UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:17-cv-05146-RGK-JEM	Date	January 8, 2020
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 to Enforce Court Order (DE 119)**

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"). Plaintiffs alleged that Defendants' decision not to promulgate regulations imposing caps on bycatch of certain protected species in the California drift gillnet fishery violated both the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 and the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1854.

On October 24, 2018, this Court granted Summary Judgment in favor of the Plaintiffs and remanded to the agency for action consistent with its Order. (Order Re: Summary Judgment ("Order"), ECF No. 102.) Presently before the Court is Plaintiff's Motion to Enforce that Order. (ECF No. 119.) For the following reasons, the Court **GRANTS** Plaintiff's motion.

II. FACTUAL BACKGROUND

A. The Regulatory Approval Process

The MSA created regional fishery management councils tasked with preparing fishery management plans in order "to prevent overfishing and . . . promote the long-term health and stability of the fishery." 16 U.S.C. §§ 1852(a)(1) & 1853(a)(1). These fishery management plans, and amendments thereto, do not become effective, however, until the Secretary—who has delegated the responsibility to NMFS—approves them. *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.

B. The Disputed Regulations

On September 23, 2016 the Pacific Fishery Management Council ("Council") submitted proposed regulations to NMFS for review. 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. Under the proposed regulations, commercial fisheries could only inadvertently kill or injure a certain number of protected species in a two-year period.

On October 13, 2016, NMFS made an affirmative determination that the proposed regulations were consistent with the MSA. NMFS then published the proposed hard-cap regulations in the Federal Register for public comment, which closed on December 28, 2016. Following the public comment period, NMFS conducted additional economic analysis of short-term effects on individual commercial fisheries. Based on its additional analysis, NMFS subsequently made a negative determination that the

proposed regulations were not consistent with the MSA. NMFS then withdrew the proposed regulations on June 12, 2017. Plaintiff's suit followed.

C. The Court's Order

On July 12, 2017, Plaintiffs sued to compel publication of the proposed regulations on the theory that a plain reading of the statute foreclosed the agency from unilaterally reversing a prior positive determination. On October 24, 2018, this Court granted Summary Judgment in favor of the Plaintiffs and remanded to the agency for action consistent with its Order. The Court's Order rejected Defendants' contention that "§ 1854(b) allows NMFS to disapprove of the proposed regulations after public comment and issue a subsequent negative determination" on the grounds that Defendants' interpretation would require the Court to read additional words into an unambiguous statute. (Order at 7.)

The Court held, rather, that because NMFS had already made an affirmative determination regarding the regulations and had initiated notice and comment under section 1854(b)(1)(A), the statute now required NMFS to proceed according section 1854(b)(3). *Id.* Specifically, the Court stated that if NMFS approves a regulation, "the agency must then, following public comment, determine whether to promulgate the proposed regulations as is or to revise the proposed regulations," and must consult with the Council prior to making any revisions. *Id.*

D. Defendants' Subsequent Actions

On February 15, 2019 Defendants sent a letter to the Pacific Council notifying them of the Court's Order. Defendants' letter falsely stated that the Court had authorized them to proceed with their negative determination: "[t]he court ordered NMFS to consult with the Pacific Fishery Management Council . . . pursuant to Section 304(b)(l)(B) on potential revisions to the Council's proposed regulations." (NMFS Letter to Pacific Fishery Management Council at 1, ECF No. 119-2.) Section 304(b)(l)(B) governs agency action following a negative determination by the NMFS as opposed to the affirmative determination that the agency had already made in this case. The agency's letter further stated as follows:

> MSA Section 304(b)(l)(B) requires that, if NMFS makes a negative determination on a Fishery Management Council's proposed regulations, that NMFS provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, the MSA, and other applicable law.

The letter then advised that the Council consider revising its hard cap regulations in such a way as to avoid "significant economic effects such as those that are expected during a fishery closure." (*Id.* at 2.) The letter included the recommendation that "the Council could minimize the adverse economic effects

of its proposed regulations by specifying reduced time/area closures that would still allow DGN fishing in certain areas during the fishing season." *Id.*

Since then, NFMS representatives have also attended meetings of the Pacific Council in which the Council has discussed potential future action regarding the regulations, currently scheduled for discussion in March of 2020. (Decl. of Ryan Wulff ¶¶ 6-9, ECF No. 124-1.)

III. JUDICIAL STANDARD

District courts have the authority to enforce the terms of their mandates. *The Fund for Animals v. Norton*, 390 F. Supp. 2d 12, 15 (D.D.C. 2005). "The exercise of this authority is 'particularly appropriate' when a case returns to a court on a motion to enforce the terms of its mandate to an administrative agency." *Flaherty v. Pritzker*, 17 F. Supp. 3d 52, 55 (D.D.C. 2014) (quoting *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984)). "Courts grant motions to enforce judgments when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment." *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004), *aff'd sub nom. Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24 (D.C. Cir. 2005). "Success on a motion to enforce a judgment gets a plaintiff only the relief to which the plaintiff is entitled under its original action and the judgment entered therein." *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005) (citing *Watkins v. Washington,* 511 F.2d 404, 406 (D.C. Cir.1975) (alterations omitted)).

IV. DISCUSSION

A. Defendants Have Not Complied with the Court's Order

Defendants argue that they are in compliance with the Court's Order. The Court disagrees.

Defendants' told to the Council that the Court had directed them to consult following a negative determination, as required under MSA Section 304(b)(l)(B). This is effectively the opposite of what the Court ordered. As described above, the Court held that Defendants were foreclosed from making a subsequent negative determination once they had already made a positive one by the plain language of the statute:

> 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." Likewise, the Court will not read words into § 1854(b).

(Order at 7) (quoting *Pac. Coast Fed'n of Fisherman's Assocs. v. Blank*, 693 F.3d 1084, 1095 (9th Cir. 2012)). Despite this, Defendants have moved forward as if the Court instead accepted their argument that the statute to allowed them to reverse their positive determination following notice and comment.

Defendants also contend that they are in compliance with the Court's order because they have attempted to confer with the Pacific Fishery Management Council on revisions to the proposed regulations, which they claim is what the statute requires in either circumstance. (Defs.' Opp. at n. 1, ECF No. 124.) ("regardless of what statutory provision was cited in the letter, the content of that letter makes clear that NMFS has been taking action to consult with the Pacific Council about revisions to the proposed hard-cap regulations, which is what is required under 16 U.S.C. § 1854(b)(3)."). Defendants ignore significant differences in the nature of the consultation.

Section 1854(b)(3) requires that NMFS consult with the Pacific Council if NMFS wants to make a change to an already-approved regulation prior to promulgating it. This is a last step, and the onus is on NMFS to either pursue it or else publish the regulation as-written within 30 days after the expiration of notice and comment. By contrast, section 1854(b)(1)(B) directs NMFS to provide recommended revisions to the Council following a negative determination. This puts the onus on the Council to re-submit proposed regulations for agency approval, followed by notice and comment. This effectively begins the regulatory approval process over again from square one. The Court's order gave NMFS the opportunity to consult with the Council on revisions prior to publication. What NMFS did instead was misrepresent the Court's Order and send the Council back to the drawing board.

It is therefore no surprise that the Pacific Council has been slow to take up the issue again. It is a far more difficult and time-consuming process to re-write regulations that have been rejected than it is to provide input on the agency's proposed revisions to regulations that the Council already wrote. As stated in discussion at the March 2019 Council meeting, it took almost four years of study and deliberation to draft the regulations the first time.[1] NMFS cannot blame the Pacific Council for moving slowly when the delay is a product of their own improper assertion that the regulations were disapproved.

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[1] *See* Remarks of Michele Culver, Transcript of 248th Meeting of the Pacific Council Meeting at 151-52 (March 2019) https://www.pcouncil.org/council-operations/council-meetings/past-meetings/.

B. The Court Will Enforce the Timeline Codified in 16 U.S.C. 1854(b)(3)

As NMFS has failed to comply with the Court's Order, the Court will specify both the statutory provision according to which it must act and the timeline according to which it must do so. This is in accordance with the Court's prior holding, which found that "Congress requires NMFS to adhere to the precise process set out in § 1854(b)." (Order at 7.)

The appropriate remedy when a court finds that an agency has exceeded its authority is normally 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)). The Ninth Circuit has held that such circumstances exist where an agency has failed to comply with a court order. *Earth Island Inst.*, 494 F.3d at 769–70; *Local Joint Exec. Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865, 873 (9th Cir. 2011).

More than a year ago, the Court remanded this case to the NMFS for further proceedings because "section 1854(b)(3) allows NFMS to revise the proposed regulations after the public comment period[.]" (Order at 8.) As discussed above, however, there is a stark difference between revising within a thirty-day window and making a retroactive negative determination.

Congress provided a clear timeline according to which agency must act under § 1854(b)(3) when it stated that "[t]he Secretary shall promulgate final regulations within 30 days after the end of the comment period[.]" As a thirty-day timeline is already codified in section 1854(b)(3), the Court's enforcement of such a timeline is nothing more than a specific articulation of the relief already provided in the Court's previous Order. Furthermore, the agency's failure to comply with the Court's previous Order constitutes a "rare circumstance" in which specific instructions are necessary.

Defendants contend that Plaintiffs must demonstrate that they meet the four-factor test for a mandatory injunction in order to obtain such relief. (Opp. 11:27-12:2.) However, "where Congress has specifically provided a deadline for performance by an agency, 'no balancing of factors is required or permitted.'" *Ctr. for Food Safety v. Hamburg*, 954 F. Supp. 2d 965, 971 (N.D. Cal. 2013) (quoting *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, n.11 (9th Cir. 2002)). As stated above, Congress has provided such a timeline here.

This Court has no desire to direct the content what fishery regulations are published. In order to simply remand for agency action, however, the Court must be able to rely in some degree on the integrity and professionalism of the agency. This includes an expectation that the agency will act in good faith rather than attempting to misrepresent or subvert the Court's Order. The Court will therefore direct the agency to comply with the correct statutory provision and will provide a timeline for doing so.

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V. CONCLUSION

In light of the foregoing, the Court **GRANTS** Plaintiff's Motion to Enforce the Court Order (ECF No. 119). The Court **ORDERS** the agency to comply with the requirements of section 1854(b)(3) of the Magnuson-Stevens Act, excerpted here in full:

> 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.

(emphasis added). As the end of the notice and comment period was now some years ago, Defendants have **thirty days** from the issuance of this Order in which to comply with the above.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____