UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | 2:17-cv-05146-RGK-JEM | Date | October 24, 2018 |
|---|---|---|---|
| Title | ***Oceana, Inc. v. Ross*** | | |

| Present: The Honorable | R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE | |
|---|---|---|
| Sharon L. Williams | Not Reported | N/A |
| Deputy Clerk | Court Reporter / Recorder | Tape No. |
| Attorneys Present for Plaintiff: | Attorneys Present for Defendants: | |
| Not Present | Not Present | |

**Proceedings:** **(IN CHAMBERS)** Order Re: **Plaintiff's Motion for Summary Judgment (DE 54)** and **Defendants' Cross-Motion for Summary Judgment (DE 67)**

## I. INTRODUCTION

On July 12, 2017, Oceana, Inc. ("Plaintiff") filed the instant action against Wilbur Ross, the Secretary of the United States Department of Commerce ("Secretary"); the National Oceanic and Atmospheric Administration ("NOAA"); and the National Marine Fisheries Service ("NMFS") (collectively, "Defendants"). Plaintiff brings three claims, alleging that Defendants: (1) acted arbitrarily and capriciously, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; (2) exceeded their authority, in violation of the APA, 5 U.S.C § 706; and (3) violated the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1854. Plaintiff seeks declaratory and injunctive relief, and requests that the Court declare Defendants violated APA or the MSA.

Presently before the Court are Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. For the following reasons, the Court **GRANTS** Plaintiff's motion and **DENIES** Defendant's motion.

## II. FACTUAL BACKGROUND

### A. The Magnuson-Stevens Act

In 1976, after finding that certain stocks of fish were in danger of becoming extinct, Congress passed the MSA to "conserve and manage fishery resources" and to "achieve and maintain, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. §§ 1801(a)(2)(A), (b)(1), & (b)(4). The MSA created eight regional fishery management councils, which work in their respective areas throughout the country to achieve the goals of the MSA. *See id.* § 1852(a). The MSA requires that the regional councils prepare fishery management plans, which must contain conservation and management measures deemed necessary "to prevent overfishing and rebuild overfished stocks, and to protect,

restore, and promote the long-term health and stability of the fishery." *Id.* §§ 1852(h)(1) & 1853(a)(1)(A). These plans, and amendments thereto, do not become effective, however, until the Secretary—who has delegated the responsibility to NMFS—approves it. *See id.* § 1854(a). The regional councils can also submit proposed regulations to NMFS that they deem necessary to implement or carry out fishery management plans or amendments. *Id.* § 1853(c).

NMFS's review of proposed regulations is governed by § 1854(b). Section 1854(b) reads in full:

> (1) Upon transmittal by the Council to the Secretary of proposed regulations prepared under section 1853(c) of this title, the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this chapter and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and—
>
> (A) if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register, with such technical changes as may be necessary for clarity and an explanation of those changes, for a public comment period of 15 to 60 days; or
>
> (B) if that determination is negative, the Secretary shall notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, this chapter, and other applicable law.
>
> (2) Upon receiving a notification under paragraph (1)(B), the Council may revise the proposed regulations and submit them to the Secretary for reevaluation under paragraph (1).
>
> (3) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (1)(A). The Secretary shall consult with the Council before making any revisions to the proposed regulations, and must publish in the Federal Register an explanation of any differences between the proposed and final regulations.

16 U.S.C. § 1854(b).

### B. California Drift Gillnet Fishery

The present case involves proposed regulations that sought to regulate commercial drift gillnet fisheries in the Pacific Ocean off the coast of California. (Defs.' Cross Mot. Summ. J. 4, ECF No. 67-1.) Commercial fishing vessels in the Pacific Ocean employ mile-long drift nets nearly 200 feet below sea level to catch swordfish and, at a lesser rate, thresher sharks. (*See* Compl. ¶ 18, ECF No. 1; Answer ¶ 18, ECF No. 28.) These nets form a vertical wall in the ocean and entangle fish that swim into them. In

addition to the targeted fish, however, other animals are inadvertently captured in the drift nets. Among the non-targeted animals captured are certain protected species, including marine mammals, and sea turtles. The non-targeted animals that are captured are commonly referred to as bycatch. The bycatch is often dead or dying when the nets are brought to the surface.

### C. The Proposed Hard-Cap Regulations

On September 23, 2016, as part of its continued effort to combat bycatch in the Pacific Ocean, the Pacific Fishery Management Council ("Pacific Council") submitted proposed regulations to NMFS for review. (*See* Statement of Uncontroverted Facts ("SUF") ¶ 6, ECF No. 54-2.) The Pacific Council—one of the eight regional fishery management councils—consists of members from California, Oregon, Washington, and Idaho, and it has "authority over the fisheries in the Pacific Ocean seaward of such States." 16 U.S.C. § 1852(a)(1)(F). The proposed regulations sought to place strict limits—referred to as hard caps—on bycatch of certain protected species in the California drift gillnet fishery. (SUF ¶ 6.) Under the proposed regulations, commercial fisheries could only inadvertently kill or injure a certain number of protected species in a two-year period. NOAA Report, 82 Fed. Reg. 26902 (June 12, 2017). If a fishery reached the "hard cap" limit, NMFS would require the fishery to shut down for the remainder of the two-year period. *Id*.

On October 13, 2016, NMFS made an affirmative determination that the proposed regulations were consistent with the MSA. (SUF ¶ 8.) NMFS then published the proposed hard-cap regulations in the Federal Register for public comment, which closed on December 28, 2016. (SUF ¶ 8.) Following the public comment period, NMFS decided to conduct additional economic analysis of short-term effects on individual commercial fisheries. (Admin. R. 0000002.) Based on its additional analysis, NMFS subsequently made a negative determination that the proposed regulations were not consistent with the MSA. (Admin. R. 0000002–0000003.) NMFS therefore concluded that the proposed hard-cap regulations were not warranted, and on June 12, 2017, it withdrew the proposed hard-cap regulations. (SUF § 9.)

## III. JUDICIAL STANDARD

Under Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such a showing, a court may grant summary judgment on all or part of the claim. *See id*.

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof

at trial, the moving party need only show that there is an absence of evidence to support the non-moving party's case. *See id.*

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *Id.* at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324.

## IV. DISCUSSION

The parties do not dispute the determinative facts of this case. The Pacific Council submitted the proposed hard-cap regulations to NMFS for review. NMFS initially made an affirmative determination, finding that the proposed regulations were consistent with the MSA. NMFS then published the proposed regulations for public comment in the Federal Register. After the public comment period closed, NMFS conducted additional economic analysis. NMFS did not promulgate the proposed regulations or consult with the Pacific Council regarding potential revisions. Instead, based on the additional analysis, NMFS made a negative determination after the public comment period, finding that the proposed hard-cap regulations were not consistent with the MSA. NMFS then withdrew the proposed regulations.

The parties agree that the APA and the MSA govern the Court's review of the agency's action at issue. (SUF ¶ 3.) Under the MSA, judicial review of agency action is limited, and a court "shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D)" of the APA. 16 U.S.C. § 1855(f)(1)(B). Section 706 of the APA directs reviewing courts to:

> (2) hold unlawful and set aside agency actions, findings, and conclusions 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) without observance of procedure required by law.

5 U.S.C. § 706(2)(A)–(D).

Here, Plaintiff challenges NMFS's action on two grounds. First, Plaintiff contends that the agency exceeded its authority under the MSA because the process by which it reviewed, and ultimately rejected, the proposed hard-cap regulations is not permitted by the MSA. Second, Plaintiff asserts that the agency's decision to withdraw the proposed hard-cap regulations was arbitrary and capricious.

Defendants argue that the agency's subsequent negative determination and its decision to withdraw the proposed regulations are consistent with and reasonable under § 1854(b).

As explained below, the Court agrees with Plaintiff and finds that NMFS exceeded its authority under the MSA and APA.

**A. Exceeds Authority Review**

To evaluate whether an agency exceeded its authority pursuant to 5 U.S.C. § 706(2)(C), courts apply the two-step framework set out by the United States Supreme Court in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *E.g.*, *Nw. Envtl. Advocates v. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008). At the first stage under *Chevron*, "if Congress has 'directly spoken to the precise question at issue,' then the matter is capable of but one interpretation by which the court and the agency must abide." *Vigil v. Leavitt*, 381 F.3d 826, 834 (9th Cir. 2004) (quoting *Chevron, U.S.A. Inc.*, 467 U.S. at 842). If the intent of Congress is silent or ambiguous, courts move to the second stage of the *Chevron* framework. At the second stage, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Vigil*, 381 F.3d at 834 (quoting *Chevron, U.S.A. Inc.*, 467 U.S. at 843).

Here, at the first stage under *Chevron*, the Court must determine if Congress addressed the agency action at issue. That is, the Court must determine whether the MSA—and specifically, 16 U.S.C. § 1854(b)—requires the agency to adhere to a precise review process. This inquiry starts and ends with the statutory text. The Court therefore need not proceed to the second *Chevron* stage.

Section § 1854(b)(1) states that the Secretary of Commerce—who, as explained above, has delegated his power to NMFS—"shall immediately initiate an evaluation" when it receives proposed regulations from one of the eight Councils. 16 U.S.C. § 1854(b)(1). Within fifteen days, NMFS "shall make a determination" as to whether the proposed regulations are consistent with the MSA and other applicable law. *Id.*

If the determination is "negative"—i.e. that the proposed regulations are not consistent with the MSA—NMFS "shall notify the Council in writing of the inconsistencies" and recommend revisions that would make the proposed regulations consistent with the MSA. *Id.* § 1854(b)(1)(B). The Council may then revise the proposed regulations and resubmit them to NMFS for further evaluation. *Id.* § 1854(b)(2).

On the other hand, if the determination is "affirmative"—i.e. that the proposed regulations are consistent with the MSA—NMFS "shall publish such regulations in the Federal Register" for public comment for a period of fifteen to sixty days. *Id.* § 1854(b)(1)(A). Within thirty days after the close of

public comment period, NMFS "shall" promulgate final regulations and consult with the Council before making any revisions to the proposed regulations. *Id.* § 1854(b)(3).

Whether Congress requires the agency to follow the precise review process set forth in § 1854(b) or whether the agency may undertake a different review process at its discretion, turns on the meaning of "shall."

The term "'shall' in a statute generally denotes a mandatory duty." *Sierra Club v. Whitman*, 268 F.3d 989, 904 (9th Cir. 2001) (citing *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001)). The Ninth Circuit, in a case that involved a different section of the MSA, previously rejected the argument that the term "shall" meant "may." *United Cook Inlet Drift Assc. v. Nat'l Marine Fisheries Service*, 837 F.3d 1055, 1064 (9th Cir. 2016) (finding that 16 U.S.C. § 1852(h)(1) required that NMFS adopt a fishery management plan). In *Yakutat, Inc. v. Gutierrez*, the Ninth Circuit also described the process of § 1854(b), explaining that after the regional council submits proposed regulations,

> the Secretary *must* determine whether the proposed regulations are consistent with both the Fishery Management Plan or amendment and the Magnuson Act prior to the public notice and comment period. . . . The Secretary evaluates proposed regulations immediately upon receipt from the Council, and within fifteen days of initiating this evaluation the Secretary *must* either publish the regulations for a fifteen to sixty day public comment period or provide recommendations to the Council as to why these regulations are not consistent with the Fishery Management Plan, the amendment, the Magnuson Act, or applicable law. The Secretary *must* then promulgate final regulations within thirty days of the end of the public comment period, and "shall consult with the Council before making any revisions to the proposed regulations."

407 F.3d 1054, 1060 (9th Cir. 2005) (emphasis added). Given the Ninth Circuit's previous findings, the Court interprets the term "shall" in § 1854(b) as "must."

The Court therefore finds that by using the term "shall," Congress intended that NMFS follow a precise process when reviewing proposed regulations.[1] By drafting § 1854(b) the way it did, Congress

[1] As the State of Washington points out in its Amicus Curiae brief, the legislative history surrounding the 1996 amendments to the MSA further supports this interpretation. (*See* Amicus Curiae Br. 12–14, ECF No. 99.) Before the 1996 amendments, the MSA did not "provide a clear timetable or process for review for regulations submitted by a Council," which created problems for the regional councils and commercial fisheries. S. Rep. No. 104-276, at 18 (1996). According to the Senate Report, part of the purpose for the 1996 amendments was to "establish streamlined procedures for consideration and approval of all regulations submitted by a Council to the Secretary." *Id.* at 18–19.

limited the number of paths the agency could take when reviewing proposed regulations from a Council. As written, § 1854(b) limits NMFS to one of two options when it receives proposed regulations. NMFS can either (1) determine that the proposed regulations are not consistent with the MSA and send them back to the Council with recommendations on revisions, or (2) determine that the proposed regulations are consistent with the MSA. 16 U.S.C. § 1854(b)(1). If the agency chooses the latter path, the agency must then, following public comment, determine whether to promulgate the proposed regulations as is or to revise the proposed regulations. *Id.* § 1854(b)(3). If the agency decides not to promulgate the proposed regulations as is, Congress requires that NMFS consult with the Council. *Id.*

Here, following the public comment period, NMFS did not promulgate the proposed regulations as is or consult with the Pacific Council about revisions to the proposed regulations. Instead, NMFS made a negative determination and withdrew the proposed regulations without consulting with the Pacific Council.

Defendants contend that § 1854(b) allows NMFS to disapprove of the proposed regulations after public comment and issue a subsequent negative determination. But, to accept Defendants' interpretation of § 1854(b), the Court would have to read additional words into the statute. The Ninth Circuit previously rejected an interpretation that required inserting words into the MSA, finding that courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Pac. Coast Fed'n of Fisherman's Assocs. v. Blank*, 693 F.3d 1084, 1095 (9th Cir. 2012) (quoting *Dean v. United States*, 556 U.S. 568, 572 (2009)). Likewise, the Court will not read words into § 1854(b).

Defendants also argue that their interpretation of § 1854(b) is reasonable. However, "[i]f 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." *Chevron, U.S.A. Inc.*,537 F.3d at 842–43. Since Congress set out a precise review process in § 1854(b), Defendants' interpretation, even if reasonable, is irrelevant to the extent that it differs from the text of the statute.

The Court finds that, under the MSA, Congress requires NMFS to adhere to the precise process set out in § 1854(b) when reviewing proposed regulations.[2] Since NMFS did not publish the proposed regulations as is or consult with the Pacific Council, NMFS exceeded its authority under the MSA and

[2] Plaintiff contends that NMFS exceeded its authority when it withdrew the proposed hard-cap regulations. Defendants argue that an agency may withdraw a proposed regulation after the notice and comment period if the agency determines that the regulation is not longer warranted. Here, even if NMFS could withdraw proposed regulations under § 1854(b), withdrawal would only be available after NMFS consulted with the Council about revisions to the proposed regulations. Since NMFS did not consult with the Pacific Council after the public comment period, the Court need not decide whether withdrawing proposed regulations is an option under § 1854(b).

the APA. As such, NMFS's action was also arbitrary and capricious. Plaintiff is therefore entitled to judgment as a matter of law on all claims. According, the Court **GRANTS** Plaintiff's motion.

### B. Remand for Agency Action

Plaintiff requests that the Court order Defendants to promulgate the Pacific Council's proposed regulations in accordance with the MSA. The Court declines.

The appropriate remedy when a court finds that an agency has exceeded its authority is to remand for further administrative proceedings. *See Earth Island Inst. v. Hogarth*, 494 F.3d 757, 770 (9th Cir. 2007). A court should order equitable relief or remand with specific instructions only in "rare circumstances." *Id.* (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). In *Earth Island*, the Ninth Circuit found "rare circumstances" because the agency at issue failed to comply with a previous court order. *Earth Island Inst.*, 494 F.3d at 769–70.

No such circumstances exist here. Since section 1854(b)(3) allows NFMS to revise the proposed regulations after the public comment period, the Court **REMANDS** to the agency for action consistent with this Order.

## V. EVIDENTIARY OBJECTIONS

To the extent the parties have objected to any of the evidence relied upon by the Court, those objections are overruled for purposes of this Order.

## VI. CONCLUSION

In light of the foregoing, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (DE 54), **DENIES** Defendants' Cross-Motion for Summary Judgment (DE 67), and **ORDERS** Plaintiff to submit a proposed final judgment in accordance with this Order within **five calendar days**.

**IT IS SO ORDERED.**

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Initials of Preparer _____