Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FAIRWEATHER FISH, INC., *et al.,*

Plaintiffs,

v.

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

Defendants.

Case No. 3:14-cv-05685-BHS

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Note on Motion Calendar: July 17, 2015

ORAL ARGUMENT REQUESTED

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

TABLE OF CONTENTS

Table of Authorities iii

I. SUMMARY OF ARGUMENT 1

II. STATEMENT OF FACTS 2

A. Standing. 2

B. Historical Background And The Final Rule. 3

III. STANDARD OF REVIEW 5

IV. THE FINAL RULE VIOLATES THE REHABILITATION ACT BY EXCLUDING OTHERWISE QUALIFIED INDIVIDUALS WITH A DISABILITY FROM PARTICIPATING IN THE IFQ PROGRAM 6

A. The Rehabilitation Act Applies To The IFQ Program. 6

B. Captain Welsh Is Disabled Within The Meaning Of The Rehabilitation Act. 7

C. Apart From His Disability, Captain Welsh Is Otherwise Qualified To Participate In The IFQ Program. 8

D. Captain Welsh Is Denied From Fully Participating In The IFQ Program Solely By Reason Of His Disability. 8

E. Allowing Disabled Individuals To Use A Hired Master Would Not Result In A Fundamental Alteration In The Nature/Purpose Of The IFQ Program. 9

F. Defendants Improperly Apply The Department Of Commerce Regulations Implementing The Rehabilitation Act To Exclude Disabled Individuals From The Definition Of "Qualified Individual With Handicaps" 14

G. Section 504 Of The Rehabilitation Act Provides For A Private Right Of Action Against Defendants. 15

H. Captain Welsh Is Not Required To Exhaust Administrative Remedies. 16

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

I. The Compliance Procedures In The Department Of Commerce Regulations Are Not Applicable. 16

J. Captain Welsh Also Has A Cognizable Right Under The APA. 17

V. THE FINAL RULE IS IMPERMISSIBLY RETROACTIVE 17

A. The Council Action. 17

B. Retroactive Rulemaking Is Prohibited By Supreme Court Precedent. 18

C. Because Retroactive Application Of The Final Rule Is Prohibited, The Effective Date Of The Final Rule Must Be After Promulgation Of That Rule Pursuant To The Administrative Procedure Act. 23

D. Retroactive Application Of The Final Rule Violates The Due Process Clause Of The U.S. Constitution. 24

VI. THE FINAL RULE VIOLATES THE MSA AND THE HALIBUT ACT 25

A. National Standard 1: Achievement Of Optimum Yield. 25

B. National Standard 2: Use Of Best Available Data In Decisionmaking. 26

C. National Standard 4: Fair And Equitable Allocation Of Fishing Privileges. 27

D. National Standard 9: Minimizing Bycatch. 29

E. National Standard 10: Promoting Safety Of Human Life At Sea. 29

VII. CONCLUSION 30

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Chemistry Council v. Dept. of Transp.,
468 F.3d 810 (D.D.C. 2006) 3

United States v. AMC Entertainment, Inc.,
549 F.3d 760 (9th Cir. 2008) 24

Baltimore Gas & Elec. Co. v. NRDC,
462 U.S. 87 (1983) 6

Bohner v. Daniels,
243 F.Supp.2d 1171 (D. Or. 2003), *aff'd* 413 F.3d 999 (9th Cir. 2005) 23

Bowen v. Georgetown Univ. Hospital,
488 U.S. 204 (1988) 18, 19, 23

Buckingham v. U.S.,
998 F.2d 735 (9th Cir. 1993) 10

Burlington Truck Lines v. United States,
371 U.S. 156 (1962) 6

Camins v. Gonzalez,
500 F.3d 872 (2007) 21

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 6

Chesapeake Climate Action Network v. Export-Import Bank of the U.S.,
-- F.Supp.3d ----, 2015 WL 267099 (D.D.C. Jan. 21, 2015) 3

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 6

City of Sausalito v. O'Neill,
386 F.3d 1186 (9th Cir. 2004) 6

Davis v. Astrue,
2011 U.S. Dist. LEXIS 92336 (N.D. Cal. Aug. 18, 2011) 15, 16

Ditullio v. Boehm,
662 F.3d 1091 (9th Cir. 2011) 21

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Doe v. Attorney General,
941 F.2d 780 (9th Cir.1991) 15, 16

Fed. Power Comm'n v. Florida Power & Light Co.,
404 U.S. 453 (1972).....6

Foss v. Nat'l Marine Fisheries Service,
161 F.3d 584 (9th Cir. 1998) 20, 24

Friends of Southeast's Future v. Morrison,
153 F.3d 1059 (9th Cir. 1998) 19

General Motors Corp. v. Romein,
503 U.S. 181 (1992).....20

J. L. v. Social Security Administration,
971 F.2d 260 (9th Cir. 1991) 17

Johnson v. Hewlett-Packard Company,
2014 U.S.Dist. LEXIS 30870 (N.D. Cal. Mar. 10, 2014).....21

Kankamalage v. INS,
335 F.3d 858 (9th Cir. 2003) 18, 21

Landgraf v. USI Film Products,
511 U.S. 244 (1994).....20, 21

Lane v. Pena,
518 U.S. 187 (1996).....15, 19, 20

Mendez v. Gearan,
947 F. Supp. 1364, 1367 (N.D. Cal. 1966) 16, 17

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Inc. Co.,
463 U.S. 29 (1983).....6, 7

Riverbend Farms, Inc. v. Madigan,
958 F.2d 1479 (9th Cir. 1992) 23, 24

Service Employees International Union Local 102 v. County of San Diego,
60 F.3d 1346 (9th Cir. 1995) 23

Sierra Club v. E.P.A.,
292 F.3d 895 (D.C. Cir. 2002).....3

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Sierra Forest Legacy v. Sherman,
646 F.3d 1161 (9th Cir. 2011) 19

Southeastern Cmty. College v. Davis,
442 U.S. 397 (1979) 7, 9, 10, 14

United States v. AMC Entertainment, Inc.,
549 F.3d 760 (9th Cir. 2008) 24

Utility Solid Waste Activities Group v. Environmental Protection Agency,
236 F.3d 749 (D.C. Cir. 2001) 24

Statutes

16 U.S.C. §304(a) and (b) 17

16 U.S.C. §1604(f)(4) 19

16 U.S.C. §1854(a) 25

16 U.S.C. §1855(f)(1), ... 5

Administrative Procedure Act, 5 U.S.C. §553 ..... *passim*

Americans With Disabilities Act, 42 U.S.C. §12101 ..... 7, 28

Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §1801 ..... *passim*

National Forest Management Act 19

Northern Pacific Halibut Act of 1982, 16 U.S.C. §773 ..... *passim*

Rehabilitation Act of 1973, 29 U.S.C. §701 ..... *passim*

Other Authorities

15 C.F.R. Part 8c 6

15 C.F.R. §8c.3 ..... 14, 15

15 C.F.R. §8c.3(2) 7

15 C.F.R. §8c.30(a) 14

15 C.F.R. §8c.70(a) 16

29 C.F.R. §1613.702(f) 14

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

29 C.F.R. §1613.704(a).....9
29 C.F.R. §1630.2.....7
41 C.F.R. §60-741.2(q).....7
50 C.F.R. §600.310(e)(3)(i)B.....25
50 C.F.R §600.325(c)(1).....27
50 C.F.R. §600.325(c)(3)(i)(3).....27
50 C.F.R. §§679.40(a)(2.....14
50 C.F.R. §679.41.....14, 20
50 C.F.R. §679.41(b)(1).....22
50 C.F.R. §§679.42(i)(1).....8
50 C.F.R. §679.42(a)(1).....25
50 C.F.R. §679.42(j)(1).....8
53 Fed. Reg. 19270 (May 27, 1988).....9, 15
57 Fed. Reg. 57130 (Dec. 3, 1992).....*passim*
58 Fed. Reg. 59375 (Nov. 9, 1993).....3
78 Fed. Reg. 24707 (April 26, 2013).....*passim*
79 Fed. Reg. 43679 (July 28, 2014).....*passim*
United States Constitution.....1, 24

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

I. MOTION AND SUMMARY OF ARGUMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Fairweather Fish, Inc. and Captain Ray Welsh move for summary judgment on all issues raised in their Complaint on the grounds that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law.

Plaintiffs challenge a final rule titled "Fisheries of the Exclusive Economic Zone Off Alaska: Pacific Halibut and Sablefish Individual Fishing Quota Program" ("Final Rule"), issued by Defendants on July 28, 2014. The Individual Fishing Quota ("IFQ") Program for commercial halibut and sablefish fisheries in Alaska allows initial recipients of catcher vessel halibut and sablefish quota share ("QS") to hire a vessel master (*i.e.,* skipper or captain) to harvest an annual fishing allocation. The Final Rule amends the hired master provisions of the IFQ Program to prohibit the use of a hired master to harvest QS acquired after February 12, 2010.

The Final Rule is improper because Defendants: (1) violated the Rehabilitation Act of 1973, 29 U.S.C. §§701 *et seq*., by excluding otherwise qualified individuals with a disability from participating in the IFQ Program; (2) engaged in impermissible retroactive rulemaking in violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§1801-1884 ("MSA"); the Northern Pacific Halibut Act of 1982, 16 U.S.C. §773 et seq. ("Halibut Act"); the United States Constitution; and the Administrative Procedure Act 5 U.S.C. §§701-706 ("APA"); (3) denied Plaintiffs due process of law in violation of the Fifth Amendment of the United States Constitution; (4) employed an incorrect interpretation of the MSA and the Halibut Act that foreclosed the required analysis and consideration of issues and alternatives, in violation of the MSA, the Halibut Act, and the APA; (5) failed to comply with national standards for fishery conservation and management required by the MSA, including

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

National Standards One, Two, Four, Nine, and Ten; and (6) failed to comply with applicable law, in violation of the MSA and the APA.

No genuine issues of material fact contravene these conclusions and Plaintiffs are entitled to summary judgment as a matter of law. Plaintiffs seek an Order (1) vacating the Final Rule; (2) enjoining Defendants from implementing the Final Rule as issued; and (3) remanding the Final Rule to Defendants for reconsideration and compliance with the applicable law as set forth herein.

II. STATEMENT OF FACTS

A. Standing.

Plaintiff Captain Welsh has a disability making it impossible and unsafe for him to be aboard his vessel when fishing. Declaration of Dr. William Bell ("Bell Dec.") attached as Exhibit 1, ¶4; Declaration of Captain Ray Welsh ("Welsh Dec.") attached as Exhibit 2, ¶¶4-5. Nonetheless, the Final Rule prohibits Captain Welsh from using a hired captain to harvest QS acquired after February 12, 2010. Captain Welsh entered into a contract for the transfer of QS after February 12, 2010. Welsh Dec. ¶7. That transfer was expressly approved by Defendants. *Id*. By retroactively promulgating the Final Rule, Defendants have deprived Captain Welsh of the benefit of this contract because his disability prevents him from being on board his vessel.

Plaintiff Fairweather Fish, Inc. ("Fairweather Fish") is a corporation. It cannot physically be on board its vessel when fishing and must hire a vessel captain to fish its QS. By prohibiting that, the Final Rule prohibits Fairweather Fish from harvesting QS acquired after February 12, 2010. Fairweather Fish entered into contracts for the transfer of QS prior to and after February 12, 2010. Declaration of Lisa Newland ("Newland Dec."), attached as Exhibit 3, ¶¶8-9. The

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

transfer of QS was expressly approved by Defendants. *Id.* By retroactively promulgating the Final Rule, Defendants have deprived Fairweather Fish of the benefit of these contracts.

Plaintiffs are harmed because they will not be able to harvest QS acquired after February 12, 2010, they will not be able to acquire and harvest additional QS, and the value of the QS they acquired after February 12, 2010 will be substantially diminished.[1]

B. Historical Background And The Final Rule.

In the early 1990s, so many boats were entering the halibut and sablefish fisheries off Alaska that the total allowable catch could be harvested in a few days. The result was a race for the fish. Among the effects of the race were (1) catches exceeding the total allowable annual harvest before managers knew the fishery had to close, (2) vessels being forced to fish in any ocean condition regardless of safety, and (3) changing fishery economics that rewarded recently built vessels with large fishing capacity. Administrative Record ("AR") at 10840, 20003, 20209-20211. *See also* 57 Fed. Reg. 57130 (Dec. 3, 1992). To reduce excess fishing capacity and stop the race for the fish, Defendants, in 1993, adopted a system to limit access to the halibut and sablefish fisheries. 58 Fed. Reg. 59375 (Nov. 9, 1993) ("1993 Rule"), AR at 20002-20028. Defendants acted pursuant to their authority under the MSA, regarding sablefish and pursuant to the Halibut Act, regarding halibut. AR at 10840. The 1993 Rule restricted the harvest of halibut and sablefish to fishermen who had fished for these species during specified years, called the qualifying years. The limited access IFQ Program provided that persons fishing during the

[1] Evidence of standing can (and should) be introduced by declaration if standing is not apparent from the Administrative Record. *See, e.g., Sierra Club v. E.P.A.,* 292 F.3d 895, 899-900 (D.C. Cir. 2002); *Chesapeake Climate Action Network v. Export-Import Bank of the U.S.*, -- F.Supp.3d ----, 2015 WL 267099, at *5 (D.D.C. Jan. 21, 2015); *Am. Chemistry Council v. Dept. of Transp.,* 468 F.3d 810, 819-21 (D.D.C. 2006). In *Sierra Club*, the court held that "a petitioner whose standing is not self-evident should establish standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner's opening brief."

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

qualifying years would receive a specified number of units (called a quota share or "QS"). A fisherman's QS was based on his or her halibut and sablefish catches in the qualifying years. Each person's QS is applied proportionally each year to that year's total allowed harvest to determine the pounds of halibut and sablefish the fisherman can catch. This annual quota is that fisherman's IFQ. AR at 10840, 10854.

Under the IFQ Program, persons qualified to receive QS in 1993 ("initial QS recipients") included individuals, corporations, partnerships, and associations. Only those persons who received QS in 1993 could participate in the fishery. Other fishermen could enter the fishery after the IFQ Program took effect only if they bought QS from initial QS recipients. The IFQ Program treated QS as property that could be sold. AR at 10840.

The 1993 IFQ Program required the QS owner to be aboard the vessel when it was fishing, called the owner-on-board ("OOB") standard. However, initial QS recipients operating in western Alaska were exempted from the OOB requirement and can rely on a hired master to harvest their QS. AR at 10841, 10853. The IFQ Program also allowed these exempted QS holders to acquire more QS without being subject to the OOB standard. AR at 10840, 10841. These QS recipients were exempted from the OOB requirement because using a hired master was common in western Alaska and "[t]he exception is intended to prevent severe disruption of current fishing practices." AR at 20019, 20262-63. It was expected that eventually, as these initial QS recipients retired or otherwise left the fishery, all QS would be held by OOB persons. AR at 10841. The IFQ Program had no timetable for this to occur. AR at 10844.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

In February 2010, the North Pacific Regional Fishery Management Council ("Council")[2] received information that initial QS recipients were acquiring additional QS as allowed by the IFQ Program. The Council received testimony claiming this reduced opportunities for potential new entrants to acquire QS. AR at 10841. In February, 2010, the Council initiated a study to evaluate the merits of amending the IFQ Program to prohibit initial QS recipients from using hired masters to harvest QS. *Id.* AR at 30373, 30378-79. In April, 2011, the Council proposed amending the IFQ Program to prohibit initial QS recipients from using hired masters to harvest QS acquired after February 12, 2010 (the "Amendment"). AR at 30616-17, 30622-23. On April 26, 2013, Defendants published a proposed rule to implement the Amendment. 78 Fed. Reg. 24707 (April 26, 2013) ("Proposed Rule"), AR at 10853-58. On July 28, 2014, Defendants published a Final Rule implementing the Amendment. 79 Fed. Reg. 43679 (July 28, 2014) ("Final Rule"), AR at 10839-52. The Final Rule took effect December 1, 2014. *Id.*

III. STANDARD OF REVIEW

The MSA and the Halibut Act provide for judicial review pursuant to the Administrative Procedure Act ("APA"). 16 U.S.C. §1855(f)(1), 16 U.S.C. §773i(d). Under the APA, an agency action is set aside if it exceeds statutory authority, or is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. §706. An action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in

[2] The Council was created by the MSA, 16 U.S.C. §1852(a)(1)(G), and given responsibility to develop fishery management plans such as the IFQ Program for fisheries in its geographic area. 16 U.S.C. §1852(h)(1). All such management plans must be approved by the Secretary of Commerce as consistent with the national standards of the MSA and other applicable law. 16 U.S.C. §1854(a) (the ten MSA national standards are set forth in 16 U.S.C. §1851(a)). Sablefish are managed under the MSA. The Council and Defendants have similar authority regarding halibut management pursuant to the Halibut Act. 16 U.S.C. §773c(c).

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

view or the product of agency expertise." *City of Sausalito v. O'Neill,* 386 F.3d 1186, 1206 (9th Cir. 2004) (*quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Inc. Co.,* 463 U.S. 29, 43 (1983)). While agency actions are granted deference, *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983), they are not spared a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415 (1971). Further, deference is not due when the agency's decision is without a substantial basis in fact. *Fed. Power Comm'n v. Florida Power & Light Co.,* 404 U.S. 453, 463 (1972). Thus, the APA requires that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n.,* 463 U.S. at 43 (*quoting Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). "The reviewing court should not attempt itself to make up for [an agency's] deficiencies; we may not supply reasoned basis for the agency's action that the agency itself has not given." *Id.* (*quoting SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947)).

For the reasons set forth below, Plaintiffs are entitled to judgment as a matter of law that the Final Rule is arbitrary, capricious, and not in accordance with law.

IV. THE FINAL RULE VIOLATES THE REHABILITATION ACT BY EXCLUDING OTHERWISE QUALIFIED INDIVIDUALS WITH A DISABILITY FROM PARTICIPATING IN THE IFQ PROGRAM

Defendants have violated the Rehabilitation Act by prohibiting Captain Welsh (and others like him) from using a hired master to harvest IFQ derived from QS acquired after February 12, 2010.

A. The Rehabilitation Act Applies To The IFQ Program.

Defendants admit the Rehabilitation Act applies to the IFQ Program. AR at 10845. Indeed, Defendants implemented regulations effectuating §119 of the Rehabilitation,

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Comprehensive Services, and Developmental Disabilities Amendments of 1978 that amended Rehabilitation Act of 1973 to prohibit discrimination in federal programs. 15 C.F.R. Part 8c.

Defendants also admit that to prove a Rehabilitation Act violation, an applicant to a government program must show he or she is disabled, that apart from the disability, the individual is otherwise qualified to receive the program benefit, that the individual is denied the benefit solely by reason of the disability. AR at 10845. Defendants further acknowledge that only if providing the accommodation would result in a major alteration or adjustment in the program can they avoid a Rehabilitation Act violation and the need to provide an accommodation. AR at 10845; *see Southeastern Cmty. College v. Davis,* 442 U.S. 397, 410, 413 (1979) ("*Davis*") (the Rehabilitation Act does not require "... [s]uch a fundamental alteration in the nature of a program;" "... it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute discrimination."). The reasonable accommodation of permitting Captain Welsh (and others like him) to use a hired master to harvest QS acquired after February 12, 2010 does not constitute a fundamental alteration in the IFQ Program but a reasonable modification.

B. Captain Welsh Is Disabled Within The Meaning Of The Rehabilitation Act.

To qualify as disabled under the Rehabilitation Act, one must have "a physical or mental impairment that substantially limits one or more major life activities," a record of such impairment, or have been regarded as having such impairment. 29 U.S.C. §705(20) (incorporating ADA definition of a disability, 42 U.S.C. §12102.) "Major life activities" include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. §12102(2); *see also* 15 C.F.R.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

§8c.3(2) (same); 29 C.F.R. §1630.2 ("Definitions" provision in regulations implementing the ADA). "Substantially limits" is defined as unable to perform a major life activity that an average person can perform or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity compared to an average person. 41 C.F.R. §60-741.2(q). Captain Welsh has permanent physical impairments that prevent him from, or substantially limit, his ability to perform several of these "major life activities." These include tasks such as concentrating, standing, walking, learning, and working. Bell Dec. at ¶¶4-5; Welsh Dec. at ¶4. Captain Welsh meets the definition of a disabled individual under the Rehabilitation Act and qualifies for a reasonable accommodation.

C. Apart From His Disability, Captain Welsh Is Otherwise Qualified To Participate In The IFQ Program.

Prior to the Final Rule, the IFQ Program provided, without any time limitations, that initial QS recipients such as Captain Welsh could employ a hired master to harvest their QS. *See* 50 C.F.R. §§679.42(i)(1), 679.42(j)(1). Captain Welsh meets the requirements to participate in the IFQ Program because he is an initial QS recipient, has a 20% or greater ownership interest in the vessel that harvests his QS, and is represented by a permitted hired master. Welsh Dec. ¶¶3, 6.

D. Captain Welsh Is Denied From Fully Participating In The IFQ Program Solely By Reason Of His Disability.

The Rehabilitation Act prohibits Defendants from excluding Captain Welsh from participating fully in the IFQ Program solely by reason of his disability. 29 USC §794(a) ("No otherwise qualified individual with a disability in the United States…shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Postal Service"). The Final Rule prohibits initial QS recipients from using a hired master to harvest QS acquired after February 12, 2010, with a limited exception for small amounts of QS. As an otherwise qualified individual with a disability, Captain Welsh can only harvest his halibut or sablefish QS by using a hired master. Welsh Dec. ¶6. Because of his disability, Captain Welsh cannot physically be on board a commercial fishing vessel. *Id.* If required to be on board, Captain Welsh's limitations would pose a danger to himself and others. *Id*. The only reason Captain Welsh cannot comply with the Final Rule is because of his disability and attendant physical limitations. Defendants have improperly denied Captain Welsh the ability to participate in the IFQ Program solely based on his disabilities.

E. Allowing Disabled Individuals To Use A Hired Master Would Not Result In A Fundamental Alteration In The Nature/Purpose Of The IFQ Program.

In rejecting a request for an accommodation to use a hired master under the Rehabilitation Act and the applicable Department of Commerce ("DOC") regulations, Defendants must demonstrate that granting the accommodation would result in a fundamental alteration in the nature of the IFQ Program. *Davis*, 442 U.S. at 410, 413. Pursuant to the final rule implementing the DOC regulations for the Rehabilitation Act, 53 Fed. Reg. 19270, 19272 (May 27, 1988), "in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in §§8c.50(a)(2) and 8c.60(d), ... for demonstrating that an action would result in *undue financial and administrative burdens.*" *Id.* (Emphasis added.) "If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration. *Id.; see Buckingham v. U.S.,* 998 F.2d 735, 739-740 (9th Cir. 1993) ("An agency shall make reasonable

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." (*citing* 29 C.F.R. §1613.704(a)) (discussing an employer's affirmative obligation to provide reasonable accommodations to qualified individuals with disabilities).

Defendants fail to meet their burden. In rejecting the accommodation to use a hired master, Defendants simply make a conclusory statement, incorrectly as noted below, that the OOB standard is a fundamental purpose of the IFQ Program. AR at 10845. Defendants fail to address, let alone present evidence, that granting the accommodation will result in any undue financial or administrative burden. Allowing Captain Welsh (and others like him) to use a hired master would not impose any undue financial burden on Defendants, as the cost of these hired masters is borne by the individuals who hire them. There is no undue administrative burden because allowing hired masters to physically captain vessels imposes no appreciable obligations, and has no impact, on the IFQ Program's day-to-day operation.

Moreover, Defendants' reliance on *Davis*, AR at 10845, is misplaced. First, *Davis* established that an accommodation was reasonable provided it did not result in a *fundamental alteration* in the nature of the program, not a fundamental purpose of the program. *Davis*, 442 U.S. at 410, 413. Second, the accommodation requested in *Davis* would have compromised the essential nature of the college's nursing program. "Such a fundamental alteration in ... a program is far more than the 'modification' the regulation requires." *Davis*, 442 U.S. at 410. Here, unlike the nursing program in *Davis* that would have had to be substantially altered to accommodate the disabled plaintiff, no fundamental alteration to the IFQ Program is required to accommodate Captain Welsh (or others like him). All that is required is that they be able to

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

continue to use a hired master to harvest QS acquired after February 12, 2010. Likewise, the essential rules of the IFQ Program will remain unchanged, ensuring that excessive fishing capacity is reduced regardless of who is physically present on their vessel.

Allowing Captain Welsh to use a hired master will not fundamentally alter the program because the program's fundamental goal had nothing to do with requiring that individuals be physically present on vessels. In Defendants' words, "The IFQ Program was intended primarily to reduce excessive fishing capacity in the commercial halibut and sablefish fixed gear fisheries." AR at 10840. The fundamental reason for creating the IFQ Program was not to establish an OOB fishery but to address issues associated with too many vessels chasing too few fish. Allowing the disabled to use hired masters will not change the Program's fundamental purpose.

The IFQ Program sought to address ten problems associated with excess fishing capacity: allocation conflicts; gear conflict; deadloss from lost gear; bycatch loss; discard mortality; excess harvesting capacity; product wholesomeness; safety; economic stability in the fisheries and communities; and rural coastal community development of a small boat fleet. AR at 20003. Nowhere is OOB mentioned. Defendants' claim that the OOB requirement was a fundamental purpose of the IFQ Program, AR at 10845, is Defendants' attempt to reinvent history to justify their violation of the Rehabilitation Act. The section of the Final Environmental Impact Statement on the 1993 IFQ Program that summarizes how the IFQ Program addresses the ten problems never mentions the OOB standard as necessary to address any of the ten problems. AR at 20273-78. Moreover, if an OOB standard was a fundamental component of the IFQ Program,

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

the Plan would not have excluded "all initial recipients of QS" and allowed these QS recipients to acquire more QS without being subject to the OOB standard. AR at 10841.[3]

It is true the Council and Defendants wanted to assure that "the fisheries continue to be dominated by owner/operator operations." AR at 20262. However, Defendants admit the IFQ Program had various and "competing objectives," not all of which were fundamental. AR at 10843. *See also* AR at 20243, list of general goals. One objective was to maintain existing business practices in western Alaska including the common practice of using hired skippers. *Id.* To balance that objective with an eventual OOB goal, the IFQ Program "exempted initial recipients of QS" from any OOB requirement. *Id.* In other words, preserving the business model of allowing the use of hired masters was more fundamental than any OOB goal.[4]

Not only were initial QS recipients exempted from the OOB standard, but the IFQ Program provided that initial QS recipients "could acquire more QS and use it..." without being subject to an OOB standard. 57 Fed. Reg. at 57138. *See also* AR 20006; AR 108432. Under the IFQ Program "initial [QS] recipients may increase their QS holdings, for which they may hire masters...." AR at 10843. *See also* AR at 10844 ("initial recipients of QS could continue to increase their holdings of QS that are exempt from the owner-on-board requirement.") To claim that a fundamental objective of the IFQ Program was to limit the acquisition of QS by initial QS recipients in order to further an OOB goal is fundamentally wrong. Indeed, the IFQ Program never required vessel ownership as a predicate to a fisherman acquiring QS.

---

[3] The only fishermen to whom the OOB requirement applied were those operating in Southeast Alaska where the fleet was already typically OOB because it was comprised of small, family owned vessels. 57 Fed. Reg. 57130, 57138 (Dec. 3, 1992), AR at 10843. Defendants' references to an exemption for all initial QS recipients really means recipients in western Alaska.

[4] In the proposed rule to implement the IFQ Program, Defendants "recognized that many of these fishing firms may use hired masters to operate their vessel" and "did not wish to constrain this option...." 57 Fed. Reg. at 57138. Defendants "recognized that hired masters of fishing vessels ... are instrumental in the success [or] failure of a fishing venture...." *Id.* at 57134.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

There was also no fixed or expected timetable for achieving an OOB fleet. AR at 10844. The Final Rule is replete with admissions that the IFQ Program "anticipated that individual and non-individual initial [QS] recipients would *eventually* be replaced by new entrants" to the fishery subject to the OOB standard. AR at 10841 (emphasis added). *See also* AR at 10843, 10848, 10849. The decision that the OOB goal would be achieved "eventually" as initial QS recipients retired or otherwise left the fishery further indicates the OOB goal was not a fundamental objective as to initial QS recipients such that it absolves Defendants of compliance with the Rehabilitation Act. Indeed, in the proposed rule to implement the IFQ Program Defendants state "*[e]xcept* for initial recipients of QS, a key element of the proposed IFQ Program is the requirement for catcher vessel QS holders to be on board the vessel during fishing operations...." 57 Fed. Reg. at 57138 (emphasis added).

Moreover, recall that the purpose of the OOB goal was to assure the fishery would "continue to be dominated by owner/operator operations," AR at 20262, such that the fishery would be prosecuted by active harvesters and not investment speculators, AR at 10843. Significantly, individual and corporate fishermen existing in 1993 were considered to be the desired type of "family owned-and-operated" business operating consistently with the OOB goal. AR at 20027. Thus, the proposed rule to implement the IFQ Program stated the OOB standard would "assure that catcher vessel QS would *continue* to be held by professional fishermen after the initial allocation process instead of being acquired by investment speculators...." 57 Fed. Reg. at 57138 (emphasis added). That Defendants characterized the OOB goal as one of *continuing* to assure an owner-operator fleet concedes that initial QS recipients already met that standard. Continuing the OOB exemption for initial QS recipients does not change a fundamental nature of the IFQ Program.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

F. Defendants Improperly Apply The Department Of Commerce Regulations Implementing The Rehabilitation Act To Exclude Disabled Individuals From The Definition Of "Qualified Individual With Handicaps."

The DOC regulations govern, *inter alia*, the IFQ Program. Those regulations provide that "no qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency." 15 C.F.R. §8c.30(a). A "qualified individual with handicaps" means "(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; (2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and (3) 'Qualified handicapped person' as that term is defined for purposes of employment in 29 C.F.R. §1613.702(f), which is made applicable to this part by §8c.40." 15 C.F.R. §8c.3.

Defendants improperly apply subsection (1) of the definition of a "qualified individual with handicaps" in 15 C.F.R. §8c.3 to exclude disabled individuals from hiring a master to harvest QS acquired after February 12, 2010, and to exclude disabled individuals from fully participating in, and benefiting from, the IFQ Program. AR at 10845. However, the IFQ Program does not require a participant to "perform services or to achieve a level of accomplishment," as provided in subsection (1) of the definition of a "qualified individual with handicaps" in the DOC regulations. 15 C.F.R. §8c.3 (definition of "qualified individual with handicaps" based on the decision in *Southeastern Cmty. College v. Davis*, 442 U.S. at 410, 413.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

397; 53 Federal Register 19270-01 (May 27, 1988)). Indeed, no level of accomplishment is referenced in the IFQ Program. *See* 50 C.F.R. §§679.40(a)(2), 679.41. Simply stated, this subsection does not apply. Defendants are attempting to improperly bootstrap their argument regarding the fundamental nature and purpose of the IFQ Program which, as discussed above, does not reference undue financial or administrative burden. However, Defendants are relying on the wrong subsection of 15 C.F.R. §8c.3.

Because the IFQ Program does not fall within subsection (1), Defendants' compliance with the DOC regulations must be in accordance with subsection (2) of the definition of "qualified individuals with handicaps" in 15 C.F.R. §8c.3 that states "(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity." Captain Welsh is a "qualified individual with handicaps" who, because of his disability, cannot be on board his vessel during fishing. Captain Welsh is entitled to an accommodation pursuant to the Rehabilitation Act in the form of a hired master to harvest his QS.

G. Section 504 Of The Rehabilitation Act Provides For A Private Right Of Action Against Defendants.

Plaintiffs have a private right of action against the federal government for injunctive and equitable relief under §504 of the Rehabilitation Act. *See Davis v. Astrue*, 2011 U.S. Dist. LEXIS 92336, at *7-14 (N.D. Cal. Aug. 18, 2011) ("The Ninth Circuit has construed this language and the legislative history behind" the Rehabilitation Act "as authorizing a private right of action against both recipients of federal funds as well as the federal government itself." *Citing Doe v. Attorney General*, 941 F.2d 780, 785 (9th Cir.1991), *overruled on other grounds by Lane v. Pena*, 518 U.S. 187, 191 (1996). As the court concluded in *Doe*, "Congress was aware that section 504

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

provided an implied right of action. Yet Congress did not eliminate this remedy but rather enforced it by adding section 505. We see no congressional intent to abolish the private right of action and every intent to enforce it…" *Id.* at 787 n.13. As the court noted in *Lane*, at 190, the fact that there are no monetary damages for §504 violations does not foreclose the possibility there could be a private right of action under §504 for injunctive or equitable relief. Further, courts have held that claims under §504 of the Rehabilitation Act should not be dismissed even where the APA provides the dominant paradigm for assessing that claim. *See Davis v. Astrue,* 2011 U.S. Dist. LEXIS at *14-17 ("Thus, even where the APA does provide the dominant paradigm for decision, that does not necessitate dismissal of the §504 claim"). *Id.* at *19.

H. Captain Welsh Is Not Required To Exhaust Administrative Remedies.

Under the Rehabilitation Act, Captain Welsh is not required to exhaust administrative remedies in connection with his Rehabilitation Act claim. *See Mendez v. Gearan*, 947 F. Supp. 1364, 1366, 1367 (N.D. Cal. 1966) (Rehabilitation Act does not have an administrative remedies requirement; "a plaintiff alleging discrimination on the basis of disability by a federal agency would have immediate recourse to a federal court under §504.").

I. The Compliance Procedures In The Department Of Commerce Regulations Are Not Applicable.

The compliance procedures in the DOC regulations are not applicable since the Final Rule *is not* a challenged "program or activity." For the compliance procedures to be triggered, the Final Rule must constitute a "program or activity." *See* 15 C.F.R. §8c.70(a) ("…this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency"). But here, the IFQ Program is the "program or activity" and Captain Welsh is not challenging the IFQ Program, but rather the Final Rule.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Even if the compliance procedures in the DOC regulations were applicable, it would be futile to exhaust them. Captain Welsh's needs cannot be satisfied through an administrative procedure because Defendants have already made a final decision by approving the Final Rule. Thus, judicial intervention is now required to prevent Captain Welsh (and others like him) from being unlawfully discriminated against. Further, judicial economy is best served by proceeding with all claims before this court so all related claims in this matter can be tried together.

J. Captain Welsh Also Has A Cognizable Right Under The APA.

The APA and §504 of the Rehabilitation Act "provide overlapping rights of action for injunctive relief. *Mendez*, 947 F. Supp. at 1367 (§504 and the APA "provide overlapping rights of action for injunctive relief for plaintiffs alleging discrimination on the basis of a disability by a federal agency.") (*citing J. L. v. Social Security Administration*, 971 F.2d 260, 269 (9th Cir. 1991) (plaintiffs alleging discrimination by the government may have a cognizable claim under either statute or both) (overruled on other grounds)). As with the DOC Compliance Procedures, exhaustion of administrative remedies is not required and would be futile.

V. THE FINAL RULE IS IMPERMISSIBLY RETROACTIVE

A. The Council Action.

On February 12, 2010, the Council stated its intent to initiate an analysis of at least seven issues relevant to the question of whether to restrict the use of hired skippers. However, the Council stated that making no change to the existing program should also be evaluated. AR at 30373, 30378-79. The Council did not actually recommend that Defendants adopt the Amendment until April, 2011. AR 30316-17, 30621-23. Until then, making no changes to the hired skipper program remained under active consideration by the Council. *Id.* *See also* AR at 30373, 30378-79, 30472-73, 30477-78. But Council action is not legally binding until adopted

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

by Defendants through the APA's public notice and comment provisions. *See* 16 U.S.C. §304(a) and (b). The Council waited until March 8, 2013 to send the Amendment to Defendants for review. AR at 41128. Defendants did not publish any Federal Register notice of the Council's recommended action until April 26, 2013. Significantly, the analysis preceding the April 26, 2013 proposed rule provided that the alternative to be considered in lieu of prohibiting the use of hired masters was to make no change to the hired master rule. AR at 10173, 10186-10199. The Final Rule was promulgated July 28, 2014 with an effective date of December 1, 2014, but it applied to the sale or acquisition of QS completed after February 12, 2010. AR at 10839-40.

The Final Rule unfairly disadvantages initial QS recipients who (1) signed contracts for the transfer of QS before February 12, 2010 but who had not completed performance of the contract by that date, and (2) signed and performed contracts for the transfer of QS after February 12, 2010. The Final Rule impermissibly retroactively attaches new legal consequences and disabilities to both categories of transactions because Plaintiffs cannot use the acquired QS.

B. Retroactive Rulemaking Is Prohibited By Supreme Court Precedent.

In *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204 (1988), the Supreme Court held the Department of Health and Human Services lacked statutory authority to promulgate a rule requiring hospitals to refund Medicare payments for services rendered before promulgation of the rule. The Court held:

> Retroactivity is not favored in the law.... [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Id. at 208. The Court noted "[t]he statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking." *Id* at 213. *See also Kankamalage v. INS,* 335 F.3d 858, 862 (9th Cir. 2003) ("The standard for finding that a

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

statute or regulation unambiguously directs retroactive application is a demanding one. The language must be so clear that it could sustain only one interpretation.") (citation omitted). Nowhere does the MSA or the Halibut Act expressly authorize the retroactive application of rules.

In response to public comments that retroactive application of the Final Rule was not expressly authorized, Defendants assert the MSA states that an allocation of fishing privileges via a quota share program may be revoked, limited, or modified at any time. AR at 10846 citing 16 U.S.C. §1853a(b). That language, however, does not contain an express authorization to retroactively apply any such revocation, limitation, or modification, particularly when the action would change the results of otherwise lawful contracts.[5]

Even if the MSA language cited by Defendants expressly provides for retroactive application of rules, that statute only governs sablefish under the Final Rule. AR at 10840. Conspicuously absent from Defendants' citation of alleged authority is any reference to any provision in the Halibut Act authorizing retroactive application of rules. The Halibut Act only authorizes Defendants to issue regulations. 16 U.S.C. §773c.

[5] Although there does not appear to be any judicial decision on a claim arising under the MSA challenging a control date under the *Bowen v. Georgetown* rule, a recent decision, *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161 (9th Cir. 2011), is instructive. There, plaintiffs asserted the U.S. Forest Service ("Service") had violated the National Forest Management Act ("NFMA") by failing to comply with monitoring requirements in a 2004 forest management plan. The Service asserted the 2004 requirement was mooted by a 2007 amendment to the forest management plan that retroactively eliminated the monitoring requirement. In holding retroactive application of the 2007 amendment unlawful, the Ninth Circuit reasoned the 2007 amendment could not apply retroactively without statutory authority in the NFMA because the Service could only "change the legal consequences of completed acts ... if Congress conveys such authority in an *express* statutory grant." *Id.* at 1188, *citing Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1070 (9th Cir. 1998). The statute at issue, 16 U.S.C. §1604(f)(4), stated a forest management plan could "be amended in any manner whatsoever" after compliance with applicable public notice and other requirements. The court held this language did not provide the Service with the authority to retroactively apply the rule at issue. *Id.* at 1188. Similarly, the Final Rule changes the legal consequences of valid contracts without express statutory authorization to take such retroactive actions.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

After *Bowen v. Georgetown* came *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), where the Supreme Court noted "the presumption against retroactive legislation is deeply rooted in our jurisprudence.... Elementary considerations of fairness dictate that ... settled expectations should not be lightly disrupted." 511 U.S. at 265; *see also General Motors Corp. v. Romein,* 503 U.S. 181, 191 (1992) ("[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions").

Citing Federalist No. 44 wherein James Madison stated "laws impairing the obligation of contracts" were "contrary to the first principles of a social compact, and to every principle of sound legislation," the *Landgraf* Court noted "[t]he largest category of cases in which we have applied the presumption against retroactivity has involved new provisions affecting contractual or property rights...." 511 U.S. at 267, 271.[6] The Court went on to find that a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability." *Id*. at 268-269. The Court also recognized there could be debate about whether a particular action had impermissible retroactive effects. *Id.* at 269-270. Thus, a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-270.

In sum, under *Landgraf*, to determine if a regulation is impermissibly retroactive a court must first consider whether the operating statute expressly authorizes retroactive rulemaking. If the answer is no, a court proceeds to the second step to determine if the regulation operates

---

[6] In *Foss v. Nat'l Marine Fisheries Service,* 161 F.3d 584 (9th Cir. 1998), the court held that QS issued under the IFQ Program are property. *Citing* 50 C.F.R. §679.41, the court stated: "There can be no doubt that the IFQ permit is property. It is subject to sale, transfer, lease, inheritance, and division as marital property in a dissolution." *Id.* at 588.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

retroactively by attaching new legal consequences to past acts. If so, it is proscribed. *See also Kankamalage v. INS,* 335 F.3d at 862.

Following *Landgraf*, the courts found changes in law have retroactive effects if they attach new liabilities or disabilities to antecedent transactions or actions. The Ninth Circuit Court of Appeals held a statute was retroactive when it subjected a lawful permanent resident returning from an overseas trip to charges of inadmissibility when prior law would not have done so. *Camins v. Gonzalez*, 500 F.3d 872, 882-84 (2007); *see also Ditullio v. Boehm*, 662 F.3d 1091 (9th Cir. 2011) (amendment authorizing punitive damages for human trafficking offenses created new liabilities for pre-enactment offenses and, therefore, was retroactive). In *Johnson v. Hewlett-Packard Company,* the court held that an amendment eliminating mandatory attorney fee awards to prevailing parties in unpaid wage actions was retroactive as to a party's right to fees for services performed before the amendment because the new law attached new consequences to actions that occurred pre-enactment. 2014 U.S. Dist. LEXIS 30870, at *18-19 (N.D. Cal. Mar. 10, 2014).

Here, neither the MSA nor the Halibut Act expressly authorize Defendants to promulgate retroactive regulations. Thus, the court may proceed to step two of the analysis. As discussed below, the Final Rule attaches new legal consequences, liabilities, and disabilities to past acts and, therefore, is impermissibly retroactive.

Plaintiff Fairweather Fish is a corporation that must hire a master to fish its QS. Fairweather Fish was among the initial QS recipients exempted from the OOB standard and allowed to acquire more QS and to harvest newly acquired QS using a hired master. *See* Newland Dec. ¶¶ 2, 6. Relying on existing law, Fairweather Fish entered into five contracts to purchase QS that would be fished using a hired skipper and, therefore, are affected by the Final

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Rule. *Id.* ¶ 8. The Final Rule attaches new legal consequences to these contracts because Fairweather Fish is unable to harvest QS and the value of these lawful contracts was destroyed.

Two of the contracts to acquire QS were signed before the Council even initiated a study of whether to recommend to Defendants a change in the hired master rule or to leave the rule unchanged. *Id.* ¶8. Two of the contracts were signed while that study was ongoing. Three of these contracts contained penalty clauses for failed performance, *i.e.,* forfeiture of the earnest money deposit. *Id.* In these four contracts, the QS was transferred to Fairweather Fish either before the Council began its study of the issues associated with possibly changing the hired master rule or while that study was ongoing. *Id.* The fifth contract to acquire QS was signed after the proposed rule to implement the Amendment was published. *Id.* Fairweather Fish signed that contract to acquire QS because, based on statements by government officials about the adverse effects of retroactively applying the Amendment, Fairweather Fish did not believe Defendants would approve retroactive application of the Amendment. *Id. See also* AR at 44434. The purchase price for these five QS acquisitions was $466,509. *Id.*

Defendants, who are statutory members of the Council, 16 U.S.C. §1852(b)(1)(B), approved each transfer as required by 50 C.F.R. §679.41(b)(1). *Id.* Those approvals occurred after February 12, 2010. *Id.* In approving each QS transfer, Defendants never advised Fairweather Fish of the February 12, 2010 control date, *id.,* although Defendants knew that if they retroactively applied a February 12, 2010 control date Fairweather Fish would not be able to use the QS and would suffer negative economic consequences. AR at 10610, 10612.

In addition to acquiring more QS, Fairweather Fish sold QS. All of those contracts were signed before February 12, 2010 and, in four instances, the QS was transferred after that date.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Newland Dec. ¶11.[7] Fairweather Fish would not have sold other QS had it known it would not be able to replace that QS. *Id.* As a result of the Final Rule, Fairweather Fish faces significant financial loss and hardship, having to pay off a loan to purchase QS it cannot use with income reduced by the sale of other QS. Newland Dec. ¶13. Captain Welsh faces similar circumstances having signed and performed a contract for the sale of QS, and for the purchase of replacement QS, after February 10, 2010 but before April, 2011. Welsh Dec. ¶7.

C. Because Retroactive Application Of The Final Rule Is Prohibited, The Effective Date Of The Final Rule Must Be After Promulgation Of That Rule Pursuant To The Administrative Procedure Act.

Since neither the MSA nor the Halibut Act expressly authorizes retroactive application of rules, the APA requires that the effective date of the Final Rule be no earlier than 30 days after its publication. 5 U.S.C. §553(d). As the Ninth Circuit Court of Appeals stated: "[t]his is sensible; until the final rule is published, the public is not sure of what the rule will be...." *Riverbend Farms, Inc. v. Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992). Similarly, in *Service Employees International Union Local 102 v. County of San Diego,* 60 F.3d 1346 (9th Cir. 1995), the Department of Labor published a rule that took effect upon publication, but the rule was later withdrawn because, absent the 30-day waiting period, it was invalid retroactive rulemaking under *Bowen v. Georgetown. Id.* at 1353. *See also Bohner v. Daniels,* 243 F.Supp.2d 1171, 1174-1175 (D. Or: 2003), *aff'd* 413 F.3d 999 (9th Cir. 2005) (Bureau of Prisons rule invalid because the Federal Register notice was published October 15, 1997 with an effective date of

[7] The contracts for the sale of QS are linked to the contracts for the purchase of QS because the process by which QS is bought and sold is that the sale proceeds are placed into an exchange account with the Alaska Exchange Corporation which acts as an intermediary for exchanged QS. However, the exchange to acquire QS can occur much later than the sale. In the case of the 2009 sale of QS, the acquisition exchange did not occur until after February 2, 2010.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

October 9, 1997). Here, the Final Rule should be effective no earlier than August 28, 2014, 30 days after publication in the Federal Register.

D. Retroactive Application Of The Final Rule Violates The Due Process Clause Of The U.S. Constitution.

The Fifth Amendment to the U.S. Constitution provides that no person may be deprived of property without due process. As noted above, QS is a property interest. *See Foss v. Nat'l Marine Fisheries Service,* 161 F.3d at 588. Retroactive application of a regulation is appropriate under the Due Process Clause only as to the date the regulated community received constructive notice of the government's intent to enforce the regulation. *United States v. AMC Entertainment, Inc.,* 549 F.3d 760, 768 (9th Cir. 2008). Recommendations from an administrative body, such as the Council, would be insufficient to constitute constructive notice of a legislative rule. *See id.* at 769-770; *see also Utility Solid Waste Activities Group v. Environmental Protection Agency,* 236 F.3d 749, 754 (D.C. Cir. 2001) (information posted on an internet website is not an adequate substitute for publication of a proposed rule in the Federal Register); *Riverbend Farms,* 958 F.2d at 1484.

Here, the proposed rule to adopt the Council's recommended Amendment was not published until April 26, 2013 which was Defendants' first statement of a possible intent to adopt and enforce the Amendment. That date is after the contract for QS acquisition was performed in Captain Welsh's situation and after four of the five Fairweather Fish contracts were performed. Welsh Dec. ¶7; Newland Dec. ¶8. As to the fifth contract, Fairweather Fish had a reasonable expectation that Defendants would reject the Council's recommendation as to an effective date because of the prohibition on retroactive rulemaking. Newland Dec. ¶8; AR at 44434. Indeed, the lack of notice to fishermen, and perhaps their expectations regarding retroactive application

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

of the Amendment, is reflected in the fact that 7.4 million units of QS were transferred after February 12, 2010. AR at 10280.

VI. THE FINAL RULE VIOLATES THE MSA AND THE HALIBUT ACT

A. National Standard 1: Achievement of Optimum Yield.

Amendments to the IFQ Program must be consistent with the MSA's National Standards. 16 U.S.C. §1854(a). National Standard 1 of the MSA requires that fishery management plans achieve the optimum yield ("OY") from the fishery. 16 U.S.C. §1851(a)(1). OY is ultimately an amount of fish that may be harvested. 50 C.F.R. §600.310(e)(3)(i)B)(ii). The Final Rule prevents the achievement of OY and, therefore, violates the MSA and the Halibut Act.[8]

Under the IFQ Program, QS are allocated by geographic area. Fishermen with QS in one area must fish their QS in that area and may not operate in another area without acquiring QS in that area. 50 C.F.R. §679.42(a)(1). It is typical in the halibut and sablefish fisheries for QS holders to trade QS, via sale and purchase, so that vessels can be deployed efficiently in various geographic areas. Typically, the issue arises when stock abundance in one area fluctuates and a QS holder lacks sufficient QS in that area so as to make a trip to the fishing grounds economic. In such situations, trading QS allows fishermen to aggregate enough QS to make a trip to waters far distant from home ports economically viable. *See* Newland Dec. ¶14. These business sales are common practice. *Id.* In western Alaska, however, a significant amount of the QS is held by corporations who can only use a hired master. AR at 10301-10313. The net effect of the Final Rule is to prevent these QS sales and purchases, thereby interfering with normal business operations in a way not intended in the IFQ Program. *See* Section IV.E, *supra.*

[8] Defendants applied each of the then-existing MSA national standards to those parts of the IFQ Program promulgated under the Halibut Act because Defendants considered the MSA national standards equally applicable to those parts of the IFQ Program promulgated under the Halibut Act. AR at 20004-20006.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Defendants' analysis regarding these issues is limited to one sentence. There, Defendants state that since initial QS recipients can remain in the fishery, Defendants "[do] not anticipate that the [Final Rule] will prevent participants from fully harvesting IFQ or the halibut and sablefish fisheries from achieving [OY]." AR at 10847. This "analysis" does not address the real problems discussed above. The facts are that Defendants' behavior will prevent the achievement of OY in contravention of the MSA and the Halibut Act.

B. National Standard 2: Use Of Best Available Data In Decisionmaking.

National Standard 2 of the MSA requires that Defendants use the best available data in making decisions. 16 U.S.C. §1851(a)(2). Here, Defendants ignored the available data and then produced no data whatsoever to support their conclusion that the Final Rule is necessary to accelerate an "eventual" transition to an OOB fleet, both of which violate National Standard 2.

At the outset, Defendants offer no evidence that the Final Rule will accelerate the pace of the transfer of QS from initial QS recipients to second generation OOB fishermen. In fact, the Council received testimony that prohibiting initial QS recipients from acquiring QS and using a hired skipper for the harvest will result in QS recipients not selling QS since they would not be able to replace it with other QS in that area or in other areas. AR at 30579-80.

Moreover, Defendants' own evidence shows the "eventual" transition to an OOB fleet is occurring. The halibut QS held by individual second generation fishermen increased from 56.4 million units in 2000 to 94.4 million units in 2010. AR at 10289. For sablefish, the comparable numbers were 26.9 million units and 63.0 million units. AR at 10293. The transfer of QS to second generation QS holders who must be OOB is proceeding forward. The same is true for non-individual, *i.e.,* corporate, initial QS holders. Between 1995 and 2009, the number of non-

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

individuals, *.i.e.,* corporations, using hired skippers to harvest halibut declined 31.5%. AR at 10232. For sablefish, the decline was 39.4%. AR at 10233.

Defendants' conclusions and rationale regarding the need for the Final Rule are not supported by the best available information, in violation of the MSA and the Halibut Act.

C. National Standard 4: Fair And Equitable Allocation of Fishing Privileges.

National Standard 4 of the MSA provides that any allocation of fishing privileges among fishermen shall be fair and equitable. 16 U.S.C. §1851(a)(4). The Halibut Act contains a similar requirement. 16 U.S.C. §773c(c). The applicable regulations define an "allocation" as a "direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals." 50 C.F.R §600.325(c)(1). Not only was the initial IFQ Program an allocation, 57 Fed. Reg. at 57137, but the Final Rule is an allocation because it changes the initial allocation by reallocating QS among persons using hired masters and those who do not. *See* AR at 10614 (Defendants' decision memorandum stating the Final Rule is consistent with statutory authority to allocate harvests).

It is true that Defendants interpret National Standard 4 to mean that an allocation, *i.e.,* a restriction on who may harvest, "may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups." 50 C.F.R. §600.325(c)(3)(i)(3). However, the Final Rule violates the fair and equitable test in the MSA and the Halibut Act because the alleged benefits of the Final Rule do not outweigh the burdens to Plaintiffs and similarly situated persons. The Final Rule effectively caps QS ownership by Fairweather Fish at the level existing on February 12, 2010. The Final Rule will cost Fairweather Fish alone approximately $789,000 over the next five years and Captain Welsh approximately $20,000-$30,000 annually. Newland Dec. at ¶10; Welsh Dec. at ¶7. However, the discussion of the fair and equitable standard in the

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Regulatory Impact Review is devoid of any discussion whatsoever regarding how the Final Rule is fair and equitable. AR at 10214-15.

The facts are that under the Final Rule, the fish will be caught by the same class of fishermen, *i.e.,* QS holders. The only difference between the pre- and post-Final Rule situation is that under the Final Rule the fish will presumably be caught by vessels owned by individuals, not corporations, and by younger individuals who are not disabled. The economic value of fishing to the nation changes only to the extent that it is diminished by the failure to achieve OY. There is no resource conservation benefit. In short, there are no net benefits to offset the harm to initial QS recipients of losing the ability to fish QS transferred after February 12, 2010. Significantly, Defendants admit the benefits of the Final Rule are "unknown." AR at 10343. Indeed, the sole identification of net national benefits proffered by Defendants is that "assuming the Council's objectives for this [OOB] action reflect society's preferences, net benefits to the nation would be expected to increase as owner-aboard becomes the norm." *Id.*

Leaving aside the issue of whether society really has a preference for, or even an opinion regarding, an OOB standard for the halibut/sablefish fleet operating in western Alaska, let alone the rate at which that goal is achieved, one can be certain that society does have a clear preference against actions that discriminate against disabled Americans. Contrary to Defendants' unsupported assumptions about society's goals, the U.S. has a well-established national policy against discrimination. *See, e.g.,* Americans With Disabilities Act, 42 U.S.C. §12101 *et seq.*; Rehabilitation Act. Achieving that national objective provides a net national benefit far exceeding Defendant's self-serving definition of society's goals.

Moreover, as noted above in Section IV.E above, Defendants admit the benefits of any OOB standard are being achieved without the Final Rule. Thus, the only possible benefit of the

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Final Rule derives from the belief that it will speed the existence of a 100% OOB fleet. Yet, there is no analysis of how accelerating the pace of the eventual transition to an OOB fishery yields positive net national benefits, even assuming the Final Rule will accelerate that pace.

For all the preceding reasons, the Final Rule violates the Halibut Act and the MSA.

D. National Standard 9: Minimizing Bycatch.

National Standard 9 of the MSA directs Defendants to minimize bycatch to the extent practicable. 16 U.S.C. §1851(a)(9). The Final Rule does not minimize bycatch. Halibut is a bycatch in the sablefish fishery as well as in the salmon troll and groundfish longline fisheries. AR at 20242, 20273. Pursuant to existing regulations, halibut bycatch must be discarded unless the fisherman has a QS for halibut that is used to cover the halibut bycatch. Newland Dec. at ¶¶15-16. If a fisherman does not have sufficient QS to cover the halibut bycatch it must be discarded, leading to waste and increased mortality since a percentage of hooked and discarded fish die after release. *Id.* Indeed, Defendants admit the transfer of QS is necessary to reduce discards and minimize bycatch. *See* AR at 20259 (limiting IFQ sales could "result in significant discards…"). Similar bycatch and post-release mortality issues arise when a fisherman fishes for halibut and other species and incidentally catches sablefish. Newland Dec. at ¶¶15-16. The Final Rule will increase bycatch in violation of the MSA and the Halibut Act.

E. National Standard 10: Promoting Safety Of Human Life At Sea.

National Standard 10 of the MSA directs Defendants to promote the safety of human life at sea. Forcing disabled fishermen to choose between losing their income and being aboard a vessel when it is fishing is, by definition, not promoting safety at sea. There is simply no valid reason to ask individuals to risk life and limb in violation of the MSA and the Halibut Act.

Smith & Hennessey
PLLC
Attorneys at Law
316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

VII. CONCLUSION

For all the preceding reasons, Plaintiffs' motion for summary judgment should be granted and the Final Rule vacated and then remanded to Defendants for revision in compliance with the Court's order.

RESPECTFULLY SUBMITTED this 19th day of March, 2015.

/s/ James A. Smith, Jr.
James A. Smith, Jr., WSBA #5444

/s/ Geoffrey P. Knudsen
Geoffrey P. Knudsen, WSBA #1324

/s/ Julia K. Doyle
Julia K. Doyle, WSBA #43993

SMITH & HENNESSEY PLLC
316 Occidental Avenue South, Suite 500
Seattle, WA 98104
Telephone: (206) 292-1770
Facsimile: (206) 292-1790
jas@smithhennessey.com
gknudsen@smithhennessey.com
jdoyle@smithhennessey.com

/s/ George J. Mannina, Jr.
George J. Mannina, Jr., *Pro Hac Vice*

/s/ Veronica M. Gray
Veronica M. Gray, *Pro Hac Vice*

/s/ Jennifer R. Darling
Jennifer R. Darling, *Pro Hac Vice*

NOSSAMAN LLP
1666 K Street, N.W., Suite 500
Washington, D.C. 20006
Telephone: (202) 887-1400
Facsimile: (202) 366-4215
gmannina@nossaman.com
vgray@nossaman.com
jdarling@nossaman.com

Attorneys for PLAINTIFFS