Fairweather Fish, Inc. et al v. Pritzker et al Doc. 36

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FAIRWEATHER FISH, INC., and CAPTAIN RAY WELSH,

Plaintiffs,

v.

PENNY PRITZKER, in her official capacity as Secretary of Commerce, et al.

Defendants.

CASE NO. C14-5685 BHS

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs Fairweather Fish, Inc., and Captain Ray Welsh's ("Plaintiffs") motion for summary judgment (Dkt. 25) and Defendants National Oceanic and Atmospheric Administration ("NOAA"), National Oceanic and Atmospheric Administration National Marine Fisheries Service ("NMFS"), Penny Pritzker, Eileen Sobeck, and Kathryn D. Sullivan's (collectively "Defendants") cross motion for summary judgment (Dkt. 29). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:



Dockets.Justia.com

## I. PROCEDURAL HISTORY

On August 27, 2014, Plaintiffs filed a complaint against Defendants challenging a final rule promulgated by Defendants on July 28, 2014. Dkt. 1. On October 30, 2014, Plaintiffs filed an amended complaint asserting nine claims for relief. Dkt. 18.

On March 19, 2015, Plaintiffs filed a motion for summary judgment. Dkt. 25. On May 15, 2015, Defendants filed a cross motion for summary judgment. Dkt. 29. On June 15, 2015, Plaintiffs responded. Dkt. 31. On July 16, 2015, Defendants replied. Dkt. 33.

## II. FACTUAL BACKGROUND

In 1976, Congress enacted the Fisheries Conservation and Management Act – commonly known as the Magnuson-Stevens Act ("MSA") – to "conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. §§ 1801(b)(1), (3). The Act establishes an Exclusive Economic Zone extending seaward from each coastal state, and, with exceptions not relevant here, subjects each fishery within the Economic Zone to NMFS' management authority. *Id*. at §§ 1802(11), 1811.

The MSA establishes eight regional fishery management councils, which are composed of federal, state, and territorial fishery management officials with expertise in conservation, management, or harvest of fishery resources within the council's geographic purview. *Id*. at § 1852(b). The principal task of each council is to recommend Fishery Management Plans and Plan amendments to "achieve and maintain,

on a continuing basis, the optimum yield" from fisheries under their authority. *Id*. at §§ 1801(b)(4), 1852(a)(1), (h)(1). Councils may also submit regulations "necessary or appropriate" to implement a Plan or Plan amendment, or to modify existing regulations. *Id*. at § 1853(c). As applicable here, the North Pacific Fishery Management Council has authority to recommend Fishery Management Plans, amendments, and regulations for fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. *Id*. at § 1852(a)(1)(G).

Councils submit recommendations to NMFS for review and approval, disapproval, or partial approval. *Id*. at §§ 1852(h), 1853(c), 1854(a)–(b). If NMFS approves all or part of a council's proposal, the agency must publish notice in the Federal Register and request public comment for a period of up to 60 days. *Id*. at §§ 1854(a)(1), (b)(1). Among the tools available to councils is a "limited access system," or a fishery where participation is restricted by regulation or by a Fishery Management Plan. *Id*. at §§ 1802(27), 1853(b)(6). A limited access system may include a "limited access privilege program," which creates quota share ("QS") corresponding to a portion of the fishery's total allowable catch. *Id*. at §§ 1802(26), 1853(b)(6); *see generally Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1087-88 (9th Cir. 2012). The creation and allocation of a quota does not create "any right, title, or interest in or to any fish before the fish is harvested by the holder" and does not "confer any right of compensation to the holder. . . if . . . revoked, limited, or modified." 16 U.S.C. §§ 1853a(b)(3), (4).

In 1953, Congress enacted the Halibut Act to implement a convention between the United States and Canada. 16 U.S.C. § 773(a). The act authorizes the International

Pacific Halibut Commission to adopt regulations for conservation of halibut along the west coasts of the United States and Canada, but these regulations are not effective in the United States until approved by the Secretary of State and the Secretary of Commerce ("the Secretary"). *Id*. at § 773b. Moreover, the Halibut Act authorizes NMFS to adopt regulations necessary for implementation of the Convention and the Act itself. *Id*. at § 773c.

The regional councils established under the MSA may also recommend regulations for halibut management. *Id*. at § 773c(c). NMFS may approve recommendations that are fair and equitable, reasonably calculated to promote conservation, and carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges. *Id*. Additionally, any regulation recommended by a council and adopted by NMFS must be consistent with the MSA's provisions for limited access systems. *Id*. (citing 16 U.S.C. § 1853(b)(6)).

Pacific Halibut (Hippoglossus stenolepis) can reach 500 pounds and reside in colder waters on both sides of the Pacific Ocean, while the sablefish (Anoplopoma fimbria) is a smaller, elongated species occupying waters from northern Mexico to the Bering Sea. Sablefish is managed as part of the "groundfish" fishery under the MSA, while halibut is regulated under the Halibut Act. By the early 1990s, both fisheries – each of which relies on "hook and line" gear – were at risk of overcapitalization in Alaskan coastal waters.

In an effort to protect halibut, sablefish, and the coastal communities that harvest each species, NMFS adopted the North Pacific Council's ("Council") recommended limited access privilege program in 1993. 58 Fed. Reg. 59375 (Nov. 9, 1993). The program created QS allowing "qualified persons" to harvest a portion of allowable catch for sablefish or halibut, and allocated the share based upon each "qualified person's" adjusted harvest of fish during the late 1980s. 57 Fed. Reg. 57130, 57133 (Dec. 3, 1992). A qualified person, in relevant part, "is a citizen of the United States at the time of application for QS," or a "non-individual entity," such as a "corporation, partnership, [or] association." 50 C.F.R. § 679.40. A holder of the share generally must remain onboard the harvesting vessel at all times, including when landing. 50 C.F.R. §§ 679.42(c), (i).

QS is transferable, permitting "second generation" fishermen to harvest sablefish and halibut even if they were not initial recipients of a share and efficiently allocating harvesting privileges within the fleet. 57 Fed. Reg. at 57136. As NMFS noted early on, however, the free transfer of QS "could lead to an excessive share of harvesting privileges . . . held by a single individual or corporation" or "to localized overfishing." *Id*. Accordingly, QS can usually move only within predefined areas, and only between vessels of similar size and purpose. *See id*. at 57134 (describing vessel categories); *id*. at 57136 (describing restrictions); *see generally* 50 C.F.R. § 679.41(g) (implementing restrictions). Generally, a recipient of transferred QS must have either received the share during the initial allocation or crewed a vessel in any United States fishery. 50 C.F.R. §§ 679.41(g)(1), (2). "The rationale for this measure is to assure that [Individual Fishing

Quotas] remain in the hands of fishermen who have a history of past participation and current dependence on the fishery." 57 Fed. Reg. at 57133.

In 2010, the Council was concerned that these transfer restrictions were inadequate to preserve the character of the halibut and sablefish fisheries, risking consolidation of QS among a small number of fishermen and discouraging formation of an "owner-operated" fleet. *See* 78 Fed. Reg. at 24708. Thus, NMFS limited the total QS held by any one person and the annual harvest from any one vessel. *See* 50 C.F.R. §§ 679.42(e)-(f), (h). Because these measures sometimes created very small, commercially unattractive portions of QS, NMFS consolidated these portions into undivided wholes, or "blocks." *See* 78 Fed. Reg. at 24708. With certain exceptions, these blocks may be used and transferred as normal QS. 50 C.F.R. §§ 679.41(e), 679.42(g). Moreover, in certain circumstances holders may consolidate, or "sweep up" blocked shares, to create a single, indivisible unit. *Id*. at §§ 679.41(e)(1), (2).

Despite NMFS' additional restrictions, NMFS claims that ongoing QS consolidation threatens to exclude new fisherman and produce a fleet largely divorced from the coastal communities that have traditionally depended on the halibut and sablefish fisheries. AR 10173. According to the Council and NMFS, this phenomenon largely flows from an exception to the requirement that holders of QS remain onboard the harvesting vessel at all times. *See* 50 C.F.R. at § 679.42(i)(1). Under this exception, an initial recipient of QS may use a "hired master" to harvest fish if the recipient has retained a twenty percent interest in the harvesting vessel, encouraging the holder to

acquire and retain QS rather than let the share pass to new fisherman. *Id*.; 78 Fed. Reg. at 24708-09.

Seeking to secure transition to an owner-operator fleet, the Council heard testimony on the "hired master exception" beginning in February of 2010. By April of 2011, the Council proposed to bar hired masters from harvesting Quota Share acquired after February 12, 2010 (the "control date") unless that QS is consolidated, or "swept up," with "blocked" QS acquired before the control date. *Id*. at 24710. NMFS claims that these measures will further Council objectives by "(1) preventing further increase in the use of hired masters while minimizing disruption to operations of small businesses that have historically used hired masters, and (2) discouraging further consolidation of QS among initial recipients who use hired masters." *Id*. at 24709. On April 26, 2013, NMFS proposed a rule to this effect, allowed public comments, and issued a final rule on July 28, 2014. 79 Fed. Reg. 43679 ("Final Rule"). The rule became effective on December 1, 2014 (the "effective date"), or nearly five years after the control date. *Id*.

## III. DISCUSSION

### A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,

323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

**B. The MSA, Halibut Act, and the National Standards**

With regard to the MSA, the Halibut Act, and the National Standards, Plaintiffs' motion for summary judgment does not track their complaint. Plaintiffs' fifth through eighth causes of action assert violations of the National Standards and their ninth cause of actions asserts that the Final Rule "is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law in violation of the APA." Dkt. 18, ¶ 144. Plaintiffs' motion, however, only asserts that the Final Rule violates MSA and Halibut Act by violating the National Standards. *See* Dkt. 25 at 32–36. In opposition, Defendants move for summary judgment on Plaintiffs' fifth through ninth claims for relief. Dkt. 29 at 21. Defendants argue that

> the record demonstrates that NMFS promulgated the [Final] Rule only after evaluating possible alternatives, analyzing a wealth of recent data, and articulating a rational connection between Quota Share consolidation and the Rule's restrictions on hired masters.

Dkt. 29 at 24. With no evidence or argument to the contrary, excluding the alleged violations of the National Standards, the Court agrees with Defendants that the Final Rule is not otherwise arbitrary or capricious. Therefore, the Court grants Defendants' motion on Plaintiffs' ninth claim for relief.

With regard to the National Standards, Plaintiffs argue that the Rule fails to comply with certain substantive provisions of the MSA. Defendants, however, dispute whether the National Standards are applicable to the Final Rule. Defendants argue that the National Standards do not apply to regulations under the Halibut Act because the operative language only requires consistency with the criteria for a limited access system

under the MSA. Dkt. 29 at 25; *see* 16 U.S.C. § 773c(c)(regulations "shall be consistent with the limited entry criteria set forth in section 1853(b)(6) [of the MSA]."). Plaintiffs' only argument in opposition is that, when NMFS adopted the IFQ program, it evaluated the program under the National Standards. Dkt. 25 at 32 n.8 (citing AR 20004-20006). While Plaintiffs are correct, this is not binding precedent that each amendment or new regulation for the limited access system must also meet the criteria of a similar, but non-operative statute. Therefore, the Court denies Plaintiffs' motion and grants Defendants' motion on Plaintiffs' fifth, seventh, and eighth claims for relief because National Standards One, Two, Nine, and Ten do not apply to the Final Rule.[1]

Plaintiffs' final claim under the Halibut Act is that Defendants failed to consider the "fair and equitable distribution of access privileges in the fishery . . . ." 16 U.S.C. § 1853(b)(6)(F). The Court must "determine only if the Secretary acted in an arbitrary and capricious manner in promulgating such regulations." *Alliance Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996) (citing *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1440 (9th Cir. 1990)). Plaintiffs argue that the Final Rule is not fair and equitable because it adversely affects their fishing rights. Dkt. 29 at 34–36. But this does not show arbitrary and capricious action. Defendants set out "to maintain a diverse owner-onboard fleet and to prevent excessive consolidation of QS." 79 Fed. Reg. 43680. In doing so, it was obvious that the class of owners who could not be aboard their vessels

[1] If the National Standards do apply to the promulgation of the Final Rule, then Defendants would most likely have acted arbitrarily and capriciously for failure to even consider minimizing bycatch (National Standard Nine) and/or safety at sea (National Standard Ten).

would be adversely affected by the rule. However, "'[c]ontrolling precedent requires that a plan not be deemed arbitrary and capricious, '[e]ven though there may be some discriminatory impact . . . .'" *Alliance Against IFQs*, 84 F.3d at 350 (quoting *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1460 (9th Cir. 1987)). Moreover, "[d]espite the harshness to the fishermen who were left out, there is no way we can conclude on this record that the Secretary lacked a rational basis for leaving them out." *Alliance Against IFQs*, 84 F.3d at 350. The same rationale holds true in this case, and the Court is without a persuasive or legitimate reason "to substitute [its] judgment for the Secretary's with regard to allocation of all the quota shares to boat owners and lessees." *Id*. Therefore, the Court denies Plaintiffs' motion and grants Defendants' motion on Plaintiffs' sixth claim for relief.

**C. Rehabilitation Act**

In the complaint, Captain Welsh asserts a cause of action for a violation of the Rehabilitation Act and an alternative cause of action for violation of the Rehabilitation Act and the APA. Dkt. 17, ¶¶ 56–87. The parties dispute (1) whether Captain Welsh may bring a standalone Rehabilitation Act claim, (2) the appropriate burden of proof, and (3) the merits of the claims. With regard to the first issue, there is authority for the proposition that "the private right of action established under § 504(a) [of the Rehabilitation Act] by the Ninth Circuit is limited to equitable remedies." *Mendez v. Gearan*, 947 F. Supp. 1364, 1367 (N.D. Cal. 1996). Therefore, the Court denies Defendants' motion on this issue.

With regard to the standard of review, the Court is unaware of and Plaintiffs have failed to cite any case law for the proposition that the burden is a preponderance of the evidence. Captain Welsh does cite two cases in support of his position, but neither of the cases hold what Captain Welsh claims. Dkt. 31 at 18. In *Ramirez v. Hart*, 2014 WL 2170376 (W.D. Wash. May 23, 2014), the court merely stated that plaintiff had failed to make a "sufficient showing on all essential elements of her claim, on which she has the burden of proof." *Id*. at *7. The court neither held nor elaborated on plaintiff's actual burden of proof. Thus, *Ramirez* does not stand for the proposition that the burden of proof is preponderance of the evidence.

In *J.L. v. Soc. Sec. Admin*., 971 F.2d 260 (9th Cir. 1992), *disapproved of by Lane v. Pena*, 518 U.S. 187 (1996), the plaintiffs argued that the burden of proof under the Rehabilitation Act should be "the familiar preponderance of the evidence standard of civil litigation." *Id*. at 267. The Ninth Circuit rejected that argument. *Id*. Instead, the Ninth Circuit stated that an agency like NMFS "has no discretion to violate the Rehabilitation Act" because it is "a statute over which it claims no special expertise." *Id*. at 268. In such circumstances, the issue before the Court is a question of law determined *de novo* once the plaintiffs reach the court for review of a final agency determination. *Id*. at 267. Therefore, the Court denies Captain Walsh's motion on this issue and will review the Final Rule *de novo* to determine whether the rule is "otherwise not in accordance with law" or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

With regard to the merits of Captain Welsh's Rehabilitation Act claims, he must show that "(1) he is an 'individual with a disability'; (2) he is 'otherwise qualified' to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance." *Weinreich v. Los Angeles Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) (quoting 29 U.S.C. § 794).

In this case, Defendants do not dispute that Captain Welsh meets the elements set forth above.[2] Defendants, however, argue that the Final Rule "passes muster under the Rehabilitation Act because it provides disabled persons with meaningful access to the Fishing Quota Program." Dkt. 29 at 48. The Court agrees to the extent that Captain Welsh has been provided reasonable access to the program. The Ninth Circuit "has recognized that the focus of the prohibition in § 504 is 'whether disabled persons were denied meaningful access to state-provided services.'" *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008) (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir.1996). A defendant "may be required to make reasonable, but not fundamental or substantial, modifications to its programs." *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015,

---

[2] Although Plaintiffs argue on behalf of Captain Welsh and other similar disabled individuals, the Court will limit its review and requested injunctive relief to the fact of Captain Welsh's situation, the only party in the instant suit. The question whether a particular accommodation is reasonable "depends on the individual circumstances of each case" and "requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards." *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999). Moreover, an overbroad injunction is an abuse of discretion. *United States v. BNS, Inc.*, 858 F.2d 456, 460 (9th Cir. 1988).

1020 (9th Cir. 2002). As such, the Ninth Circuit has held that the Rehabilitation Act "establish[es] only a comparative obligation." *Mark H.*, 513 F.3d at 939.

After assessing the competing interests, the Court concludes that Captain Welsh has been provided meaningful access to the program. First, Captain Welsh does not dispute Defendants' contention that the Final Rule "only affects *at most* 30% of his income from Quota Share." Dkt. 29 at 48 (citing Dkt. 25-2 Declaration of Captain Welsh, ¶ 7). Second, Captain Welsh may apply for medical exceptions for two out of every five years for the affected portion of his share. 50 C.F.R. § 679.42(d)(2).[3] When compared with the competing obligation of regulating the dangerous activity of fishing on the open ocean and the competing goals of allowing access to new entrants, as well as providing means for local coastal communities, the Court declines to impose a fundamental and substantial modification on Defendants by setting aside the Final Rule. Therefore, the Court denies Captain Welsh's motion and grants Defendants' motion on Captain Welsh's first and second claims for relief.

**D. The Antiretroactivity Principle**

In their complaint, Plaintiffs assert a cause of action for impermissible retroactive application of law and a cause of action for a violation of their Fifth Amendment right to due process of law. Dkt. 17, ¶¶ 88–100. Defendants argue that the due process claim is superfluous and need not be addressed by the Court. Dkt. 29 at 46. Plaintiffs counter that the issues are inextricably intertwined. Dkt. 31 at 24 n.10. The Supreme Court has

[3] Captain Welsh does not challenge this rule under the Rehabilitation Act.

recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). "It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution," including the Due Process Clause. *Id*. at 266.

In this case, Plaintiffs' due process claim is based on allegations of no reasonable notice. Dkt. 17, ¶ 98; Dkt. 31 at 23–24. Plaintiffs cite case law to the Court wherein the issues presented were whether the complaining parties had reasonable notice and opportunity to be heard as to proposed rules that included previous "control dates." For example, in *Gen. Category Scallop Fishermen v. Sec'y of U.S. Dep't of Commerce*, 720 F. Supp. 2d 564 (D.N.J. 2010), *aff'd sub nom. Gen. Category Scallop Fishermen v. Sec'y, U.S. Dep't of Commerce*, 635 F.3d 106 (3d Cir. 2011), the plaintiffs argued that their due process rights were violated because the relevant agency adopted a final rule on April 14, 2008 with a November 1, 2004 control date. The court disagreed concluding that the plaintiffs had sufficient notice of the proposed rule, which included the proposed control date, and multiple opportunities to be heard before the rule was adopted.

Similar to *Scallop Fishermen*, Plaintiffs in this case had sufficient notice and opportunity to be heard regarding the February 12, 2010 control date. In fact, the proposed rule, which included the relevant date, was published in the Federal Register on April 26, 2013. 78 Fed. Reg. 24710 ("a hired master could not be used to fish IFQ halibut or sablefish derived from catcher vessel QS that was received by transfer after February 12, 2010 . . . ."). Moreover, it is undisputed that there were opportunities for

public comment before the Final Rule was adopted. To the extent that Plaintiffs argue that they should have received notice before February 12, 2010 that Defendants would adopt a Final Rule on July 28, 2014 with the relevant control date, their argument is without merit because they fail to cite any precedent holding that due process affords such protections. *See* Dkt. 31 at 24. Due process guarantees notice and an opportunity to be heard on proposed legislation, which Plaintiffs were undisputedly provided. Therefore, the Court denies Plaintiffs' motion and grants Defendants' motion on Plaintiffs' due process claim.

With regard to Plaintiffs' other claim, they assert that the Final Rule is impermissibly retroactive. Dkt. 25 at 24–32. "[T]he presumption against retroactive legislation is deeply rooted" in the law, since "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. 244, 265 (1994). Accordingly, "statutory retroactivity has long been disfavored," though not flatly prohibited, and courts ordinarily do not give effect to retroactive law. *Id*. at 268. This principle applies equally to administrative rulemaking. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

The Ninth Circuit has set forth "a two-step framework to determine if [a rule] has a retroactive effect." *Sacks v. S.E.C.*, 648 F.3d 945, 951 (9th Cir. 2011). First, the court must "determine whether the statute or regulation clearly expresses that the law is to be applied retroactively." *Id*. (citing *Mejia v. Gonzales*, 499 F.3d 991, 997 (9th Cir. 2007)). If not, the court must "consider whether application of the regulation would have a

retroactive effect by attach[ing] new legal consequences to events completed before its enactment." *Id*. (internal quotations omitted). If, under this second step, the statute or regulation has retroactive effect, "it does not govern absent clear congressional intent favoring such a result." *Koch v. SEC*, 177 F.3d 784, 786 (9th Cir. 1999) (quoting *Landgraf*, 511 U.S. at 280); *see Bowen*, 488 U.S. at 208.

In this case, the Final Rule does not clearly express that it is to be applied retroactively. Although the rule affects shares that were transferred or acquired before the effective date, the rule only restricts future harvests of fish. In other words, harvests caught before December 1, 2014 need not comply with the Final Rule. Therefore, the Court will proceed to step two of the analysis.

"The inquiry into whether a statute [or regulation] operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotations omitted). A regulation has retroactive effect "when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id*. (internal quotations omitted). A judgment bearing on retroactivity should be guided by "fair notice, reasonable reliance, and settled expectations." *Id*. (internal quotations omitted). Finally, "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. 244, 271 (1994).

Upon review of the case law, the Court finds the controlling principles muddled, at best. *See*, *e.g.*, *Polone v. C.I.R.*, 505 F.3d 966, 972 (9th Cir. 2007) ("the Supreme Court has provided various formulas for determining whether a particular statute applies retroactively."); *Landgraf*, 511 U.S. at 270 ("Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity."). One principle, however, is apparent and counsels in favor of concluding that the Final Rule improperly applies retroactively. Cases arising in various areas of the law make a distinction between regulations that completely extinguish rights and regulations that only impose additional burdens on an individual's rights. For example, in *St. Cyr*, the Supreme Court considered an immigration regulation that removed the Attorney General's discretion to waive deportation proceedings against permanent resident aliens who had been convicted of certain felonies. 533 U.S. at 293–98. The defendant, Enrico St. Cyr, accepted a plea bargain to a crime that made him automatically deportable, but eligible for a waiver of deportation at the discretion of the Attorney General. *Id*. at 293. Then, Congress passed the regulation in question, stripping the Attorney General of any discretion to waive the proceeding, and deportation proceedings were initiated against St. Cyr. *Id*. The Court held that the regulation was impermissibly retroactive because it completely stripped St. Cyr of rights he possessed when he accepted the plea bargain. *Id*. at 321–25.

Similar to *St. Cyr*, in *Mejia*, 499 F.3d 991, the Ninth Circuit considered a regulation adopted by the Attorney General that further interpreted the same waiver provision. The federal statute authorized the Attorney General to waive deportation

proceedings if the denial of admission would result in "extreme hardship" to the alien or an immediate family member. 8 U.S.C. § 1182(h)(1)(B). In 2003, the Attorney General adopted a regulation stating that waivers would be denied unless "the alien clearly demonstrates that the denial of [relief] would result in exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d). Like St. Cyr, Jorge Humberto Mejia accepted a plea bargain before the regulation was adopted and faced deportation proceedings after the regulation was adopted. *Mejia*, 499 F.3d at 994–95. Mejia argued that the new standard was impermissibly retroactive. *Id*. at 997–98. The Ninth Circuit, however, rejected that argument because "[b]oth before and after the adoption of the regulation, Mejia faced only possible deportation." *Id*. at 998. "As the Supreme Court observed in *St. Cyr*, '[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.'" *Id*. at 998 (quoting *St. Cyr*, 533 U.S. at 325). Thus, *St. Cyr* and *Mejia* illustrate the difference between a regulation that completely vitiates one's rights and a regulation that adversely affects those same rights.

In the context of property law, courts have labeled the adverse affect on rights as "imposing additional burdens" on the exercise of one's rights or merely "frustrating business expectations." *See, e.g., Polone*, 505 F.3d at 972 ("a change in the property tax regime would not be considered retroactive with respect to all who had purchased property prior to the effective date of the amendment."); *Chem. Waste Mgmt., Inc. v. U.S.E.P.A.*, 869 F.2d 1526, 1536 (D.C. Cir. 1989). For example, in *Waste Mgmt.*, the Environmental Protection Agency ("EPA") adopted a rule requiring the management of certain hazardous waste material no matter when the waste was disposed of. *Id*. at 211–

212. The plaintiffs were numerous hazardous waste disposal site owners that, under the new regulation, would be required to manage covered waste regardless of when the waste was deposited at the particular site. *Id*. The court framed the question as follows:

> did the agency improperly engage in retroactive rulemaking in ordering that its leachate regulations be made applicable to leachate derived from wastes which were not deemed hazardous at the time they were disposed?

*Id*. at 213. In rejecting the plaintiffs' argument that the regulation applied retroactively, the court provided as follows:

> As a practical matter, of course, a landfill operator has little choice but to collect and manage its leachate. Active management of leachate is sound environmental practice, and a panoply of regulations require it. A landfill operator therefore finds its present range of options constrained by its own past actions (the decision to accept certain wastes) even though it could not have foreseen those consequences when the actions occurred. This does not, however, make the rule a retroactive regulation. It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.

*Id*. at 217 (footnotes omitted).

In this case, the Final Rule goes well beyond frustrating Plaintiffs' business expectations. In explaining the effect of the rule, the Secretary provided as follows:

> The Council noted that under the proposed action, initial QS recipients would have options for using QS received by transfer after February 12, 2010. Specifically, initial recipients who received catcher vessel QS after February 12, 2010, could choose to sell those QS to other halibut and sablefish IFQ fishery participants, or to new entrants into the fishery. Other than selling the QS, the options and associated impacts differ between individual and non-individual initial recipients. An individual initial recipient who receives catcher vessel QS after February 12, 2010, could choose to fish the IFQ derived from that QS as an owner onboard. A non-individual initial recipient who received catcher vessel QS by transfer after

> February 12, 2010, could also choose to fish the resulting IFQ using a hired master, but only until the effective date of this action. After the effective date, a non-individual initial recipient would be prohibited from fishing QS received by transfer after February 12, 2010, using a hired master, but could, as noted above, sell those QS. Alternatively, a non-individual initial recipient could continue to hold that QS, but the resulting IFQ could not be used because a non-individual entity must hire a master to harvest the IFQ.

78 Fed. Reg. 24709. In other words, Fairweather Fish's options are either sell their QS or keep it, but not use it. Defendants argue that the rule "merely placed a new condition on the use of [QS] received by transfer after the control date." Dkt. 29 at 44. While Defendants may have a point as to Captain Welsh, the Court disagrees as to Fairweather Fish because the "condition" is dispositive of Fairweather Fish's right to harvest its QS. Similar to St. Cyr, there is a clear difference between forcing a disabled captain to board a fishing vessel in the open ocean and forcing Fairweather Fish to sell its QS. *St. Cyr*, 533 U.S. at 325 ("[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."). The Court finds that such results go beyond imposing additional burdens or frustrating the business expectations of harvesting fish. Thus, the Final Rule has retroactive effect.

The final question the Court must consider is whether there exists clear congressional intent favoring a retroactive result. *Koch*, 177 F.3d at 786. Defendants argue that Plaintiffs have no reliance interest in their QS because the shares "may be revoked, limited, or modified at any time . . . ." 16 U.S.C. § 1853a(b)(2). A divided panel of the D.C. Circuit reached the same result when considering similar language governing trademarks. *See Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 795 (D.C. Cir. 2011) ("*Cubaexport*"). In

*Cubaexport*, a Cuban-based company registered a trademark under an exception to the Trading with the Enemy Act "allowing Cuban-affiliated entities to register and renew U.S. trademarks." *Id*. at 795. In 1998, however, Congress modified the exception such that Cubaexport was barred from renewing its trademark when it came up for renewal in 2006. *Id*. at 796. Cubaexport sued arguing, in part, that the law impermissibly applied retroactively. *Id.* The D.C. Circuit disagreed stating that, "[b]ecause the Cuban Assets Control Regulations stated that exceptions were revocable at any time, Cubaexport had no vested right to perpetual renewal of the trademark." *Id*.

Similar to Cubaexport's trademark rights, Plaintiffs' QS rights were never "vested." While Plaintiffs argue that the revocation language is insufficient to show clear Congressional intent for retroactive application of regulations (Dkt. 31 at 20–21), the principle is that Congress did not intend to confer vested rights by issuing a QS. Plaintiffs were aware that any QS they purchased was subject to revocation at any time, which precludes them from asserting that their property rights were either improperly taken away or impaired by the Final Rule. Although the result seems harsh that Plaintiffs, and others similarly situated, were specifically targeted by Defendants, the Court is unable to conclude that Plaintiffs' conditional rights are protected by the presumption against retroactive application. Therefore, the Court denies Plaintiffs' motion and grants Defendants' motion on the claim of improper retroactivity.

## IV. ORDER

Therefore, it is hereby **ORDERED** that Plaintiffs' motion for summary judgment (Dkt. 25) is **DENIED** and Defendants' cross motion for summary judgment (Dkt. 29) is

**GRANTED**. The Clerk shall enter **JUDGMENT** in favor of Defendants and close this case.

Dated this 20th day of October, 2015.

BENJAMIN H. SETTLE
United States District Judge