), *count dismissed*, 116 F. Supp. 2d 205 (D. Mass. 1999).

154. *See, e.g.*, National Standard Guidelines, 50 C.F.R. pt. 600 (2001) (describing the earlier publication of the proposed rule and the receipt of comments). *See also Tutein*, 43 F. Supp. 2d at 118-19.

155. United States v. Mead Corp., 533 U.S. 218, 230, 233 (2001).

156. *See* Englebrecht, *supra* note 148, at 1240 (noting that it is uncertain whether *Chevron* applies to the NMFS's Essential Fish Habitat Final Rules because the NMFS used notice and comment procedures to create these Rules but the Magnuson Act did not require it to do so).

not directly address this question. After its lengthy exposition on the importance of notice and comment procedures in its discussion of congressional intent, the Court pointed to the absence of these procedures a second time in its discussion of agency practice. This suggests that the agency's failure to use notice and comment procedures was independently significant. Thus, the fact that the NMFS used notice and comment procedures when it issued the Guidelines supports the argument that the Guidelines are worthy of analysis under *Chevron*, even though the Act did not require the NMFS to use these procedures.

Besides the agency's failure to use notice and comment procedures, the Court in *Mead* was also reluctant to grant *Chevron* analysis to Customs's ruling letters in *Mead* partly because Customs produces such letters frequently through its decentralized regional offices.[157] The Court noted that "[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."[158] Thus, the large number of documents at issue, the frequency with which the agency produced such documents, and the fact that they did not come from the agency headquarters discouraged the Court in *Mead* from analyzing Customs's ruling letters under *Chevron*.

The Guidelines, on the other hand, are few in number.[159] The NMFS has only amended the Guidelines a handful of times since they were first promulgated. The Guidelines exist as a unified section in the Code of Federal Regulations, rather than as a series of separate, unorganized documents, like Customs's ruling letters. Whereas the Customs Service allows its forty-six decentralized offices to issue classification ruling letters,[160] only the NMFS, a centralized agency within the Department of Commerce, is responsible for drafting the Guidelines. The NMFS has not delegated this responsibility to the Regional Councils; indeed, the Magnuson Act does not authorize the NMFS to do so.[161] In this way, the Guidelines differ dramatically from FMPs, FMP Amendments, and regulations implementing FMPs, which are all initially drafted by the Regional Councils. Therefore, because the Guidelines are the rare product of centralized agency decision making rather than the frequent creations of loosely connected regional offices, courts should be willing to analyze the Guidelines under *Chevron*.

Finally, Congress may have added the provision in the Magnuson Act that states that the Guidelines "shall not have the force and effect of law" for reasons other than to deprive the Guidelines of analysis under *Chevron*.

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157. *Mead*, 533 U.S. at 233.
158. *Id.*
159. *See* 50 C.F.R. pt. 600.
160. *Mead*, 533 U.S. at 233-34.
161. *See* 16 U.S.C. § 1851(b) (2000).

One could use the legislative history behind this provision to support this theory. The legislative history states that, by adding this provision, Congress intended that "the National Standards themselves, and not the interpretation of such standards as contained in the guidelines, are the basis upon which the adequacy of any particular FMP is to be judged."[162] This statement suggests that Congress was contemplating that the NMFS might find a particularly innovative FMP to be consistent with the National Standards but not the Guidelines. Thus the purpose of the provision in question may be to encourage the Secretary of Commerce to approve the innovative FMP in such a case, rather than to deprive the Guidelines of analysis under *Chevron*.

Congress may also have intended to shield the Guidelines from judicial review altogether. This interpretation is supported by the District Court's holding in *Tutein v. Daley*.[163] In that case, the plaintiffs challenged the Guideline that defines the term "overfished."[164] The plaintiffs argued that the term "overfished" is only used in the Magnuson Act to refer to a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis. Consequently, the plaintiffs argued the term should not be used to refer to situations where the stock size is too low for the achievement of this goal.[165] The plaintiffs further argued that the court had jurisdiction to review the Guideline under section 305(f)(1) of the Magnuson Act.[166]

Section 305(f)(1) states that "[r]egulations promulgated by the Secretary under this Act . . . shall be subject to judicial review."[167] The court in *Tutein v. Daley* reasoned that this provision provides for judicial review of the Guidelines only if the Guidelines constitute "regulations."[168] The court defined "regulations" as "legally binding obligations placed upon a council and/or the agency which have the force and effect of law."[169] The court then described the "regulations" that the Magnuson Act does provide for, the regulations implementing FMPs. According to the court, the regulations that implement FMPs have the force of law because the Act makes it "unlawful . . . for any person . . . to violate . . . any regulation."[170] The court contrasted these regulations with the Guidelines and noted the provision that states that the Guidelines "shall not have the force and effect of law."[171] The court said that subjecting a Guideline to

162. H.R. REP. No. 97-549, at 24 (1982).
163. 43 F. Supp. 2d 113 (D. Mass. 1999), *count dismissed*, 116 F. Supp. 2d 205 (D. Mass. 1999).
164. *Id.* at 115.
165. *Id.* at 115-16.
166. *Id.*
167. 16 U.S.C. § 1855(f)(1) (2000).
168. 43 F. Supp. 2d at 121.
169. *Id.*
170. 16 U.S.C. § 1857.
171. *Tutein*, 43 F. Supp. 2d at 121-22 (citing 16 U.S.C. § 1851(b)).

judicial review would "obviate and render superfluous this language."[172] This statement indicates that the court believed that the purpose of this provision was to avoid a grant of jurisdiction to a court to review the Guidelines.

There are thus at least two possible reasons why Congress might have added the provision stating that the Guidelines "shall not have the force and effect of law" other than to deprive the Guidelines of *Chevron* analysis. Congress may have intended this provision to encourage the Secretary to approve particularly innovative FMPs, or to avoid a grant of jurisdiction to a court to review the Guidelines. It is therefore unclear whether this provision was meant to deprive the Guidelines of analysis under *Chevron*. However, the Court's opinion in *Mead* demonstrated that Congress need not have intended to deprive an agency interpretation of analysis under *Chevron* for a court to decide that the agency interpretation is not entitled to this analysis. On the contrary, under *Mead* an agency interpretation does not qualify for *Chevron* deference as long as it was not promulgated in the exercise of congressionally delegated authority to make rules carrying the force of law. Because the plain meaning of the provision authorizing the Secretary of Commerce to issue the Guidelines does not delegate authority to make rules of this kind, it is unlikely that a court faced with the issue would hold that the Guidelines are entitled to analysis under *Chevron*.

## V
## REASONS WHY, DESPITE *MEAD*, COURTS ARE UNLIKELY TO INVALIDATE THE GUIDELINES

### A. *Statutory Preclusion of Judicial Review of the Guidelines*

Although a court would probably hold that the Guidelines are not entitled to *Chevron* analysis, it is unlikely that a court will ever invalidate any of these Guidelines. In fact, the Magnuson Act may preclude direct judicial review of the Guidelines.[173] If this is true, judicial review of the Guidelines can only occur indirectly. That is, a court can only review them after the NMFS has implemented thcm through an FMP and regulations implementing the FMP.

The plaintiffs in *Tutein v. Daley* argued that the court had jurisdiction to review the Guidelines under both the Magnuson Act and the APA.[174] Thus, after determining that the Magnuson Act fails to provide for judicial review of the Guidelines, the court addressed whether judicial review of the Guidelines is available under the APA.[175] The court held that the

172. *Id.* at 122.
173. *See id.* at 122-25.
174. *Id.* at 120.
175. *Id.* at 122.

Magnuson Act affirmatively precludes judicial review of the Guidelines under the APA.[176]

The court in *Tutein* began its analysis with a statement of the general presumption in favor of judicial review of agency action.[177] Section 704 of the APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[178] However, section 701(a) of the APA states that this authorization does not apply "to the extent that . . . statutes preclude judicial review."[179] The court therefore noted that the presumption in favor of judicial review may be overcome by proof of congressional intent to preclude such review, including "inferences of [congressional] intent drawn from the statutory scheme as a whole."[180] According to the court, the APA's exception for statutes that preclude judicial review generally applies only when "the existence of an alternative review procedure provide[s] 'clear and convincing evidence' of a legislative intent to preclude judicial review."[181] The court found that an alternative procedure existed for review of the Guidelines.[182] It cited the "elaborate and detailed administrative framework whereby councils and the Secretary . . . develop FMPs, propose regulations, review such regulations, conduct public hearings, respond to public comments and, within set periods of time, promulgate final regulations implementing an FMP."[183] These final regulations, the court emphasized, are subject to judicial review.[184]

The court in *Tutein* was therefore persuaded that the Magnuson Act sets forth "a definite path leading to judicial review," and the Guidelines are only a step in this process.[185] According to the court, the "comprehensive and time sensitive nature of this administrative process," and the "emphasis placed upon the development of regulations in contrast to the absence of such a process for advisory guidelines" indicate that Congress intended to preclude direct judicial review of the Guidelines.[186] The court also noted that allowing direct judicial review at the Guidelines stage of the administrative process would "severely disrupt the statutory scheme."[187] Instead, a court may review the Guidelines "[i]n the natural

176. *Id.* at 122-25.
177. *Id.* at 122.
178. 5 U.S.C. § 704 (2000).
179. 5 U.S.C. § 701(a).
180. *Tutein*, 43 F. Supp. 2d at 123 (citing Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984)).
181. *Id.* at 124 (citing Franklin v. Massachusetts, 505 U.S. 788, 820 n.21 (1992)).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 125.

coursc of events," that is, "in the context of a cause of action based on a rcgulation or actions taken by the Secretary implementing an FMP."[188] Thus, relying on the APA's exception for statutes that preclude judicial review, the court in *Tutein* introduced a major obstacle to judicial review of the Guidelines.

### B. *The Ripeness Doctrine*

The ripeness doctrine presents another major obstacle to direct judicial review of the Guidelines. Thus, even if a court disagreed with the court's holding in *Tutein* and found that judicial review of the Guidelines is not precluded by the Magnuson Act, it still might not reach the issue of deference, because it might find the Guidelines alone are not ripe for review.

The court in *Natural Resources Defense Council, Inc. v. Evans* addressed the issue of ripeness in the context of the Magnuson Act.[189] In that case, environmental organizations challenged the inclusion in an FMP Amendment of the mixed-stock exception, a provision in the Guidelines that permits overfishing if certain conditions are met.[190] The FMP Amendment at issue provided that the NMFS might increase the optimum yield "above the overfishing level as long as the harvest meets the mixed-stock exception in the National Standard Guidelines."[191] The NMFS argued that the issue of the mixed-stock exception was not ripe for review, even though it had been included within an FMP Amcndment.[192]

The court in *Natural Resources Defense Council, Inc. v. Evans* accepted the NMFS's argument after applying the Ninth Circuit's two-part test for ripeness. According to this test, whether a case is ripe for review depends on "(1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if [the court] decline[s] to consider the issucs."[193] Whether an issue is fit for judicial decision depends on whether the issue is "essentially legal in nature," and whether "further

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188. *Id.* at 124-25. The court in *Tutein* also distinguished the situation of the NMFS Guidelines from the situation at issue in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986). In that case, the Supreme Court held that the Packwood Amendment to the Magnuson Act impliedly authorized judicial review of the Secretary's failure to certify a foreign nation as diminishing the effectiveness of an international treaty establishing whaling quotas. *Id.* at 230 n.4. The court in *Tutein* held that the Magnuson Act did not similarly authorize judicial review of the Guidelines, because it was persuaded by congressional intent to the contrary. *Tutein*, 43 F. Supp. 2d at 123 n.16.

189. 168 F. Supp. 2d 1149, 1158-59 (N.D. Cal. 2001), *aff'd in part, vacated in part by* 316 F.3d 904 (9th Cir. 2003); *see also* Tutein v. Daley, 116 F. Supp. 2d 205, 207-09 (D. Mass. 1999); S.E. Fisheries Ass'n v. Mosbacher, 742 F. Supp. 692, 694-97 (D.D.C. 1990).

190. *See* 50 C.F.R. § 600.310(d)(6) (2001).

191. *Natural Res. Def. Council, Inc.*, 168 F. Supp. 2d at 1158 (quoting from the FMP Amendment).

192. *Id.*

193. *Id.* at 1159 (citing City of Auburn v. Qwest Corp., 247 F.3d 966, 976 (9th Cir. 2001)).

factual amplification is necessary."[194] The court found that the validity of the mixed-stock exception was not ripe for review because the NMFS had not yet applied this exception.[195] The court emphasized that the "particular facts underlying any NMFS decision to invoke the mixed-stock exception might bear significantly on the appropriateness of such a decision."[196] The court also found that postponing review would not impose hardship on the plaintiffs, because "there are no legally controlling rules or regulations to which the public must adhere."[197]

The test for ripeness that the Ninth Circuit used in *Natural Resources Defense Council, Inc. v. Evans* is slightly different from the Supreme Court's most recent test for ripeness as expressed in *Ohio Forestry Ass'n v. Sierra Club*.[198] According to the Supreme Court, in determining whether an issue is ripe for review, a court must consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[199] Although the Ninth Circuit in *Natural Resources Defense Council, Inc. v. Evans* addressed the first and third factors of this test with respect to the validity of the mixed-stock exception, it failed to address the second.[200] However, it seems clear that judicial review of the mixed-stock exception before the NMFS has ever applied this exception interferes with further action by the NMFS. Thus, the second factor of the Supreme Court's test for ripeness, like the first and third factors, weighs against a finding of ripeness with respect to the validity of the mixed-stock exception.

The Ninth Circuit's analysis of the ripeness issue in *Natural Resources Defense Council, Inc. v. Evans* is likely to be applicable whenever a plaintiff challenges an FMP or FMP Amendment that has not yet been implemented through regulations. More importantly, a very similar analysis is likely to apply whenever a plaintiff directly challenges the validity of an interpretation of the Magnuson Act contained within the Guidelines.

The first factor of the Court's test for ripeness—whether delayed review would cause hardship to the plaintiffs—will weigh against a finding of ripeness with respect to the Guidelines. Hardship to the plaintiffs

194. *Id.* (citing *Auburn*, 247 F.3d at 977).

195. *Id.*

196. *Id.*

197. *Id.* The court did not directly discuss whether the mixed-stock exception is "essentially legal in nature." *Id.* Since the court found that further factual development was necessary for a court to address the exception, it seems clear that the court did not think the issue was a purely legal one.

198. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998).

199. *Id.* at 733.

200. *See Natural Res. Def. Council, Inc.*, 168 F. Supp. 2d at 1159.

depends on whether they "command anyone to do anything or to refrain from doing anything; . . . grant, withhold, or modify any formal legal license, power, or authority; . . . subject anyone to any civil or criminal liability; . . . [or] create . . . legal rights or obligations."[201] It is hard to see how an agency interpretation that does not have the "force and effect of law" could accomplish any of these things. Thus, it is unlikely that a court will find that the Guidelines cause hardship to any plaintiff.

Moreover, unless the NMFS has implemented a provision of the Guidelines both through an FMP and regulations implementing the FMP, the issue of its validity is unlikely to meet the second and third factors of the Court's test for ripeness in *Ohio Forestry*. Any judicial review of the Guidelines before they have been implemented is likely to interfere with further action by the NMFS. Thus, the second factor will probably not be met because, as the court in *Tutein v. Daley* noted, allowing direct judicial review at the Guidelines stage of the administrative process would "severely disrupt the statutory scheme."[202]

Similarly, the issue of the validity of one of the Guidelines is also unlikely to meet the third factor of the Court's test in *Ohio Forestry*—whether "the courts would benefit from further factual development of the issues"[203]—unless the NMFS has implemented it through both an FMP and regulations implementing the FMP. Thus, the Ninth Circuit in *Natural Resources Defense Council, Inc. v. Evans* held that the issue of the mixed-stock exception was not ripe for review despite its having already been included within an FMP Amendment. This holding suggests how far the NMFS must go towards implementing a provision of the Guidelines before the validity of that provision can be challenged.[204] Not only must the NMFS include the provision of the Guidelines within an FMP or FMP Amendment, but the particular circumstances that make the provision applicable must exist before the issue of the validity of the provision is ripe for review. Otherwise, "the courts would benefit from further factual development of the issues."[205]

Thus, all three factors of the Court's test for ripeness in *Ohio Forestry* indicate that the ripeness doctrine is likely to prevent direct judicial review of the NMFS Guidelines. Any court faced with the issue of the validity of one of the Guidelines is therefore unlikely to find that the issue is ripe for review, unless the NMFS has implemented an interpretation of the Magnuson Act contained within the Guideline through an FMP and other implementing actions.

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201. *Ohio Forestry*, 523 U.S. at 733.

202. 43 F. Supp. 2d 113, 125 (D. Mass. 1999), *count dismissed*, 116 F. Supp. 2d 205 (D. Mass. 1999).

203. *Ohio Forestry*, 523 U.S. at 733.

204. *See also Tutein*, 43 F. Supp. 2d at 125.

205. *Ohio Forestry*, 523 U.S. at 733.

### C. Chevron *Analysis of FMPs and FMP-Implementing Regulations*

Most instances of judicial review under the Magnuson Act occur in the context of an FMP Amendment or a regulation implementing an FMP. Courts have also often assumed that the Magnuson Act provides for judicial review of FMP Amendments and that these Amendments are ripe for review, despite the court's holding in *Natural Resources Defense Council, Inc. v. Evans*.[206] The Magnuson Act also clearly provides for judicial review of FMP-implementing regulations,[207] and, because parties must comply with them or face civil penalties, citations, and/or vessel forfeitures,[208] the validity of such regulations is often ripe for review.[209] Plaintiffs challenging an FMP, FMP Amendment, or a regulation implementing an FMP often allege that the document they are challenging is inconsistent with the National Standards. Thus, courts addressing these challenges often face the issues presented by the interpretations of the Magnuson Act embodied in the Guidelines.[210] However, because these challenges are to FMPs, FMP Amendments, or regulations implementing FMPs, and not to the Guidelines themselves, the level of deference due these interpretations in these cases depends not on whether the Guidelines have the "force and effect of law," but on whether FMPs, FMP Amendments, and regulations implementing FMPs do.

Courts have frequently assumed that FMP Amendments and FMP-implementing regulations are entitled to *Chevron* analysis.[211] For example, in *Midwater Trawlers Cooperative v. United States*, the Ninth Circuit struck down a regulation that implemented an FMP by setting the 1999 alloeation of the Pacific Whiting fish for the Makah tribe.[212] The court found that this regulation was inconsistent with National Standard Two.[213] In doing so, it analyzed the allocation using the two-step *Chevron* framework.[214] The court found that the NMFS had set the allocation using a method of pure political compromise, rather than through an application of

206. *See, e.g.*, Associated Fisheries of Me. v. Daley, 127 F.3d 104 (1st Cir. 1997).

207. 16 U.S.C. § 1855(f)(1) (2000).

208. 16 U.S.C. §§ 1857-1858.

209. *See, e.g.*, Midwater Trawlers Coop. v. United States, 282 F.3d 710 (9th Cir. 2002); N.C. Fisheries Ass'n v. Evans, 172 F. Supp. 2d 792 (E.D. Va. 2001); Ace Lobster Co. v. Evans, 165 F. Supp. 2d 148 (D.R.I. 2001); Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150 (D.D.C. 2000); A.M.L. Int'l, Inc. v. Daley, 107 F. Supp. 2d 90, 101 (D. Mass. 2000).

210. *See, e.g.*, Natural Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 753 (D.C.Cir. 2000); *N.C. Fisheries Ass'n*, 172 F. Supp. 2d at 803 (citing 50 C.F.R. § 600.315(b) (2001)); *Blue Water Fisherman's Ass'n*, 122 F. Supp. 2d at 167; *A.M.L. Int'l, Inc.*, 107 F. Supp. 2d at 101; Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 220 (D.D.C. 1990).

211. *See, e.g.*, *Midwater Trawlers Coop.*, 282 F.3d at 720; *Natural Res. Def. Council*, 209 F.3d at 754; S. Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998), *injunction granted* 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

212. 282 F.3d 710.

213. *Id.* at 720-21.

214. *Id.* at 720.

scientific information.[215] Because the Magnuson Act clearly requires the NMFS to use the "best scientific information available,"[216] the court found that congressional intent was clear with respect to the issue at hand.[217] The court therefore resolved the issue at *Chevron* step one, the inquiry into whether the statute is clear, and did not address *Chevron* step two, the inquiry into whether the agency interpretation was reasonable.[218]

Similarly, in *Natural Resources Defense Council, Inc. v. Daley*, the District of Columbia Circuit invalidated a regulation that implemented an FMP through a quota for the 1999 summer flounder harvest.[219] The court in that case carefully explained the two-step *Chevron* analysis. The court chose to analyzc the quota under *Chevron* step two, rather than step one, because "[t]he statute does not prescribe a precise quota figure, so there is no plain meaning on this point."[220] Applying *Chevron* step two, the court found that the NMFS quota was not "a reasonable and permissible construction of the statute," because it failed to prove likely to prevent ovcrfishing and achieve the optimum yield, as required by National Standard One.[221]

On the other hand, in *Southern Offshore Fishing Ass'n v. Daley*, the court found that the NMFS's final rule setting the 1997 quota for the commercial shark fishery was entitled to deference under *Chevron*.[222] The court refused to find that the NMFS had failed to comply with National Standard Two in setting the 1997 quota. Citing *Chevron*, the court instead found that the NMFS's determination was "entitled to deference" because it was a "reasonable accommodation of manifestly competing interests."[223]

The Court's decision in *Mead* reaffirms the applicability of the *Chevron* doctrine to FMPs, FMP Amendments, and regulations implementing FMPs. Under *Mead*, when a statute requires that an agency use notice and comment procedures, statutory interpretations created using these procedures carry the force of law and are therefore entitled to *Chevron* analysis.[224] The Magnuson Act requires that notice and comment procedures be used to create FMPs, FMP Amendments, and regulations implementing FMPs.[225]

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215. *Id.*

216. 16 U.S.C. § 1851(a)(2) (2000).

217. *Midwater Trawlers Coop.*, 282 F.3d at 720.

218. *See id.*

219. 209 F.3d 747 (D.C. Cir. 2000).

220. *Id.* at 754.

221. *Id.*

222. 995 F. Supp. 1411 (M.D. Fla. 1998), *injunction granted*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

223. *Id.* at 1433 (citing Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 226-27 (D.D.C. 1990); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Ine., 467 U.S. 837, 865-66 (1984)).

224. United States v. Mead Corp., 533 U.S. 218, 230-31 (2001).

225. 16 U.S.C. § 1854(a)-(b) (2000).

In *Natural Resources Defense Council, Inc. v. Evans*, the court addressed whether notice and comment procedures were required for the annual specifications approved by the NMFS for the Pacific Groundfish fishery.[226] The NMFS argued that its annual speeifications do not constitute "regulations" implementing an FMP and were therefore not subject to notice and comment procedures.[227] In support of this contention, the NMFS pointed to the judicial review provisions of the Magnuson Act, which authorize judicial review not just for "regulations," but also for "actions taken by the Secretary."[228] The NMFS argued that the annual specifications were merely "actions" and not "regulations." The court, however, noted that the provision that mentions "actions" was meant merely to prevent the tolling of the statute of limitations when the NMFS takes an action pursuant to a regulation, rather than to exempt such actions from the requirements of notice and comment.[229] The court found that the annual specifications imposed "legally binding obligations which have the force and effect of law and carry with them the threat of civil penalties, citations, and/or vessel forfeitures," and were therefore "regulations."[230] The court also found that, even if the annual specifications are not "regulations" subject to notiee and comment procedures under the Magnuson Act, they are "rules" under the APA and therefore subject to notice and comment procedures under section 553 of that statute.[231]

It is therefore clear that the NMFS is required to use notice and comment procedures to issue FMP Amendments and regulations implementing FMPs. Under *Mead*, these documents must be analyzed under *Chevron*.[232] In most instances when a court faces one of the Guidelines, the Guideline has been implemented through one of these documents.[233] Because these documents are entitled to *Chevron* analysis, any court confronted with the issue will probably find that the Guideline as implemented is also entitled to *Chevron* analysis.

226. 168 F. Supp. 2d 1149, 1155-57 (N.D. Cal. 2001).

227. *Id.* at 1155.

228. *Id.* (citing 16 U.S.C. § 1855(f)).

229. *Id.*

230. *Id.* (citing Tutein v. Daley, 43 F. Supp. 2d 113, 121 (D. Mass. 1999), *count dismissed*, 116 F. Supp. 2d 205 (D. Mass. 1999)).

231. *Id.* at 1156.

232. *See* United States v. Mead Corp., 533 U.S. 218, 230-31 (2001).

233. *See, e.g.*, Natural Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 753 (D.C.Cir. 2000); N.C. Fisheries Ass'n v. Evans, 172 F. Supp. 2d 792, 803 (E.D. Va. 2001) (citing 50 C.F.R. § 600.315(b) (2001)); Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150, 167 (D.D.C. 2000) (collecting cases); A.M.L. Int'l, Inc. v. Daley, 107 F. Supp. 2d 90, 101 (D. Mass. 2000); Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 220 (D.D.C. 1990).

### D. The Thirty-Day Statute of Limitations

Even when the NMFS has implemented a Guideline through an FMP Amendment or a regulation implementing an FMP, the thirty-day statute of limitations may still prevent judicial review of the Guideline.[234] Courts have not hesitated to enforce this time limit.[235] In fact, courts have demanded that plaintiffs identify with a high degree of specificity which particular regulatory provisions they are challenging, so that the courts may determine when the statute of limitations began to run for those particular provisions. For example, in *North Carolina Fisheries Ass'n v. Evans*, members of the fishing industry tried to obtain judicial review of the emergency and final rules that set the 2001 quotas for the summer flounder fishery.[236] The plaintiffs alleged that the system used to calculate these quotas favored recreational fishers over commercial fishers.[237] The court found that five of the plaintiffs' seven claims were time barred.[238] The court reasoned that these claims arose in 1992 when an amendment to the relevant FMP instituted the system at issue. The 2001 quotas merely continued to use the system instituted in 1992. Thus the time for challenging the system had long passed.[239]

In combination with the requirements of the ripeness doctrine, the statute of limitations places a heavy burden on potential challengers to NMFS actions under the Magnuson Act. While a challenger must wait for the relevant issue to be ripe for review, if he or she waits too long, the statute of limitations may have run. The effect of these rules is especially striking for someone who desires to directly challenge one of the Guidelines. The NMFS has infrequently amended these Guidelines. Thus, the statute of limitations has probably already run for anyone who wishes to challenge the essential principles underlying the Guidelines.

Moreover, even if a plaintiff challenges the Guidelines only indirectly through their implementation in an FMP, FMP Amendment, or a regulation implementing an FMP, a court may reason as the court in *North Carolina Fisheries Ass'n v. Evans* did, and pierce through to the date of the original Guideline. If the court sees the plaintiff as challenging the legal principle contained within the Guideline, rather than as challenging the FMP, FMP

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234. 16 U.S.C. § 1855(f)(1).

235. *See, e.g.*, *N.C. Fisheries Ass'n*, 172 F. Supp. 2d at 798-99; Connecticut v. Daley, 53 F. Supp. 2d 147, 161-62 (D. Conn. 1999), *aff'd*, 204 F.3d 413 (2d Cir. 2000).

236. 172 F. Supp. 2d at 796.

237. *Id.* at 796-97.

238. *Id.* at 798-99.

239. *Id.* The plaintiffs also argued that certain FMP Amendments in 1999 failed to comply with the equality provisions that were added to the Magnuson Act in the 1996 Amendments. They argued that the emergency and final rules that they were challenging were the first regulations to implement these FMP Amendments. *Id.* at 799. The court disagreed, noting that the NMFS had published final specifications for the fishery each year from 1999 through 2001, and the plaintiffs could have made the same challenge to those specifications. *Id.*

Amendment, or regulation implementing the FMP, the court may view the statute of limitations as having begun to run when the Guideline was promulgated, rather than when the document in question was promulgated. If this is the case, the plaintiff's challenge will probably be time barred. The statute of limitations therefore presents another obstacle to judicial review of the Guidelines.

### *E. The Mootness Doctrine*

Like the thirty-day statute of limitations, the doctrine of mootness often prevents judicial review of regulations implementing FMPs. For example, in *Gulf of Maine Fishermen's Alliance v. Daley*, the First Circuit dismissed on mootness grounds an action by an association of commercial fishers to challenge a series of closures of the Gulf of Maine groundfish fishery.[240] The New England Fisheries Management Council (NEFMC), with the acquiescence of the NMFS, had promulgated a regulation known as "Framework 25," which instituted a series of closures of this fishery.[241] The fishers' association sued.[242] However, while the case was pending, the NEFMC adopted "Framework 27," which modified and expanded the closures instituted in Framework 25.[243] Framework 25 was therefore no longer in effect, so the court dismissed the action as moot,[244] even though the particular elosure that the plaintiffs were challenging had been readopted in Framcwork 27 and later Frameworks.[245]

Aecording to the First Circuit, "a case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome of the controversy.'"[246] According to the court, "[t]he promulgation of new regulations and amendment of old regulations are among [the] intervening events as can moot a challenge to" a regulation.[247] Thus, the promulgation of Framework 27 had mooted the plaintiffs' challcnge to Framework 25.

The plaintiffs also argued that their claims, although moot, were still aetionable under the exception to the mootness doctrine for actions that are, by their nature, "capable of repetition, yet evading review."[248] The court rebuffed this argument because there was no evidence that "the challenged action was in its duration too short to be fully litigated prior to its cessation

240. 292 F.3d 84 (1st Cir. 2002).
241. *Id.* at 86-87.
242. *Id.* at 87.
243. *Id.*
244. *Id.*
245. *Id.* at 88.
246. *Id.* at 87 (quoting Thomas R.W. v. Mass. Dept. of Educ., 130 F.3d 477, 479 (1st Cir. 1997).
247. *Id.* at 88.
248. *Id.*

or expiration."[249] According to the court, "[n]ew fishing regulations are not promulgated so quickly . . . that all timely legal challenges are inevitably precluded."[250] The court pointed to the fact that at least one Framework had been fully litigated before being superseded by a new Framework, and that the plaintiffs in the present case sought numerous extensions of time during the litigation process.[251]

One can easily see how the mootness doctrine presents difficulties for potential litigants in the context of fisheries conservation and management under the Magnuson Act. The status of any given fishery is constantly changing due to the natural variations in population size and shifting environmental conditions. The agencies charged with fisheries management and conservation must continually revise and update their regulations in response to these changes. Thus, by the time a court addresses a challenge to one of these regulations, the NMFS may well have adopted another regulation to supersede the challenged one. Under these circumstances, the court may dismiss the case as moot. This situation may arise even if the litigant properly raised the challenge within the thirty-day statute of limitations. The mootness doctrine therefore presents another obstacle to judicial review under the Magnuson Act. Like the other doctrines discussed in this Part, this obstacle might arise when the NMFS issues a regulation implementing an FMP based on the principles set forth in the Guidelines, and thereby might prevent a court from addressing the issue of the deference due to the Guidelines.

### F. *Stare Decisis*

As explored in Part II.D above, the courts have extensively relied on the Guidelines for the appropriate interpretations of the National Standards. Because of the long-standing nature of this reliance, many of these interpretations have become binding precedent.[252] For example, the Guidelines for National Standard Two state that the Secretary may prepare and implement an FMP even though the scientific information concerning the fishery is incomplete.[253] Although this proposition is not explicitly stated in the Magnuson Act, courts have nevertheless come to accept it. In fact, in *Ace Lobster Co. v. Evans*, the court found sufficient precedent for this proposition in other district court and court of appeals cases that it treated this proposition as a settled matter of law.[254] The court therefore cited to these cases for this proposition rather than to the Guidelines.[255]

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249. *Id.* at 89.
250. *Id.*
251. *Id.*
252. *See* Ace Lobster Co. v. Evans, 165 F. Supp. 2d 148, 176-77 (D.R.I. 2001).
253. 50 C.F.R. § 600.315(b) (2001).
254. 165 F. Supp. 2d 148, 176-77 (D.R.I. 2001) (collecting cases).
255. *Id.*

The court in *Ace Lobster* also addressed the validity of the uniform trap cap regulations for the lobster fishery under National Standard Four,[256] which requires that fishing privileges be allocated fairly and equitably among fishers of different states.[257] The Guidelines explain that this standard forbids FMPs to differentiate between residents of different states, but does not forbid conservation measures that simply have different impacts on residents of different states. This differential allocation, however, must be justified both in tcrms of the FMP's conservation objectives and by a weighing of the hardships imposed by the allocation against the benefits to the fishery overall.[258]

After citing extensively to these Guidelines, the court in *Ace Lobster* described in detail three court cases in which the courts upheld allocations of fishing privileges against allegations that they violated National Standard Four.[259] In each of these cases, the court followed the logic set forth in the Guidelines and rejected a claim based on the disparate effects of the allocations on different groups of fishers.[260] Each of these three courts upheld the allocation at issue because it was justified by its conservation goals and because the allocation's likely benefits to the fishery outweighed the hardship imposed on certain groups of fishers. The court in *Ace Lobster* found that the precedent provided by the Guidelines and these three cases was enough to support the notion that an allocation that impacts fishers in different states differently may be valid. It therefore upheld the uniform trap cap regulations against the plaintiffs' challenge.[261]

As the court's decision in *Ace Lobster* demonstrates, the courts' extensive reliance on the Guidelines suggests many of the important substantive principles embodied therein have now become accepted law. Thus, despite the Court's decision in *Mead*, a court is unlikely to set forth an interpretation of one of the National Standards that differs from the Guidelincs.

### G. *The* Skidmore *Doctrine*

According to the Court in *Mead*, an agency interpretation of a statute that is not entitled to *Chevron* analysis may still be entitled to some deference pursuant to *Skidmore*.[262] If a court faces a challenge to the validity of

256. *Id.* at 179 (citing 50 C.F.R. § 600.325).

257. 16 U.S.C. § 1851(a)(4) (2000).

258. 50 C.F.R. § 600.325.

259. *Ace Lobster*, 165 F. Supp. 2d at 178-81 (citing Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996); Alaska Factory Trawlers Ass'n v. Baldridge, 831 F.2d 1456 (9th Cir. 1987); Sea Watch Int'l v. Mosbacher, 762 F. Supp. 370 (D.D.C. 1991)).

260. *See id.*

261. *Id.*

262. United States v. Mead Corp., 533 U.S. 218, 234-35 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

one of the Guidelines, and the challenge is not barred by the doctrines of statutory preclusion of review, ripeness, mootness, or the running of the statute of limitations, the court will probably find that the Guidelines are not entitled to *Chevron* analysis. Nevertheless, the Guidelines may be entitled to analysis under *Skidmore.* The Court in *Mead* held that *Skidmore* deference is appropriate whenever the agency at issue has available to it "specialized experience and broader investigations and information."[263] "Such a ruling," the Court said, "may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[264] This level of deference was appropriate for the Customs's classification ruling letter at issue in *Mead* because "the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case."[265]

Similarly, the regulatory scheme for fisheries conservation and management is also highly complex, and the NMFS often bases its determinations on speeialized seientific knowledge. Courts addressing challenges to NMFS actions under thc Magnuson Act often refer to the deference due to the NMFS's scientific expertise.[266] For example, in *Associated Fisheries of Maine v. Daley,* the court called for "special deference to an agency's scientific expertise where . . . that expertise is applied in areas within the agency's specialized field of competence."[267] Courts are conscious of the high degree of detail present in the Magnuson Act's fisheries management scheme. They are aware that determinations regarding the long-term health and well-being of fisheries require a high level of scientifie expertise, as well as sensitivity to ecosystem effects.[268] It is therefore very likely that a court faced with the interpretation of the National Standards in the Guidelines will find that the NMFS's interpretations of the Magnuson Act are entitled to *Skidmore* deference. Thus, despite the Court's decision in *Mead,* the courts are likely to continue to uphold the Guidelines and the environmentally sensitive interpretations of the Magnuson Act contained therein.

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263. *Id.* at 234 (quoting *Skidmore,* 323 U.S. at 139).

264. *Id.* at 235.

265. *Id.*

266. *See, e.g.,* Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150, 163 (D.D.C. 2000) (holding that a determination by the NMFS was "within the agency's discretion"); Nat'l Fisheries Inst. v. Mosbacher, 732 F. Supp 210, 223 (D.D.C. 1990) (deferring to the NMFS's determination of which conservation and management measures are in the nation's "best interest" because the resolution of this issue "implicate[d] substantial agency expertise" so that it was "appropriate . . . to defer to the expertise and experience of [the agency].").

267. 127 F.3d 104, 110 (1st Cir. 1997).

268. *See, e.g., id.*; *Blue Water Fisherman's Ass'n,* 122 F. Supp. 2d at 163; *Nat'l Fisheries Inst.,* 732 F. Supp. at 223.

## CONCLUSION

There are many reasons why a court is unlikely to hold that the NMFS's National Standard Guidelines are not entitled to deference based on the Supreme Court's decision in *Mead.* Notwithstanding the provision of the Magnuson Act that states that these Guidelines "shall not have the force and effect of law," there are several reasons why *Chevron* deference may still be appropriate pursuant to *Mead.* Moreover, a court is unlikely to ever reach the issue of the deference due to the Guidelines, because the ripeness and mootness doctrines, the statutory preclusion of review, and the Magnuson Act's thirty-day statute of limitations all present formidable obstacles to judicial review of the Guidelines. If a court does manage to address the issue of the validity of one of the Guidelines, it may find that the Guideline's interpretation of the Magnuson Act has already become binding precedent through the decisions of other courts. Lastly, a court addressing one of the Guidelines may find that, even if no other court has addressed the particular Guideline at issue, the NMFS's interpretation of the Magnuson Act embodied in the Guideline is entitled to deference under *Skidmore*.

In the context of the Magnuson Act, it is easy to see why Congress was not eager to allow direct judicial review of the Guidelines. As the court in *Tutein v. Daley* noted, the Magnuson Act provides a "definite path leading to judicial review" of fishery conservation and management measures after they have been fully implemented by the NMFS.[269] During the process of implementation, Congress preferred members of the fishing industry and environmentalists to focus their efforts on the Regional Councils, who draft the initial versions of FMPs, FMP Amendments, and regulations implementing these actions.[270] Members of the fishing industry often dominate the Regional Councils and therefore have a direct role in the creation of FMPs, FMP Amendments, and regulations implementing FMPs.[271] Congress also provided procedures through which the NMFS must notify the public when it is considering fisheries management measures and through which the public may comment on these measures before they are implemented.[272] Thus, Congress meant to encourage participation and cooperation in fisheries management and avoid excessive litigation regarding the appropriateness of particular measures. Because the Guidelines further the goal of an ecological approach to fisheries

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269. 43 F. Supp. 2d 113, 124 (D.Mass. 1999), *count dismissed*, 116 F. Supp. 2d 205 (D. Mass. 1999).

270. *See* 16 U.S.C. § 1852 (2000).

271. Many commentators have criticized the domination of the Regional Councils by members of the fishing industry. *See, e.g.*, David A. Dana, *Overcoming the Political Tragedy of the Commons: Lessons Learned From the Reauthorization of the Magnuson Act*, 24 ECOLOGY L.Q. 833, 842 (1997); Shelley et al., *supra* note 108, at 237-38.

272. 16 U.S.C. § 1854(a)-(b).

management, avoiding judicial scrutiny of the Guidelines allows the NMFS to pursue its environmental goals without unnecessary litigation.

The effect of the Supreme Court's decision in *Mead* in other areas of law could potentially be substantial. The status of the Guidelines is not unlike the status of many documents and reports created by other administrative agencies.[273] Even within fisheries management, the statutory scheme created by the Magnuson Act provides several agencies other than the NMFS with opportunities to participate in the process. The Regional Councils are the primary examples.[274] Another example is the Atlantic States Marine Fisheries Commission, a body created by Congress to prepare FMPs for fisheries within the three-mile Atlantic coastal zone governed by the states and for fisheries that exist in both federal and state waters on the Atlantic coast.[275] The proper attitude for the courts towards the recommendations and findings of these agencies is a subject of much debate.[276]

Although the Court's decision in *Mead* modifies the application of traditional doctrines of judicial deference to administrative agencies, courts should not be quick to abandon their previous practice with respect to such agency interpretations. As this Comment demonstrates, there are many reasons the analysis set forth in *Mead* may be largely irrelevant to a court's treatment of a particular agency interpretation of a statute. There are often other doctrines of administrative law that present formidable obstacles to judicial review of agency interpretations. Frequently, these obstacles, like traditional rules of judicial deference to administrative agencies, prevent undue interference with the agency's administration of the statutory scheme. The existence of these obstacles minimizes the need for rules requiring judicial deference to administrative agencies and decreases the importance of such rules. For these reasons, the importance of doctrines of judicial deference to administrative agencies and the significance of the Court's decision in *Mead* should not be overestimated.

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273. *See, e.g.*, Reno v. Koray, 515 U.S. 50, 61 (1995) (diseussing the deference due to the Bureau of Prisons' "Program Statement"); Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 157 (1991) (referring to the "OSHA Field Operations Manual" as "entitled to some weight"); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-58 (1991) (holding that EEOC guidelines are only entitled to *Skidmore* deference); Cmty. Hosp. of Monterey Peninsula v. Thompson, Nos. 01-17512, 02-15115, 2003 WL 1221933 (9th Cir. 2003) (holding that the Secretary of Health and Human Services's "Provider Reimbursement Manual" is not entitled to *Chevron* deference).

274. *See* 16 U.S.C. § 1852.

275. 16 U.S.C. §§ 5102-5108 (2002).

276. *See, e.g.*, Connecticut v. Daley, 53 F. Supp. 2d 147, 163-79 (D. Conn. 1999), *aff'd*, 204 F.3d 413 (2d Cir. 2000) (upholding the Secretary of Commerce's decision to defer to the recommendations of the Atlantie Commission and Mid-Atlantic Fishery Management Council); N.C. Fisheries Ass'n v. Brown, 917 F. Supp. 1108, 1115 (E.D. Va. 1996) (holding that the Secretary of Commerce cannot impose a moratorium on the harvesting of weakfish without a recommendation from the Atlantic Commission); J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1156-59 (E.D. Va. 1995) (considering the force and effect of the "supply year policies" of the Mid-Atlantic Council).