



MEMORANDUM

September 13, 2010

To: Hon. Barney Frank
Attention: Bruno Frietas

From: Adam Vann, Legislative Attorney, 7-6978

Subject: **The Authority to Issue “Emergency” Regulations Pursuant to Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act**

You have asked us to determine the extent of the authority of the Secretary of Commerce (Secretary) to promulgate regulations to address an “emergency” pursuant to Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens). Specifically, you have asked whether this emergency authority includes the authority to promulgate such regulations to address economic conditions. Because the statute does not define what constitutes an “emergency” that triggers the Secretary’s emergency authority, and the legislative history does not shed light on the interpretation of the language, it appears possible that action taken by the Secretary in response to an economic “emergency” could likely withstand judicial review, so long as the Secretary’s determination that the conditions in question constituted an “emergency” was a reasonable one.

Section 305(c) of Magnuson-Stevens provides that “[i]f the Secretary finds that emergency exists ... he may promulgate emergency regulations ... necessary to address the emergency ... without regard to whether a fishery management plan exists for such fishery.”¹ The Section further authorizes the regional Fishery Management Councils to take similar action in case of emergency or overfishing. These emergency regulations are effective for up to 180 days without the usual procedural requirements that apply to most agency rulemakings, and may be extended for an additional 186 days provided the public is given an opportunity to comment and, in the case of Council action, the Council is actively preparing a fishery management plan.²

There is no indication in the statute as to what does or does not constitute an “emergency” triggering the authority to issue emergency regulations under Magnuson-Stevens. Furthermore, the decision to issue emergency regulations even if there is a finding that an emergency (or overfishing) exists is a discretionary one. Section 305(c) provides that the Secretary “*may* promulgate emergency regulations or interim measures necessary to address the emergency or overfishing,”³ not that the Secretary “shall” or “must” promulgate emergency regulations or interim measures to address the emergency or overfishing.

¹ 16 U.S.C. § 1855(c)(1).

² *Id.* at § 1855(c)(3).

³ *Id.* at § 1855(c)(1) (emphasis added).

Therefore, the decisionmaking process regarding the issuance of emergency regulations pursuant to Section 305(c) is left to the discretion of the Secretary.

Were the Secretary to exercise this discretion to promulgate emergency regulations upon a finding of an “economic emergency,” any legal challenge to the Secretary’s actions would be subject to the judicial review requirements found in Section 305(f) of Magnuson-Stevens. Under Section 305(f):

Regulations promulgated by the Secretary under this Act ... shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, United States Code ... except that ... the appropriate court shall only set aside any such regulation ... on a ground specified in Section 706(2)(A), (B), (C), or (D) of such title.

The relevant review provisions of “Section 706” cited in Section 305(f) of Magnuson-Stevens are taken from the Administrative Procedure Act (APA).⁴ The provisions provide that agency actions, findings, and conclusions shall be held unlawful and set aside if they are found to be: (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) unsupported by substantial evidence.⁵ Any successful legal challenge to an emergency rulemaking by the Secretary in response to an economic situation would need to demonstrate that the Secretary’s decision to categorize the economic situation as an “emergency” would fall into one of these categories. The most likely avenue for legal challenge would be a claim that the Secretary’s actions under 305(c) in determining that an economic condition constitutes an emergency was “in excess of statutory jurisdiction, authority or limitations, or short of statutory right.”⁶

The leading case on judicial review of agency interpretation of the authority granted to them by a statute is *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*⁷ This case involved the Environmental Protection Agency’s rules defining “stationary source” for purposes of nationwide regulation of emissions under the Clean Air Act. In *Chevron*, the Court enunciated a two-step test for judicial review of an agency’s interpretation of its own statute: (1) Has Congress “directly spoken to the precise question at issue?” and (2) if Congress has not done so and “the statute is silent or ambiguous with respect to the specific issue,” is the agency’s answer “based on a permissible construction of the statute?”⁸ Under *Chevron* step one, if Congress has spoken directly to the question at issue, then *Chevron* deference is not due and the Court “must give effect to the unambiguously expressed intent of Congress.”⁹ If Congress’s intent is unclear or if Congress is silent, the courts’ role at *Chevron* step two is to defer to any reasonable agency interpretation of the pertinent statutory language.¹⁰

⁴ 5 U.S.C. Subchapter II.

⁵ 5 U.S.C. § 706(2).

⁶ *Id.*

⁷ 467 U.S. 837 (1984) (*Chevron*). For a fuller discussion of *Chevron*, see CRS Report R41260, *The Jurisprudence of Justice John Paul Stevens: The Chevron Doctrine*, by Todd Garvey.

⁸ *Chevron*, 467 U.S. at 842-43. The *Chevron* Court also discussed express and implied congressional delegations of legislative authority to agencies: “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 843-44.

⁹ *Id.* at 843.

¹⁰ *Id.* at 843.

Applying the *Chevron* two-part test to a hypothetical determination by the Secretary that an economic condition constitutes an “emergency” triggering the Secretary’s authority to issue emergency regulations, it seems clear that Congress has not directly spoken to the precise question at issue. The question, then, is whether the Secretary’s interpretation of the scope of Section 305(c) authority is “based on a permissible construction of the statute.”

It seems possible that a determination by the Secretary that certain economic conditions constitute an emergency would be “based on a permissible construction” of the language in Section 305(c) of Magnuson-Stevens. Congress did not offer guidance in the statute as to what constitutes an “emergency” for purposes of authorizing the Secretary to promulgate emergency or interim measures in Magnuson-Stevens. In addition, a search of the legislative history revealed no insight as to the limits Congress intended to place on the Secretary’s authority under Section 305(c) of Magnuson-Stevens. As the Court stated in *Chevron*, when Congressional intent is unclear, as it appears to be in this case, courts will defer to “any reasonable interpretation” of the statute.¹¹ It seems likely that at least some economic conditions or situations could rise to the level of an “emergency” under a reasonable interpretation, although it is difficult to predict how a court might evaluate an exercise of the Secretary’s Section 305(c) authority in response to a particular condition or situation.

At least one other agency has exercised its own “emergency” rulemaking authority in response to economic conditions. The regulations governing the U.S. Forest Service authorize the Chief and the Associate Chief of the Service to “make the determination that an emergency situation exists.”¹² Such a determination allows for work to begin on a project as soon as that decision is published in the Federal Register.¹³ These Forest Service regulations define an “emergency situation” to include “[a] situation on National Forest Service lands ... that would result in substantial economic loss to the Federal Government if implementation of the decision were delayed.”¹⁴

Finally, it should be noted that the National Marine Fisheries Service (the division of the Department of Commerce tasked with stewardship of the nation’s living marine resources and their habitat) has previously attempted to define its emergency rulemaking authority. In its revised Policy Guidelines for the Use of Emergency Rules,¹⁵ NMFS listed the justifications for emergency action. Among the categories of “Emergency Justification” is an “Economic” emergency, defined as action “to prevent significant direct economic loss or preserve a significant economic opportunity that otherwise might be foregone.”¹⁶ Our research did not reveal any legal challenges to this characterization of Section 305(c) authority.

¹¹ *Chevron*, 467 U.S. at 843.

¹² 36 C.F.R. § 215.10(a).

¹³ *Id.* at § 215.10(c).

¹⁴ *Id.* at § 215.2.

¹⁵ Document is available at <https://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/procedures/01-101-07.pdf>. This document “simply puts the original guidance in the required directive format.” *Id.* The Policy Guidelines were originally published at 62 Fed. Reg. 44421 (August 21, 1997).

¹⁶ *Id.* at 2.