

1 UNITED STATES COURT OF APPEALS  
2  
3 FOR THE SECOND CIRCUIT  
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5  
6 August Term, 2009  
7

8 (Argued: March 9, 2010 Decided: June 29, 2010)  
9

10 Docket No. 09-1594-cv  
11  
12

13 STATE OF NEW YORK, NEW YORK STATE  
14 DEPARTMENT OF ENVIRONMENTAL CONSERVATION,  
15 and ALEXANDER B. GRANNIS,  
16

17 *Plaintiffs,*  
18

19 UNITED BOATMEN OF NEW YORK, INC., NEW YORK  
20 FISHING TACKLE TRADE ASSOCIATION, INC., and  
21 FISHERMEN'S CONSERVATION ASSOCIATION,  
22

23 *Intervenor-Plaintiffs-Appellees,*  
24

25 -v.-  
26

27 ATLANTIC STATES MARINE FISHERIES COMMISSION,  
28

29 *Defendant-Appellant,*  
30

31 GARY LOCKE, UNITED STATES DEPARTMENT OF  
32 COMMERCE, CONRAD C. LAUTENBACHER, NATIONAL  
33 OCEANIC AND ATMOSPHERIC ADMINISTRATION, and  
34 JAMES W. BALSIGER,  
35

36 *Defendants.\**  
37  
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\* The Clerk of the Court is directed to amend the official caption as set forth above.

1 Before: LEVAL, SACK, and WESLEY, *Circuit Judges*.

2  
3 Interlocutory appeal from an order of the United States  
4 District Court for the Eastern District of New York (Sifton,  
5 J.), entered on March 9, 2009, denying the Atlantic States  
6 Marine Fisheries Commission's motion to dismiss the  
7 complaint in intervention and certifying to this Court the  
8 question of whether the Atlantic States Marine Fisheries  
9 Commission is subject to suit under the Administrative  
10 Procedure Act. We hold that the Atlantic States Marine  
11 Fisheries Commission is not a federal agency within the  
12 meaning of the Administrative Procedure Act. We further  
13 hold that, assuming its validity, the "quasi-federal" agency  
14 doctrine is inapplicable to the facts of this dispute.  
15 Consequently, intervenor-plaintiffs cannot maintain a cause  
16 of action against the Commission under the Administrative  
17 Procedure Act.

18  
19 REVERSED and REMANDED.

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21 \_\_\_\_\_  
22 SEAN H. DONAHUE, Donahue & Goldberg, LLP,  
23 Washington, D.C., *for Appellant*.

24  
25 SHAUN M. GEHAN, Kelley Drye & Warren LLP,  
26 Washington, D.C. (Philip L. Curcio, Melville,  
27 N.Y., *on the brief*), *for Appellees*.

28  
29 \_\_\_\_\_  
30 WESLEY, *Circuit Judge*:

31 For 68 years, the Atlantic States Marine Fisheries  
32 Commission ("ASMFC" or the "Commission") has endeavored to  
33 promote the utilization and protection of the fisheries of  
34 the Atlantic seaboard. The Commission is the product of a  
35 congressionally approved interstate compact authorized by  
36 Article I, § 10, clause 3 of the United States Constitution.

1 This interlocutory appeal requires us to determine whether  
2 the intervenor-plaintiffs, United Boatmen of New York, Inc.,  
3 New York Fishing Tackle Trade Association, Inc., and the  
4 Fishermen's Conservation Association (collectively  
5 "intervenor-plaintiffs" or "United Boatmen"), may assert a  
6 claim under section 702 of the Administrative Procedure Act,  
7 5 U.S.C. § 702 (the "APA"), to seek judicial review of the  
8 Commission's decisions.

9 In essence, the premise of United Boatmen's complaint  
10 in intervention is a simple one: intervenor-plaintiffs  
11 maintain that the Commission is more than a congressionally  
12 authorized state cooperative agreement. In the view of the  
13 intervenor-plaintiffs, ASMFC is a federal agency, or at  
14 least acts so much like one that we should treat it as one  
15 for purposes of the APA.

16 We hold that the ASMFC is not a federal agency within  
17 the meaning of the APA; it is not an "authority of the  
18 [g]overnment of the United States." 5 U.S.C. § 701(b)(1).  
19 We further hold that, in this case, the "quasi-federal"  
20 agency doctrine should not be used to expand the statutory  
21 definition of an agency under the APA. Thus, United Boatmen  
22 are not entitled, pursuant to 5 U.S.C. § 702, to seek

1 judicial review of the actions of the Commission. We  
2 therefore reverse and remand this matter to the district  
3 court for further proceedings consistent with the opinion of  
4 this Court.

#### 5 I. BACKGROUND

6 This case arises from disputes over the management of  
7 the summer flounder fishery off of the Atlantic coast. In  
8 response to a decrease in the stock of summer flounder, also  
9 known as fluke, regulatory "efforts have been made to  
10 conserve and restore the population." *Connecticut v. U.S.*  
11 *Dep't of Commerce*, 204 F.3d 413, 414 (2d Cir. 2000). The  
12 Atlantic seaboard states retain primary authority over the  
13 conservation and management of fisheries within the  
14 "territorial sea" – waters within three miles of shore, as  
15 well as in rivers and estuaries. The federal government is  
16 responsible for regulation of the "exclusive economic zone"  
17 – waters from three to 200 miles from shore. See 16 U.S.C.  
18 §§ 1801(b)(1), 1856(a), 5102(6); see also *Sea Hawk Seafoods,*  
19 *Inc. v. Locke*, 568 F.3d 757, 760 (9th Cir. 2009); *United*  
20 *Boatmen v. Gutierrez*, 429 F. Supp. 2d 543, 546 (E.D.N.Y.  
21 2006).

1           The facts and procedural history of this controversy  
2 are set out in detail in the opinions of the district court.  
3       *See New York v. Gutierrez*, No. 08 Civ. 2503 (CPS) (RLM),  
4 2008 WL 5000493, at \*1-4 (E.D.N.Y. Nov. 20, 2008); *see also*  
5 *New York v. Locke*, No. 08 Civ. 2503 (CPS) (RLM), 2009 WL  
6 2413463, at \*1-2 (E.D.N.Y. Aug. 3, 2009); *New York v. Locke*,  
7 No. 08 Civ. 2503 (CPS) (RLM), 2009 WL 1194085, at \*1-7  
8 (E.D.N.Y. Apr. 30, 2009); *New York v. Gutierrez*, 623 F.  
9 Supp. 2d 301, 305-06 (E.D.N.Y. 2009). A brief review of the  
10 facts and history of this case is all that is needed to  
11 provide context for our decision.

12           This suit was commenced by the State of New York, the  
13 Commissioner of the New York State Department of  
14 Environmental Conservation, and the New York State  
15 Department of Environmental Conservation (collectively "New  
16 York State plaintiffs"), against the Secretary of the United  
17 States Department of Commerce, the United States Department  
18 of Commerce, the Under Secretary of Commerce and  
19 Administrator for the National Oceanic and Atmospheric  
20 Administration, the National Oceanic and Atmospheric  
21 Administration, and the Acting Assistant Administrator for  
22 the National Marine Fisheries Service (collectively "federal

1 defendants").<sup>1</sup> The New York State plaintiffs contend that  
2 the final management rule for the 2008 recreational summer  
3 flounder fishery violates the Magnuson-Stevens Fishery  
4 Conservation and Management Act, as amended in 1996 by the  
5 Sustainable Fisheries Act, 16 U.S.C. § 1801 *et seq.* (the  
6 "MSA"), and the APA, 5 U.S.C. § 706(2) (A).<sup>2</sup>

7 Intervenor-plaintiffs in this action are private groups

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<sup>1</sup> As a result of this Court's holding, intervenor-plaintiffs' claims against ASMFC must be dismissed. The New York State plaintiffs' suit against the federal defendants will continue in the district court. See 623 F. Supp. 2d at 316. On July 24, 2009, the New York State plaintiffs filed a complaint challenging the management measures for the 2009 summer flounder season. *New York v. Locke*, 09 Civ 3196 (NG) (RLM) (E.D.N.Y. July 24, 2009). In this iteration of the litigation, the New York State plaintiffs named as defendants both the federal defendants and the ASMFC.

<sup>2</sup> On March 4, 2010 counsel for the New York State plaintiffs sent a letter to the district court arguing that "[b]ecause the same issues underlying this action are recurring, . . . the expiration of the 2008 management measures has not rendered [the case] moot." Letter to the Honorable Nina Gershon by Alexander B. Grannis, New York State Department of Environmental Conservation, *Grannis, et al. v. Locke, et al.*, 08 Civ. 2503 (E.D.N.Y. Mar. 4, 2010) (Gershon, J.) (D. Ct. Doc. No. 148). Although the 2008 management measures have expired, we agree that because "(1) the challenged action [is] in its duration too short to be fully litigated prior to its . . . expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again," the controversy is not moot. *Van Wie v. Pataki*, 267 F.3d 109, 114 (2d Cir. 2001) (alterations in original).

1 who maintain that the New York State plaintiffs failed to  
2 adequately represent their interests in defining the scope  
3 of their suit. United Boatmen of New York, Inc. is a  
4 professional trade organization that represents the for-hire  
5 fishing vessel industry in New York. Members of United  
6 Boatmen derive a substantial portion of their revenue from  
7 sport fishing for summer flounder. The New York Fishing  
8 Tackle Trade Association, Inc. is a professional trade  
9 organization that represents the wholesale and retail bait  
10 and tackle dealer industry in New York. The Fishermen's  
11 Conservation Association is a non-profit organization whose  
12 members are individual recreational anglers who target,  
13 among other species, summer flounder in state and federal  
14 waters contiguous to New York State.

15 In 1942, the ASMFC was created by a congressionally  
16 approved interstate compact ("ASMFC Compact"). See Pub. L.  
17 No. 77-539, 56 Stat. 267 (1942), *as amended by* Pub. L. No.  
18 81-721, 64 Stat. 467 (1950); *see also* U.S. Const. art. I, §  
19 10, cl. 3. The purpose of the Compact "is to promote the  
20 better utilization of the fisheries . . . of the Atlantic  
21 seaboard" through a "joint program for the promotion and  
22 protection of such fisheries." ASMFC Compact, art. I. The

1 Compact specifically provides that it shall not "be  
2 construed to limit the powers of any signatory state or to  
3 repeal or prevent the enactment of any legislation or the  
4 enforcement of any requirement by any signatory state  
5 imposing additional conditions and restrictions to conserve  
6 its fisheries." ASMFC Compact, art. IX.

7 Each member state appoints three representatives to the  
8 Commission.<sup>3</sup> ASMFC Compact, art. III. The Compact requires  
9 that these representatives be the state's director of marine  
10 fisheries, a state legislator, and a citizen with knowledge  
11 relevant to the regulation of marine fisheries. *Id.* The  
12 signatories to the ASMFC "exercise joint regulatory  
13 oversight of their fisheries through the development of  
14 interstate fishery management plans." *R.I. Fishermen's*  
15 *Alliance, Inc. v. R.I. Dep't of Env'tl. Mgmt.*, 585 F.3d 42,  
16 46 (1st Cir. 2009); *accord Medeiros v. Vincent*, 431 F.3d 25,  
17 27 (1st Cir. 2005). From the inception of the ASMFC until

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<sup>3</sup> The ASMFC Compact was ratified by Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Pennsylvania, and the District of Columbia. ASMFC Compact, arts. II, XII, § 2; see also *R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Env'tl. Mgmt.*, 585 F.3d 42, 46 (1st Cir. 2009).



1 1993, participation in the interstate fishery management  
2 plans adopted by the Commission was voluntary. *Medeiros*,  
3 431 F.3d at 27. Consequently, "compliance was spotty." *Id.*

4 In 1993, Congress adopted the Atlantic Coastal  
5 Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101-5108  
6 (the "ACFCMA"), in order to give the ASMFC some "teeth."  
7 *R.I. Fishermen's Alliance*, 585 F.3d at 46. Congress sought  
8 to accomplish this goal by mandating state participation in  
9 the interstate fishery management plans promulgated by the  
10 Commission. 16 U.S.C. § 5104(a)(1). Pursuant to the  
11 ACFCMA, a plan must "specify the requirements necessary for  
12 [s]tates to be in compliance," and the ASMFC must "identify  
13 each [s]tate that is required to implement and enforce that  
14 plan." *Id.* The Commission is obligated to review member  
15 states' "implementation and enforcement of coastal fishery  
16 management plans" and "report the results of the reviews" to  
17 the Secretary of Commerce. *Id.* § 5104(c).

18 Under the ACFCMA, the Secretary of Commerce is  
19 empowered to make an independent finding regarding whether a  
20 state has failed to implement management measures and, if  
21 so, "whether the measures that the [s]tate has failed to  
22 implement and enforce are necessary for the conservation of

1 the fishery in question.” *Id.* § 5106(a)(2). If the  
2 Secretary makes a determination of noncompliance with  
3 respect to “necessary” measures, he or she “shall declare a  
4 moratorium on fishing in the fishery in question within the  
5 waters of the noncomplying [s]tate.” *Id.* § 5106(c)(1).

6 The congressional findings accompanying the ACFCMA note  
7 that “[b]ecause no single governmental entity has exclusive  
8 management authority for Atlantic coastal fishery resources,  
9 harvesting of such resources is frequently subject to  
10 disparate, inconsistent, and intermittent [s]tate and  
11 [f]ederal regulation that has been detrimental to the  
12 conservation and sustainable use of such resources.” *Id.* §  
13 5101(a)(3). The ACFCMA explicitly affirms, however, that  
14 the “responsibility for managing Atlantic coastal fisheries  
15 rests with the [s]tates, which carry out a cooperative  
16 program of fishery oversight and management through the  
17 Atlantic States Marine Fisheries Commission.” *Id.* §  
18 5101(a)(4).

19 On July 16, 2008, United Boatmen moved to intervene in  
20 the action commenced by the New York State plaintiffs and to  
21 join the Commission as a defendant. See 2008 WL 5000493, at  
22 \*5-14. The court granted United Boatmen’s motion and

1 "decline[d] to limit the scope of [United Boatmen's]  
2 intervention to the parties and issues asserted in [the New  
3 York] plaintiffs' complaint."<sup>4</sup> *Id.* at \*13. The court  
4 concluded that the New York State plaintiffs' "failure to  
5 join ASMFC as a defendant constituted nonfeasance," *id.*,  
6 sufficient to rebut the presumption of adequate  
7 representation present when a state brings suit in its  
8 capacity as *parens patriae*, see, e.g., *United States v.*  
9 *Hooker Chem. & Plastics Corp.*, 749 F.2d 968, 984-85 (2d Cir.  
10 1984); see also *United States v. City of N.Y.*, 198 F.3d 360,  
11 367 (2d Cir. 1999). Following the district court's  
12 decision, intervenor-plaintiffs filed their complaint in

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<sup>4</sup> The district court improperly concluded that the ASMFC was subject to joinder, by motion of the intervenor-plaintiffs, pursuant to Federal Rule of Civil Procedure 19(a)(1)(A). "Except in extraordinary cases, . . . intervenors may only join issue on a matter that has been brought before the court by another party[.] They cannot expand the proceedings." *Lamprecht v. Fed. Comm'n Comm'n*, 958 F.2d 382, 389 (D.C. Cir. 1992) (internal quotation marks and citations omitted). United Boatmen's motion should have been evaluated under Federal Rule of Civil Procedure 15(c). Nonetheless, the "general rule that an intervening party may join issue only on a matter that has been brought before the court by another party" is only a "prudential restraint," and therefore does not impair this Court's ability to reach the questions certified for interlocutory review. *Synovus Fin. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 952 F.2d 426, 434 (D.C. Cir. 1991) (internal quotation marks and brackets omitted).

1 intervention on December 19, 2008.

2 ASMFC brought a motion to dismiss United Boatmen's  
3 complaint in intervention for failure to state a claim. 623  
4 F. Supp. 2d at 306; see also Fed. R. Civ. P. 12(b)(6). In  
5 support of its motion to dismiss, ASMFC pointed out that  
6 neither its governing Compact<sup>5</sup> nor any federal statute  
7 provide a private right of action to seek judicial review of  
8 its regulatory decisions.<sup>6</sup> More importantly for purposes of  
9 this litigation, the Commission maintained that the  
10 provisions of the APA, which provide a right of action

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<sup>5</sup> By contrast, other interstate compacts do provide for judicial review. *E.g.*, Washington Metropolitan Transit Regulation Compact, Pub. L. No. 101-505, art. XIII, § 5(a), 104 Stat. 1300, 1312 (1990); Tahoe Regional Planning Compact, Pub. L. No. 96-551, art. VI(j)(3), 94 Stat. 3233, 3247 (1980); Northeast Dairy Compact, § 16(C), S.J. Res. 28, 104th Cong. (1995).

<sup>6</sup> The district court properly rejected the idea that United Boatmen could avail themselves of an implied right of action. *Gutierrez*, 2008 WL 5000493, at \*9. "[T]he Supreme Court has come to view the implication of private remedies in regulatory statutes with increasing disfavor." *Hallwood Realty Partners, LP v. Gotham Partners, LP*, 286 F.3d 613, 618 (2d Cir. 2002). An implied private right of action exists only if Congress intended to create such a right. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). In looking to the "text and structure," *id.* at 288, of the ASMFC Compact and the ACFCMA, we find no exception to the ordinary rule is warranted. On appeal, United Boatmen do not seek to imply a cause of action from the ASMFC Compact or the ACFCMA.

1 against federal agencies, 5 U.S.C. §§ 701(b)(1), 702, do not  
2 apply to action by an interstate compact entity.<sup>7</sup>

3 The district court denied ASMFC's motion to dismiss.  
4 623 F. Supp. 2d at 305. The court concluded that  
5 intervenor-plaintiffs could maintain a claim against the  
6 Commission under section 702 of the APA based on the theory  
7 that the Commission is a "quasi-federal" agency. *Id.* at  
8 311. In so holding, the district court concluded that  
9 "allowing ASMFC['s] actions essentially to escape judicial  
10 review [would be] inappropriate." *Id.* at 312. The district  
11 court then granted the Commission's request for  
12 certification of its order for interlocutory appeal. 28  
13 U.S.C. § 1292(b). A panel of this Court granted leave to  
14 appeal the interlocutory order of the district court.

15 On appeal, the Commission advances largely the same

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<sup>7</sup> In support of its motion to dismiss, the Commission also made an alternative argument that it should be accorded Eleventh Amendment immunity from suit. The district court rejected this argument. 623 F. Supp. 2d at 311; see also *Alabama v. N. Carolina*, No. 132-orig, 2010 WL 2160786, at \*15 n.5 (June 1, 2010); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40-41 (1994); *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009). In light of our determination that the Commission is not subject to suit under the APA, we decline to address the district court's sovereign immunity ruling.

1 arguments that it did before the district court.  
2 Essentially, ASMFC argues that intervenor-plaintiffs'  
3 complaint should be dismissed as it pertains to the  
4 Commission because it is not a federal agency; therefore,  
5 intervenor-plaintiffs may not seek review of the  
6 Commission's fishery management decisions under the APA. By  
7 contrast, intervenor-plaintiffs urge us to affirm the  
8 district court's determination that the Commission is a  
9 "quasi-federal" agency subject to suit under the APA.  
10 Intervenor-plaintiffs also suggest that this Court take an  
11 even stronger position than the one adopted by the district  
12 court and find that the Commission is actually a federal  
13 agency for the purpose of regulating coastal fishing  
14 activities. We hold that the Commission is not subject to  
15 suit by United Boatmen under the APA.

## 16 **II. DISCUSSION**

17 The coverage of the APA, including its judicial review  
18 provisions, is governed by the statutory definition of the  
19 term "agency." Thus, we must first look to the text, see  
20 *Sec. & Exch. Comm'n v. Dorozhko*, 574 F.3d 42, 46 (2d Cir.  
21 2009), of section 701(b)(1), which provides a definition of  
22 this term. See *Bailey v. United States*, 516 U.S. 137, 144

1 (1995). Other authorities have "characteriz[ed] the APA  
2 definition as 'not very satisfactory.'" *Lee Constr. Co.,*  
3 *Inc. v. Fed. Reserve Bank*, 558 F. Supp. 165, 173 (D. Md.  
4 1982) (quoting 1 K. Davis, *Administrative Law Treatise* §  
5 1.01, at 1 & n.1 (1958)); see also *Soucie v. David*, 448 F.2d  
6 1067, 1073 (D.C. Cir. 1971) (stating the APA's "statutory  
7 definition of 'agency' is not entirely clear"). We agree  
8 that we cannot say that the meaning of agency as defined by  
9 the APA is so "plain on its face" as to end our inquiry.  
10 *E.g., Barszcz v. Dir., Office of Workers' Comp. Programs &*  
11 *Elec. Boat Corp.*, 486 F.3d 744, 749 (2d Cir. 2007). While  
12 this may not be a case where our "inquiry should end" with  
13 the text, *but see United States v. Ron Pair Enters., Inc.*,  
14 489 U.S. 235, 241 (1989), the text of the APA does provide  
15 significant guidance.

16 Examination of the definition of a federal agency, as  
17 provided by the APA, reveals that the ASMFC Compact does not  
18 fall within the scope of the statute. In reaching this  
19 conclusion, "[w]e consider not only the bare meaning of  
20 [the] word" agency, *Bailey*, 516 U.S. at 145, but also the  
21 purpose of the APA and the structure and function of the

1 Commission. We further hold that, assuming the validity of  
2 the "quasi-federal" agency doctrine, even on its own terms,  
3 it does not apply to the Commission.

4 **A. The Statutory Definition of Agency Does not Encompass**  
5 **the Commission**

6  
7 The provisions of the APA "provide[] the statutory  
8 structure upon which federal administrative law is built."  
9 *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1012 (9th Cir.  
10 2000) (internal quotation marks omitted and alteration in  
11 original). The APA states that "[a] person suffering legal  
12 wrong because of agency action, or adversely affected or  
13 aggrieved by agency action . . . is entitled to judicial  
14 review thereof." 5 U.S.C. § 702. Under the APA the term  
15 "agency" is defined as an "authority of the [g]overnment of  
16 the United States." 5 U.S.C. § 701(b)(1); see also *Old Town*  
17 *Trolley Tours of Wash., Inc. v. Wash. Metro. Area Transit*  
18 *Comm'n*, 129 F.3d 201, 204 (D.C. Cir. 1997). Despite this  
19 express definition, courts that have wrestled with its  
20 application have declared that the "law on the simple  
21 question of what is an agency is quite complex." *McKinney*  
22 *v. Caldera*, 141 F. Supp. 2d 25, 31 (D.D.C. 2001) (quoting  
23 *Lee Constr. Co.*, 558 F. Supp. at 172). These courts have



1 emphasized "the need to examine the structure, function, and  
2 mandate" of the entity in question in determining whether it  
3 falls within the definition set out in the APA. *Id.* at 33;  
4 see also *Wash. Research Project, Inc. v. Dep't of Health,*  
5 *Educ. & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir. 1974).

6 The APA definition expressly excludes certain entities,  
7 such as Congress and the federal courts. 5 U.S.C. §  
8 701(b)(1)(A)-(B); see also *id.* § 701(b)(1)(C)-(H). Although  
9 an interstate compact entity is not specifically exempted  
10 from the definition, this "textual silence, when read  
11 against the backdrop of . . . the canons of construction  
12 applicable to statutes that implicate the separation of  
13 powers, points," *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C.  
14 Cir. 1991), to the conclusion that the ASMFC is not a  
15 federal agency within the meaning of the APA. "It is  
16 axiomatic that the statutory definition of the term excludes  
17 unstated meanings of that term." *Meese v. Keene*, 481 U.S.  
18 465, 484 (1987); see also *Day v. Shalala*, 23 F.3d 1052, 1064  
19 & n.12 (6th Cir. 1994) (concluding that a state entity  
20 administering a federal program was not subject to the  
21 requirements of the APA because the APA applies only to

1 federal agencies). In any event, the statutory exclusions  
2 from the coverage of the APA applies only to bodies that  
3 would otherwise be "authorit[ies] of the [g]overnment of the  
4 United States." 5 U.S.C. § 701(b)(1). We find that the  
5 Commission is not such an authority.

6 The wording of section 701(b)(1) indicates that we  
7 should not give the definition of "agency" a more expansive  
8 reading. See *United States v. Angelilli*, 660 F.2d 23, 31  
9 (2d Cir. 1981). The text of the APA tells us what the term  
10 agency "means." 5 U.S.C. § 701(b)(1). We have previously  
11 interpreted the word "means" as a more restrictive statutory  
12 term than another term that could have been selected by  
13 Congress in defining surrounding statutory language.  
14 *Angelilli*, 660 F.2d at 31. We read it that way here. For  
15 example, the definitional language of the APA would have a  
16 different meaning if it told us that an agency "includes"  
17 various governmental authorities. See *id.*

18 The fact that the ASMFC was created by an interstate  
19 compact and approved by Congress does not alter this  
20 analysis. We find that the APA's definition of a federal  
21 agency does not fit the Commission. The ASMFC Compact  
22 states that the "Commission shall be a body corporate, with

1 the powers and duties set forth" in the Compact. ASMFC  
2 Compact, art. III. Although the Commission acts in parallel  
3 with the federal government in managing the stock of summer  
4 flounder off of the Atlantic coast, it exists outside the  
5 federal administrative law framework. And, it would upset  
6 the "federal-state balance," *Armstrong*, 924 F.2d at 289, to  
7 subject its actions to accountability measures devised to  
8 restrain the actions of federal authorities. *Cf. Fed.*  
9 *Commc'ns Comm'n v. Fox Television Stations, Inc.*, - U.S. -,  
10 129 S. Ct. 1800, 1817 (2009).

11 The regulation of the territorial sea is a matter  
12 traditionally left to the states. *See In re Air Crash Off*  
13 *Long Island, New York, on July 17, 1996*, 209 F.3d 200, 204  
14 (2d Cir. 2000). Fishery management in the exclusive  
15 economic zone, however, is governed by federal authorities  
16 pursuant to the MSA.<sup>8</sup> With one enumerated exception, see 16

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<sup>8</sup> The MSA establishes "eight Regional Fishery Management Councils," 16 U.S.C. § 1852(a)(1), that are responsible for preparing fishery management plans for federal waters, *id.* § 1852(h)(1). The Secretary of Commerce has final authority to approve each plan developed under the MSA. *Id.* § 1854. Parties who allege that they are aggrieved by regulations adopted by the Secretary have a right to judicial review, *id.* § 1855(f), conducted in accord with the review provisions of the APA, 5 U.S.C. § 701 *et seq.* *See Connecticut*, 204 F.3d at 414-16.

1 U.S.C. § 1856(b), the MSA states that it shall not “be  
2 construed as extending or diminishing the jurisdiction or  
3 authority of any [s]tate within its boundaries,” *id.* §  
4 1856(a)(1). Of course, summer flounder move freely between  
5 state and federal waters. *Cf. City of Charleston v. A*  
6 *Fisherman’s Best, Inc.*, 310 F.3d 155, 160 (4th Cir. 2002)  
7 (recognizing that the habitat for swordfish spans both  
8 federal and state waters). Thus, coordinated regulatory  
9 activities make good sense in this context. However, the  
10 fact that federal and state entities act toward a common  
11 goal does not convert the state – or interstate – body into  
12 a federal one.

13 Although interstate compacts are contemplated by the  
14 Constitution, U.S. Const. art. I, § 10, cl. 3, and subject  
15 to congressional approval, we cannot escape the fact that  
16 the entity itself is an aggregation of states. While “an  
17 interstate compact or agreement becomes federal law if it is  
18 a congressionally sanctioned interstate compact within the  
19 meaning of the Compact Clause of the Constitution,” *NYSA-ILA*  
20 *Vacation & Holiday Fund v. Waterfront Comm’n*, 732 F.2d 292,  
21 297 (2d Cir. 1984), it does not follow that the Commission  
22 is a federal agency. To hold otherwise would have the

1 effect of treating every congressionally authorized  
2 interstate compact entity, regardless of the body's  
3 structure and function, into a federal "agency" for purposes  
4 of the APA. For reasons explained below, we do not think  
5 this result was intended by Congress.

6 The authority exercised by ASMFC under the Compact is  
7 not federal in nature. The signatory states have agreed to  
8 coordinate their regulatory activity in order to "promote  
9 the better utilization of the fisheries." ASMFC Compact,  
10 art. I. But, there is no indication that the contracting  
11 states understood themselves to be compacting to create a  
12 federal agency. "Interstate compacts . . . are presumed to  
13 be the subject of careful consideration before they are  
14 entered into, and are drawn by persons competent to express  
15 their meaning, and to choose apt words in which to embody  
16 the purposes of the . . . contracting parties." *New Jersey*  
17 *v. Delaware*, 552 U.S. 597, 615-16 (2008) (internal quotation  
18 marks omitted). We therefore decline to find that ASMFC is  
19 anything other than a state cooperative agreement, from  
20 which states are free to withdraw upon notice to the other  
21 member states. ASMFC Compact, art. XII.

22 While it is true that there is a "strong presumption

1 that Congress intends judicial review of administrative  
2 action," *Sharkey v. Quarantillo*, 541 F.3d 75, 84 (2d Cir.  
3 2008) (internal quotation marks omitted), that presumption  
4 is only available with regard to the administrative acts of  
5 federal agencies as defined in the APA. See *Bowen v. Mich.*  
6 *Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986),  
7 *superseded on other grounds by* Omnibus Budget Reconciliation  
8 Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874, 2037-38  
9 (1986). United Boatmen maintain that their claim should be  
10 accorded this presumption because the enactment of the  
11 ACFCMA rendered ASMFC a federal agency. We disagree.  
12 United Boatmen assume the conclusion they seek to reach.  
13 ASMFC is simply not an authority of the United States. The  
14 "primary purpose," *Elliott Assocs., LP v. Banco de la*  
15 *Nacion*, 194 F.3d 363, 371 (2d Cir. 1999), of the APA is not  
16 to reach contracts between states. And, the language of the  
17 ACFCMA makes it clear that the authority to regulate the  
18 summer flounder fishery within the territorial sea remains  
19 with the states and that the federal government plays only a  
20 supporting role in this endeavor. 16 U.S.C. § 5101(a)(4).  
21 Therefore, we hold that ASMFC does not satisfy the  
22 definition of an agency as set forth in § 701(b)(1) of the

1 APA.

2 **B. The "Quasi-Federal" Agency Doctrine Does Not Bring the**  
3 **Commission Within the Meaning of the Term Agency under**  
4 **the APA**

5  
6 The court below maintained that "whether Congress  
7 designates an entity as a federal agency does not end the  
8 inquiry as to whether the entity in fact operates as a  
9 federal agency."<sup>9</sup> *Gutierrez*, 623 F. Supp. 2d at 307. The  
10 district judge opined that if the ASMFC "had become so  
11 federal in character" that it should be regarded as a  
12 "quasi-federal" agency, then it would be amenable to suit by  
13 the intervenor-plaintiffs under the APA. *Id.* at 308. Thus,  
14 the court found that, "[i]n light of [the] substantial  
15 federal involvement in the Commission, it is not  
16 unreasonable to conclude that, despite state sovereignty  
17 concerns, ASMFC should be treated as a 'quasi-federal  
18 agency' and subjected to a private right of action under the  
19 APA." *Id.* at 312.

20 The district court relied on decisions of several other  
21 courts that have acknowledged this doctrine. *See Am.*

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<sup>9</sup> While this may be true as a matter of semantics, Congress must do more than authorize the formation of an interstate body and coordinate its regulatory activities with this body to bring it within the reach of the APA.

1 *Trucking Ass'n, Inc. v. Del. River Joint Toll Bridge Comm'n*,  
2 458 F.3d 291, 304 n.10 (3d Cir. 2006); *Heard Commc'ns, Inc.*  
3 *v. Bi-State Dev. Agency*, 18 F. App'x 438, 439-40 (8th Cir.  
4 2001) (per curiam) (unpublished disposition); *Elcon Enters.,*  
5 *Inc. v. Wash. Metro. Area Transit Auth.*, 977 F.2d 1472,  
6 1479-80 (D.C. Cir. 1992).<sup>10</sup> We find these decisions

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<sup>10</sup> No circuit court of appeals has adopted the "quasi-agency" doctrine in a published decision. Only the Eighth Circuit Court of Appeals has endorsed the analysis that underpins the "quasi-agency" doctrine. *Heard Commc'ns*, 18 F. App'x at 440. In any event, for the reasons expressed in this opinion, we are not persuaded that the doctrine – even as expressed by the courts that have accepted it – is properly invoked here. Indeed, no circuit court has applied the doctrine to bring an entity that does not otherwise meet the definition of an agency under § 701(b)(1) within the judicial review provisions of the APA. In *American Trucking Association*, the Third Circuit concluded that the appellants had waived the issue of whether or not review under the APA was available; therefore, it did not decide the issue. 458 F.3d at 304 n.10. Thus, this case cannot properly be read as an endorsement of the "quasi-federal" agency doctrine. The Eighth Circuit expressly held that the bi-state compact that was the subject of the litigation in *Heard Communications* was "not a quasi-federal agency subject to the APA." 18 F. App'x at 439. In *Elcon*, the Court of Appeals for the District of Columbia simply assumed, without deciding, that the Washington Metropolitan Transit Authority was a federal agency. 977 F.2d at 1480. It appears that this doctrine is the creation of several district courts. *E.g., Seal & Co., Inc. v. Wash. Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1154-56 (E.D. Va. 1991); *Coal. for Safe Transit, Inc. v. Bi-State Dev. Agency*, 778 F. Supp. 464, 467-68 (E.D. Mo. 1991) (citing *Union Switch & Signal, Inc. v. Bi-State Dev. Agency*, No. 91-1401C (7) (E.D. Mo. Oct. 23, 1991) (unpublished disposition)).



1 unpersuasive. Taken together, this authority provides scant  
2 support for the "quasi-federal" agency doctrine. Indeed, we  
3 are skeptical of the validity of this judge-created concept.

4 It is clear to us, at the very least, that the "quasi-  
5 federal" agency doctrine – whatever its merit – does not  
6 apply to the Commission. The lower court was of the view  
7 that the "quasi-federal" agency cases identify "three  
8 factors relevant to whether a compact authority warrants the  
9 quasi-federal agency classification." 623 F. Supp. 2d at  
10 308 (internal quotation marks omitted). However, the court  
11 forthrightly acknowledged that two of the three factors do  
12 not apply to the ASMFC. With that concession, the court  
13 implicitly recognized that, given the facts of this case,  
14 designation as a "quasi-federal" agency is an ill-fitting  
15 means by which to describe the ASMFC. Nonetheless, the  
16 district court concluded that, irrespective of other  
17 considerations, federal involvement in the activities of the  
18 Commission warranted a finding that it is a "quasi-federal"  
19 agency. We disagree.

20 By its nature, there will always be federal involvement  
21 in a congressionally approved interstate compact. We are  
22 unpersuaded, however, that this requires us to subject what

1 is, at its core, a contract between states to the judicial  
2 review provisions of the APA. The ASMFC is a body comprised  
3 "only of its constituent" states. *Cf. Saunders v. Wash.*  
4 *Metro. Area Transit Auth.*, 359 F. Supp. 457, 460 (D.D.C.  
5 1973). A finding that the ASMFC is a "quasi-federal" agency  
6 would be in tension with its governing Compact, which serves  
7 as a contractual agreement between the member states. The  
8 structure and composition of the ASMFC weigh against  
9 characterizing it as a "quasi-federal" agency. We may infer  
10 that congressional approval of the ASMFC was granted as a  
11 means of aiding the contracting states in their regulatory  
12 activities. *Cf. Doe v. Pennsylvania Bd. of Probation &*  
13 *Parole*, 513 F.3d 95, 104 (3d Cir. 2008). And, Congress  
14 chose to endorse the creation of this regulatory body  
15 comprised of states rather than preempt the area by creating  
16 an *actual* federal agency. *See A Fisherman's Best*, 310 F.3d  
17 at 169.

18 Beyond federal involvement, the fact that federal  
19 interests are implicated by the activities of the Commission  
20 does not transform ASMFC into a federal entity subject to  
21 suit under the APA. *See California v. Sierra Club*, 451 U.S.  
22 287, 297-98 (1981). "An interstate compact represents a

1 political compromise between constituent elements of the  
2 Union." *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528,  
3 542 (8th Cir. 2004) (internal quotation marks omitted).  
4 Congress may often have an interest in the terms of such a  
5 compromise, but this does not lead us to conclude that  
6 private parties are therefore entitled to assert a claim  
7 against the compact as if it were a federal agency.

8       The import of the district court's reasoning is that,  
9 because sound policy choices animate the APA, these policies  
10 must apply to the Commission; we again disagree. The  
11 district court in essence created a presumption of APA  
12 coverage for any entity whose functions may implicate  
13 federal interests. It noted: "Congress may not, through  
14 legislation imposing federal obligations, oversight,  
15 funding, or otherwise, transform an entity into something  
16 closely resembling a federal agency, and yet escape the  
17 accountability mechanism it intended to apply to such  
18 federal agencies - unless, of course, it specifically  
19 provides that the APA shall not apply to the entity in  
20 question." *Gutierrez*, 623 F. Supp. 2d at 307. The basis  
21 for the district court's observation that the Commission  
22 "closely resembl[es]" a federal agency eludes us. And,

1 regardless of whether or not it would be desirable, as a  
2 policy matter, to extend the reach of the APA to the ASMFC,  
3 we see no basis to expand the definition of "agency" so as  
4 to allow it to reach the ASMFC. Congress and the states may  
5 work in partnership in the interest of a common regulatory  
6 goal without subjecting an interstate body to review  
7 provisions designed to apply to federal agencies.

8 Even assuming, without deciding, that there may be  
9 circumstances in which Congress has endowed an entity that  
10 is not an "authority of the [g]overnment of the United  
11 States," 5 U.S.C. § 701(b)(1), with attributes that make it  
12 so similar to a federal agency that it is subject to the  
13 judicial review provision of the APA, the district court  
14 erred in concluding that the ASMFC is a "quasi-federal"  
15 agency. We hold that, in the absence of other factors not  
16 present in this case, the acts of Congress in approving the  
17 interstate Compact, in adopting the ACFCMA, and in providing  
18 funding to the Commission,<sup>11</sup> did not transmogrify the ASMFC  
19 into a "quasi-federal" agency. *See Seattle Master Builders*

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<sup>11</sup> Pursuant to the ASMFC Compact, the signatory states also "make annual appropriations to the support of the Commission." ASMFC Compact, art. XI.

1 *Ass'n v. Pac. Nw. Elec. Power & Conservation Planning*  
2 *Council*, 786 F.2d 1359, 1364 (9th Cir. 1986); *but see Heard*,  
3 18 F. App'x at 440.

4 The APA is designed, at least in part, to ensure that  
5 federal actors are held accountable to the public. See  
6 *Cohen v. Rice*, 992 F.2d 376, 380 (1st Cir. 1993). This  
7 concern is not a salient one here. There are other checks  
8 on the Commission's actions, which rest primarily within the  
9 authority of the states that comprise the Commission and the  
10 state-level officials that represent ASMFC's member states.

11 The fact that the ASMFC is an interstate compact entity  
12 provides an inherent restraint on its decision making  
13 process. "No action shall be taken by the Commission in  
14 regard to its general affairs except by the affirmative vote  
15 of a majority of the whole number of compacting states  
16 present at any meeting." ASMFC Compact, art. VI. And,  
17 "[n]o recommendation shall be made by the Commission in  
18 regard to any species of fish except by the affirmative vote  
19 of a majority of the compacting states which have an  
20 interest in such species." ASMFC Compact, art. VI. Each  
21 state is obligated to carry out the terms of the ASMFC  
22 Compact, and member states may seek judicial relief to

1 enforce rights under the agreement. See *Texas v. New*  
2 *Mexico*, 462 U.S. 554, 569-70 (1983); see also *Nebraska v.*  
3 *Cent. Interstate Low-Level Radioactive Waste Compact Comm'n*,  
4 187 F.3d 982, 985 (8th Cir. 1999). Further, member states  
5 may avail themselves of an internal appeal mechanism; states  
6 may appeal decisions of a management board to the full  
7 membership of the Commission.<sup>12</sup>

8 Although its actions are not subject to review under §  
9 702 of the APA, the Commission is a politically accountable  
10 body. ASMFC is composed of state conservation agency  
11 directors, state legislators, and public citizens appointed  
12 by the governors of the member states.<sup>13</sup> ASMFC Compact,  
13 art. III. The actions of the ASMFC involve the coordinate  
14 exercise of the states' sovereign policy-making powers. In  
15 this regard, the Commission is more akin to a legislative  
16 body than to a federal agency. The Commission's decisions  
17 are implemented through rule-making by the individual

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<sup>12</sup> See the Interstate Fisheries Management Program Charter, §§ 3(d)(9), 4(h), available at <http://www.asmfc.org/>.

<sup>13</sup> Federal legislators are constitutionally prohibited from serving as federal agency officials. U.S. Const., art. I, § 6, cl. 2.

1 states, which affords an opportunity for public  
2 participation in the management process. In addition, the  
3 ASMFC makes its decisions public.

4 Finally, the ACFCMA provides a check on the actions of  
5 the Commission; it requires that the Secretary of Commerce  
6 review a finding that a state has failed to comply with a  
7 fishery management plan. 16 U.S.C. § 5106(a). The Compact  
8 provides that, if the Secretary determines a state has  
9 failed to comply with measures that are "necessary for the  
10 conservation" of a fishery, the Secretary shall impose a  
11 moratorium. *Id.* §§ 5106(a), (c). If the Secretary imposes  
12 and enforces a federal moratorium based on his or her  
13 independent findings of noncompliance, a party that is  
14 allegedly aggrieved by the Secretary's action can obtain APA  
15 review of that federal "agency action." 5 U.S.C. §§ 702,  
16 704.

17 The Commission is designed to address concerns that are  
18 traditionally within the province of the states. That the  
19 Commission seeks to address these concerns with support from  
20 the federal government, and in a manner that is harmonious  
21 with federal regulations, does not alter its essential  
22 nature. The fact that federal interests are implicated by

1 the activities of the ASMFC does not transform it into a  
2 federal agency for purposes of seeking judicial review of  
3 its actions.

### 4 **III. CONCLUSION**

5 The district court's order of March 9, 2009, denying  
6 the Atlantic States Marine Fisheries Commission's motion to  
7 dismiss the complaint in intervention as it pertains to that  
8 defendant, is hereby REVERSED and the case is REMANDED for  
9 further proceedings consistent with this opinion.