

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Charter Operators of Alaska,
a non-profit corporation
3998 Beluga Circle
Homer, AK 99603

CIVIL ACTION

CASE NO: 11-664-EGS

Alaska's Kodiak Island Resort, LLC
PO Box 316
Larsen Bay, AK 99624

Captain Allen Walburn
PO Box 316
Larsen Bay, AK 99624

Crystal Bay Lodge, LLC
PO Box 1575
Petersburg, AK 99833

**PLAINTIFFS' COMPLAINT FOR
REVIEW OF AGENCY ACTION AND
FOR DECLARATORY RELIEF**

Captain Nicolas Ausman
1361 Elderberry Circle
Coeur D'Alene, ID 83815

**PRELIMINARY INJUNCTION
SOUGHT**

Plaintiffs,

vs.

The Honorable Gary W. Locke, in his
official capacity as Secretary of the U.S.
Department of Commerce,
Office of the Secretary, Room 5852
14th Street and Constitution Ave., NW
Washington, DC 20230

Jane Lubchenco, in her official capacity
as Administrator of the National
Oceanographic and Atmospheric
Administration
Department of Commerce, Room 5128
14th Street and Constitution Ave., NW
Washington, DC 20230

Eric C. Schwaab, in his official capacity
as Administrator of the National Marine
Fisheries Service
Department of Commerce, Room 14636
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

PLAINTIFF'S COMPLAINT

Jurisdiction and Venue

1. This action arises under the Northern Pacific Halibut Act of 1982 (the “Halibut Act”), 16 U.S.C. §§ 773-773k, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

2. This court has jurisdiction over this action by virtue of the Halibut Act, which provides, “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under this Act. Any such court may, at any time – (1) enter restraining orders or prohibitions; (2) issue warrants, process *in rem* or other process; (3) prescribe and accept satisfactory bonds or other security; and (4) take such other actions as are in the interest of justice.” 16 U.S.C. § 773i(d).

3. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, which grants the district courts “original jurisdiction of all civil actions arising under the ...laws...of the United States,” 28 U.S.C. § 1361, which grants the district courts “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff”, and 28 U.S.C. § 2201 which grants the district court jurisdiction “to may declare the rights and other legal relations of any interested party seeking such declaration.”

4. Jurisdiction is also found under the APA, 5 U.S.C. § 706, which authorizes a court to “set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and 5 U.S.C. § 704, which provides a right to judicial review of all “final agency action for which there is no other adequate remedy in a court.”

5. Venue is proper in this district court pursuant to 28 U.S.C. § 1391(e).

Nature of the Case

6. This is an action for review of a final rule issued by the Secretary of Commerce through the National Marine Fisheries Service (NMFS), a division of the National Oceanic and Atmospheric Administration (NOAA) entitled *Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska* to fish for halibut. The final rule was published in the Federal Register on January 5, 2010 and the challenged portion became effective on February 1, 2011. 75 Fed. Reg. 554. See Exhibit 1 attached hereto and incorporated by reference. The final rule creates a limited access system for charter vessels in the guided sport fishery for halibut in the International Pacific Halibut Commission Regulatory (IPHC) Areas 2C (Southeast Alaska) and Area 3A (Central Gulf of Alaska).

7. For the purpose of “curtail[ing] growth of the fishing capacity in the guided sport fishery for halibut” 75 Fed. Reg. 554, NMFS published a proposed rule on April 21, 2009. 74 Fed. Reg. 18178. See Exhibit 2 attached hereto and incorporated by reference. The proposed rule was intended to implement the recommendation of the North Pacific Fishery Management Council (Council), a body lacking authority to adopt rules, but created to recommend rules.

8. The proposed rule, however, did not implicate any concerns for resource conservation. The rule was intended to limit only the number of vessels fishing for halibut but

not the amount of halibut harvested. The proposed rule sought to adopt a permitting scheme where a limited number of “Charter Halibut Permits” (CHP) were issued to charter vessel operators that had made more than five “log book” trips (or 15 for a transferable CHP) for bottomfish during the 2004 or 2005 season and more than five log book trips (or 15 for a transferable CHP) for halibut in the 2008 season.

9. NMFS requested public comment regarding the proposed rule. *See* 74 Fed. Reg. at 18192.

10. Plaintiffs, Kodiak Island Resort, Captain Allen Walburn, Captain Nicolas Ausman, Crystal Bay Lodge, COA Board member Captain Roger Nettlow and other COA members filed comments objecting to the proposed rule because they would not qualify for a CHP.

11. Plaintiffs explained that they and their businesses would suffer tremendous harm if not permitted to guide anglers for halibut fishing as their operations are premised upon such a service.

12. On January 10, 2010, NMFS, on behalf of the Secretary of Commerce, published its final rule. The requirement to possess a CHP before a charter operator can fish for halibut became effective on February 1, 2011. *See* 75 Fed. Reg. 554.

13. Because the final rule admittedly does not promote the conservation of the halibut resource – it only seeks economic consolidation of the charter industry – while causing the elimination of approximately 327 charter businesses, the final rule violates 16 U.S.C. §§ 773c(c) of the Halibut Act, which requires that all allocations or assignments of halibut fishing privileges “be reasonably calculated to promote conservation.”

14. The final rule also violates the Halibut Act because it is not “consistent with the limited entry criteria set forth in [16 U.S.C.] section 1853(b)(6)” The final rule is inconsistent with 16 U.S.C. section 1853(b)(6) (part of the Magnuson Stevens Fishery Conservation and Management Act (hereinafter Magnuson Stevens Act)), as implemented by 50 C.F.R. §600.310, because it fails to set an “optimum yield” for halibut. *See* 75 Fed. Reg. 559 (“specification of optimum yield for halibut . . . has not been determined.”).

15. The final rule is inconsistent with 16 U.S.C. section 1853(b)(6) because no fishery management plan was prepared prior to establishing the limited access system.

16. The final rule is inconsistent with 16 U.S.C. section 1853(b)(6)(F), as implemented by 50 C.F.R. §600.325, because it is not fair and equitable to all fisherman and is not calculated to promote conservation.

17. The final rule is inconsistent with 16 U.S.C. section 1853(b)(6)(C), as implemented by 50 C.F.R. §600.330 because it is based solely on economic allocation and not conservation. In addition, the limited access program for halibut is not tied or related in any way to an optimum yield as the Defendants admitted no such optimum yield for halibut has been set. *See* 75 Fed. Reg. 559 (“specification of optimum yield for halibut . . . has not been determined.”).

18. The final rule violates 16 U.S.C. §§ 773c(c) of the Halibut Act, which requires that “[i]f it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen” because the allocation in the final rule is not fair and equitable to **all** halibut fisherman.

19. The final rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” in violation of the APA. *See* 5 U.S.C. §706 (2)(A).

20. The final rule is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” in violation of the APA. *See* 5 U.S.C. §706 (2)(C).

21. Plaintiffs seek in this action an order declaring the final rule adopted by NMFS to be invalid and vacating the rule.

22. Plaintiffs further seek an order from this court under 5 U.S.C. §705 staying the effectiveness of the final rule pending conclusion of the case on the merits because the Plaintiffs will suffer irreparable injury if they are not allowed to continue charter fishing for halibut this season.

Parties

23. Plaintiff, Charter Operators of Alaska (COA) is a non-profit organization incorporated in the State of Alaska and pursuant U.S. IRC 501 (c)(6). Members of COA either own or operate a combined lodge and charter boat operation or a charter boat operation that provides guided charter services to anglers fishing for halibut in the Area 2C (Southeast Alaska) and Area 3A (Central Gulf of Alaska).

A. Captain Jack Roskind is President of COA and an Alaskan licensed charter boat captain that has been providing charter boat guiding services to anglers fishing for halibut since 2008. Captain Roskind is the owner of Knot Roughin’ It Charters located in Whittier, Alaska. Whittier is located within Area 3A.

B. Captain Roger Nettlow is a member of the Board of Director for COA and is an Alaskan licensed charter boat captain that has been providing charter boat guiding services to anglers fishing for halibut since 2008. Captain Nettlow is the owner of Sound Fun Charters located in Whittier, Alaska.

C. Captain Kent Haina is a member of the Board of Director for COA and is

an Alaskan licensed charter boat captain that has been providing charter boat guiding services to anglers fishing for halibut since 2007. Captain Haina is the owner of Poi Boy Fishing, LLC in Homer, Alaska.

24. Plaintiff, Alaska's Kodiak Island Resort, LLC (Kodiak Island Resort), is located in Larsen Bay, Kodiak Island, Alaska. Plaintiff, Captain Allen Walburn, is the owner and operator of Kodiak Island Resort which is located within Area 3A. Captain Walburn is an Alaskan licensed charter boat captain that has been providing charter boat guiding services to anglers fishing for halibut since 2007. Kodiak Island Resort has been providing charter boat guiding services as well as accommodations and other services to anglers fishing for halibut since 2007.

25. Plaintiff, Crystal Bay Lodge, LLC, is located in Petersburg, Alaska. Plaintiff, Captain Nicolas Ausman, is the owner and operator of Crystal Bay Lodge which is located within Area 2C. Captain Ausman is an Alaskan licensed charter boat captain that has been providing charter boat guiding services to anglers fishing for halibut since 2008. Crystal Bay Lodge has been providing charter boat guiding services as well as accommodations and other services to anglers fishing for halibut since 2008.

26. COA Members and Plaintiffs' businesses are built around single and multi-day clients who come to Alaska for the sole or primary purpose of recreational fishing. The Plaintiffs and COA members do not qualify for a CHP under the Defendant's final rule and will be precluded from taking any anglers fishing for halibut in 2011 and beyond. The Plaintiffs, as well as the communities in which they operate, have and will suffer substantial economic harm and other negative effects from the final rule. *See Exhibits 3-6, Affidavits of Captains Ausman, Walburn, Nettlow and Roskind, respectively, attached hereto and incorporated by reference.*

27. Plaintiffs are primarily charter boat operators, who make their living operating chartering fishing vessels and providing recreational services as well as other associated businesses like lodging in and around the waters of the Pacific Ocean along nearest to the State of Alaska, all of whom have been adversely affected by governmental action. Charter Operators of Alaska is a non-profit corporation established to protect and advance the legal rights and interests of charter operators.

28. The purpose of COA is “to repeal, amend, or modify the federal Charter Halibut Limited Entry Program to include all businesses that were in existence up to the end of 2010. COA’s secondary mission is defend against all encroachments on the rights of charter halibut businesses, their clients, and sports fishermen.”

29. The relief COA seeks on behalf of its members is injunctive in nature (through invalidation of the final rule) and a type that is appropriate for an organization to request on behalf of its members.

30. Each of COA members is affected by the final rule in a manner similar to the individual plaintiffs as they do not qualify for a CHP. *See* Exhibit 6.

31. Defendant Gary Locke is Secretary of the United States Department of Commerce. He is sued in his official capacity as the chief officer of the Department charged with managing United States marine fisheries, including promulgation of the final rule challenged herein.

32. Defendant Jane Lubchenco is the Under Secretary of Commerce for Oceans and Atmosphere, and the Administrator of the National Oceanic and Atmospheric Administration (“NOAA”). NOAA is an agency within the Department of Commerce and the Administrator is

responsible for managing United States marine fisheries. She is sued in her official capacity as chief officer of NOAA.

33. Defendant NOAA is an agency of the U.S. Department of Commerce with supervisory responsibility for the National Marine Fisheries Service (“NMFS”). The Secretary of Commerce has delegated responsibility to manage fisheries and ensure compliance with the Halibut Act and the APA to NOAA, which in turn has sub-delegated those responsibilities to NMFS.

34. Defendant Eric C. Schwaab is the Assistant Administrator for Fisheries for NOAA and Administrator of NMFS. He is sued in his official capacity as chief officer of NMFS charged with managing United States marine fisheries.

35. Defendant NMFS is an agency of the United States Department of Commerce that has been delegated the responsibility to manage United States marine fisheries. NMFS is the United States government agency with primary responsibility to manage marine fisheries and enforce the Halibut Act.

Relevant Statutory and Regulatory Provisions

36. The Secretary of Commerce and the International Pacific Halibut Commission (“IPHC”) manage fishing for Pacific halibut through regulations established under the authority of the Northern Pacific Halibut Act of 1982 (the “Halibut Act”), 16 U.S.C. §§ 773-773k; 50 C.F.R. §§ 300.60-300.66.

37. The IPHC promulgates regulations governing the halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (the “Convention”). The IPHC’s regulations are subject to approval by the Secretary of State with concurrence from the Secretary of Commerce.

See 16 U.S.C. § 773b. After approval by the Secretaries of the State and Commerce, the IPHC regulations are published in the Federal Register as annual management measures. See 50 C.F.R. § 300.62.

38. The Halibut Act’s general rulemaking authority provides the Secretary of Commerce with broad authority and discretion to “adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and Act....” 16 U.S.C. § 773c(b)(1). The Halibut Act also provides the North Pacific Fishery Management Council (the “Council”) with the authority to recommend regulations to the Secretary of Commerce to allocate harvesting privileges among U.S. fisherman. See 16 U.S.C. § 773c(c). The Secretary has full authority to adopt any regulation or no regulation in his discretion, irrespective of any Council recommendation, and the Secretary may act whether or not the Council makes any recommendation. *Id.*

39. Section 5(c) of the Halibut Act provides in relevant part:

* * *

Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different States, and **shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of this title.** If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to **all** such fishermen, based upon the rights and obligations in existing Federal law, reasonably **calculated to promote conservation**, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges.

* * *

16 U.S.C. § 773c(c) (emphasis added).

40. 16 U.S.C. section 1853(b)(6), part of the Magnuson Stevens Act, sets forth the following criteria for any limited entry plan:

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may

* * *

(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

- (A) present participation in the fishery;
- (B) historical fishing practices in, and dependence on, the fishery;
- (C) the economics of the fishery;
- (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
- (E) the cultural and social framework relevant to the fishery and any affected fishing communities;
- (F) the fair and equitable distribution of access privileges in the fishery; and
- (G) any other relevant considerations

Facts

41. The harvest of halibut off Alaska generally occurs in four basic fisheries – commercial, guided sport (charter), unguided sport, and subsistence fisheries. *See* 72 Fed. Reg. 74257, 74258. The final rule adopted by NMFS seeks to reduce the number of businesses in the guided sport charter fisheries. The purpose of the reduction is solely economic in nature to “stabilize” the charter industry. *See* 75 Fed. Reg. at 554. NMFS readily admits that “biological conservation of the halibut resource is not the principal purpose of the rule.” *Id.* at 562. Indeed, NMFS candidly admits:

This rule limits the number of charter vessels that may participate in the charter halibut fishery and the number of charter vessel anglers that may catch and retain halibut on charter vessels.

This rule is not intended, by itself, to reduce the charter harvest of halibut or the number of fish each angler may catch and retain.

The IPHC takes into account halibut removals by all user groups in establishing the constant exploitation yield (CEY). Past increases in charter halibut harvests have created conservation and allocation concerns that the Council and NMFS have taken steps to address, but the halibut resource in Area 2C and 3A is being managed in a sustainable manner. . . .

See 75 Fed. Reg. at 568 (emphasis added).

42. Throughout NMFS's responses to the 156 comments it received, NMFS reiterated the final rule will have no impact on the number or quantity of halibut harvested. *See* 75 Fed. Reg. at 564 *et seq.*; responses to comments 6, 14, 18, 21, 23, 25, 26, 29, 37, 43, 134, 140, and 154. To the contrary, NMFS clearly stated that the reduction in the halibut charter fleet will not limit the number of charter anglers because the reduced charter fleet will have plenty of capacity for current and future angler demand. *See* 75 Fed. Reg. at 568.

43. NMFS stated:

Although the number of vessels with charter halibut permits operating under this rule is limited, their passenger carrying capacity exceeds current 2008 levels of participation. The numbers of charter halibut permits and associated endorsements issued under this rule create significant opportunities for charter halibut operations to expand their capacity to meet existing and higher levels of angler demand for guided halibut fishing.

See 75 Fed. Reg. at 572; *Id.* at 568 (“These figures indicate that the charter halibut industry will be able to meet recent charter vessel angler demand levels with the number of permits expected to be issued under this rule. Hence, no restriction in guided angler access to the halibut resource is expected under this rule.”).

44. Rather, NMFS candidly admits reduction in harvest will occur only through direct harvest controls such as a bag limit reduction and not by consolidation of the charter fleet:

the intended effect of this rule is to ‘curtail growth of fishing capacity in the guided sport fishery for halibut.’ NMFS does not expect growth curtailment to result in harvest curtailment, at least in the short term. Any reduction in the harvest by the charter halibut sector during the short term more likely will result from direct harvest controls, such as the daily bag limit reduction for charter vessel anglers in Area 2C this year (74 FR 21194, May 6, 2009).

See 75 Fed. Reg. at 566.

45. The final rule is simply designed for economic consolidation of the charter industry and will have no result in any reduction the harvest of halibut.

46. According to NMFS data, there were 404 guided charter operations in Area 2C in 2008. *See* Exhibit 7, “Environmental Assessment/Regulatory Impact Review/ Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A” on November 6, 2009 at p. 207-08. (hereinafter EA/RIR/FRFA). Under the final rule, 231 guided charter operations would qualify for a CHP while 173 guided charter operations would not. *Id.*

47. In Area 3A, there were 450 guided charter operations in 2008. *Id.* Under the final rule, 296 guided charter operations would qualify for a CHP while 154 guided charter operations would not. *Id.*

48. In total there were 854 guided charter operations in 2008. The final rule would likely have the effect of shutting down approximately 327 guided charter operations for no conservation reason. This amounts to a reduction 38% reduction in the number of guided charter operations.

49. The effect of shutting down 327 guided charter operations will only serve to enrich the remaining 527 guided charter operations.

50. NMFS acknowledges that “only currently active guided charter operations that will not receive a permit to continue to participate in this fishery [~327], will suffer significant adverse economic impacts.” *See* Exhibit 7, EA/RIR/FRFA, p. 209.

51. The effect of the final rule can be easily demonstrated through a hypothetical: Assume prior to the rule there was an annual demand of 10,000 halibut anglers provided by 854

charter operators. These 10,000 anglers were allowed to harvest their limits of halibut which will be amount X. Following implementation of the final rule and assuming an annual demand of 10,000 anglers, that demand will be provided by 527 charter operators. These 10,000 anglers can still harvest their limits of halibut which is still amount X. Thus, there is no net result in decrease of halibut harvested (amount X can be the same or greater). Rather, 327 charter operators are out of business and the other 527 charter operators are much more profitable as a result of the final rule.

52. NMFS does not explain how the reduction in the number of charter operators fishing for halibut – while the actual harvest remains the same or increases – as opposed to the reduction in anglers or halibut limits, is “calculated to promote conservation” of the halibut resource.

53. Rather, the only connection to the “promotion of conservation” that NMFS even suggests is the following speculative statement:

This action is intended to stabilize the charter vessel industry, which will enhance the effectiveness of existing and potential future harvest restrictions. This will assist the IPHC to meet its overall harvest rate targets.

See 75 Fed. Reg. at 568. NMFS, however, never explains beyond this conclusory statement how consolidation of the charter vessel industry will “enhance” the effectiveness of existing or potential future harvest restrictions. Nor does NMFS ever explain how the consolidation will assist IPHC to meet its overall harvest rate targets.

54. The NMFS prepared what they referred to as an “Environmental Assessment/Regulatory Impact Review/ Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A” on November 6, 2009. *See* Exhibit 7 and referred to *supra* as EA/RIR/FRFA. NMFS

previously prepared an “Environmental Assessment/Regulatory Impact Review/Initial Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A” on April 25, 2008.

55. The Halibut Act, provides in pertinent part:

(c) Regional Fishery Management Council involvement

The Regional Fishery Management Council having authority for the geographic area concerned may develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nationals or vessels of the United States, or both, which are in addition to, and not in conflict with regulations adopted by the Commission. Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different States, and **shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of this title.** If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, **such allocation shall be fair and equitable to all such fishermen,** based upon the rights and obligations in existing Federal law, **reasonably calculated to promote conservation,** and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges: *Provided*, That the Regional Council may provide for the rural coastal villages of Alaska the opportunity to establish a commercial halibut fishery in areas in the Bering Sea to the north of 56 degrees north latitude during a 3 year development period.

16 U.S.C. § 773c(c) (bold and underline emphasis added).

56. The final rule violates the Halibut Act for three reasons. First (and as will be discussed in Count One), the final rule is not “reasonably calculated to promote conservation” of halibut. Second (and as will be discussed in Count II), the final rule is not “consistent with the limited entry criteria set forth in section 1853(b)(6) of this title” as required by the Halibut Act. Third (and as will be discussed in Count III), the final rule’s allocation and assignment of halibut fishing privileges is not “fair and equitable to all such fishermen.”

COUNT ONE
(Halibut Act)

57. Plaintiffs incorporate the allegations set forth above in Paragraphs 1- 56 as if fully set forth herein

58. The final rule is not “reasonably calculated to promote conservation” of halibut as specifically required by the Halibut Act.

59. The final rule was calculated solely to consolidate and limit the number of charter vessels in the halibut industry and was not designed, intended or calculated to conserve the halibut resource. *See* 75 Fed. Reg. at 562.

60. NMFS admits the final rule is not a resource conservation mechanism and that it is not intended, designed, or calculated to limit or reduce the amount of halibut harvested by guided anglers aboard charter vessels in the final rule wherein NMFS states “This rule is not designed to limit the harvest of halibut by charter vessel anglers, but rather to curtail the growth of fishing capacity by the charter halibut fishery.” *See* 75 Fed. Reg. at 571; *See also* supra ¶’s 41-44, 51-53.

61. Rather the final rule is simply an economic-based rule that concentrates the privilege of halibut fishing to a select group of charter operators while destroying other businesses with no conservation purpose.

62. In fact, NMFS admits that “this program will not by itself limit the number of charter vessel anglers that may use sport fishing guide services or their harvest of halibut. Instead, this program will define and limit the number of charter operators.” *See* 75 Fed. Reg. at 571.

63. Moreover, NMFS admits “the halibut resource in Area 2C and 3A is being managed in a sustainable manner. . . .” *See* 75 Fed. Reg. at 568. Thus, the status quo is not

harming the halibut resource.

64. The APA proscribes agency decision-making that represents an abuse of discretion and does not comply with statutory requirements. 5 U.S.C. §706 (2).

65. The final rule does not comply with the Halibut Act and as such is invalid as contrary to the Halibut Act and the APA.

COUNT TWO
(Halibut Act)

66. Plaintiffs incorporate the allegations set forth above in Paragraphs 1- 56 as if fully set forth herein.

67. As noted above, the Halibut Act mandates that any regulations adopted under the Halibut Act shall be approved by the Secretary of Commerce “and shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of this title.”

68. 16 U.S.C. section 1853(b)(6), part of the Magnuson Stevens Act, sets forth the following criteria for any limited entry plan:

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may

* * *

(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

- (A) present participation in the fishery;
- (B) historical fishing practices in, and dependence on, the fishery;
- (C) the economics of the fishery;
- (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
- (E) the cultural and social framework relevant to the fishery and any affected fishing communities;
- (F) the fair and equitable distribution of access privileges in the fishery; and
- (G) any other relevant considerations

69. Plaintiffs assert that the final rule violates the Halibut Act because it is inconsistent with 16 U.S.C. section 1853(b)(6) because no fishery management plan was prepared and no optimum yield for halibut has been established; subsections (A) and (B) because the final rule is retroactive – for purposes of obtaining a CHP – to 2005 and fails to properly take into account the present participation in the fishery and the historical fishing practices in, and dependence on, the fishery; subsections (C) because the NMFS did not consider the economic impact on charter vessels that will not receive a CHP; and (F) because the final rule’s allocation and assignment of halibut fishing privileges is not “fair and equitable to all such fishermen.”

70. The NMFS has adopted rules that provide guidance in applying the above statutory section and some of its criteria. Specifically, the NMFS has adopted what they refer to as National Standards. The Following National Standards are applicable and have been violated by NMFS:

National Standard 1 – Optimum Yield (50 C.F.R. § 600.310)

National Standard 4 – Allocations (50 C.F.R. § 600.325)

National Standard 5 – Efficiency (50 C.F.R. § 600.330)

I. The Final Rule is inconsistent with 16 U.S.C. section 1853(b)(6) because no optimum yield for halibut has been established

71. As noted above, one condition of any allocation program under the Halibut Act is that it “**shall be consistent** with the limited entry criteria set forth in section 1853(b)(6) of [title 16].” 16 U.S.C. § 773c(c) (emphasis added).

72. One of the threshold conditions and criteria under 16 U.S.C. section 1553(b)(6) is that the limited access system is established pursuant to a fishery management plan “in order to achieve optimum yield” of the fishery.

73. Optimum yield is defined in Magnuson-Stevens Act, as the “the amount of fish which— (A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; and (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor. . . .”

74. The NMFS has not prepared a fishery management plan for halibut. Nor has NMFS determined what the optimum yield is for halibut. The NMFS admits in the final rule that “specification of optimum yield for halibut . . . has not been determined.” *See* 75 Fed. Reg. at 559.

75. As such, the final rule could not have been “establish[ed] . . . in order to achieve optimum yield” as required by the 16 U.S.C. section 1553(b)(6) and by reference the Halibut Act.

76. The limited access CHP program was not “establish[ed] . . . in order to achieve optimum yield.” Rather, NMFS clearly stated the intent of the final rule as: “the intended effect [of this rule] is to curtail growth of fishing capacity in the guided sport fishery for halibut.” *See* 75 Fed. Reg. 554.

77. Because optimum yield has not been specified for halibut pursuant to a fishery management plan, the final rule cannot be consistent with “the limited entry criteria set forth in section 1853(b)(6) of [title 16]” as expressly required by the Halibut Act. *See* 16 U.S.C. § 773c(c).

78. Accordingly, the final rule does not comply with the Halibut Act and as such is invalid as contrary to the Halibut Act and the APA because it does not comply with statutory requirements. 5 U.S.C. §706 (2).

II. NMFS did not consider or take into account the economic impact on charter operators as required 16 U.S.C. section 1853(b)(6)(C)

79. As noted above, the Halibut Act requires any allocation program “**shall be consistent** with the limited entry criteria set forth in section 1853(b)(6) of [title 16].” 16 U.S.C. § 773c(c) (emphasis added).

80. One of the limited entry criteria requires the Council and Secretary to consider the “economics of the fishery.” 16 U.S.C. § 1853(b)(6)(C).

81. NMFS did not analyze the economics of the halibut industry and specifically did not analyze the impact on the small charter businesses that the final rule will put out of business for the sole reason to make the qualifying charter businesses more profitable (and not related to any resource conservation objective).

82. NMFS recognized that its analysis of the economics was deficient in the final rule wherein it stated:

The Analysis [i.e., the EA/RIR/IRFA] estimates numbers of operations affected by this action, and examines the costs and benefits of the action accruing to different sectors. **Much of the Analysis is qualitative, reflecting the limited information that exists on the charter vessel business generally and on the angler demand.**

See 75 Fed. Reg. at 573 (emphasis added).

83. NMFS did not quantify (or even attempt to quantify) the economic impacts on the charter businesses that will not receive a CHP. Nor did NMFS quantify the expected economic windfall that it will bestow upon the select charter businesses that will receive or more CHPs.

84. The final rule is also in violation of and inconsistent with National Standard 5 – Efficiency (50 C.F.R. § 600.330) that implements the economics of the fishery criteria in 16 U.S.C. section 1553(b)(6)(C).

85. National Standard 5, provides in part, that “no [conservation and management] measure shall have economic allocation as its sole purpose.” *See* 50 C.F.R. § 600.330(a).

86. The final rule is designed and calculated solely to cause a consolidation of the guided sport fishery for halibut by “curtailing growth” of that industry.

87. National Standard 5 specifically discusses standards for limited access to fisheries. 50 C.F.R. § 600.330(c), provides in part the following description of limited access systems:

A ‘system for limiting access,’ which is an optional measure under section 303(b) of the Magnuson-Stevens Act, is a type of allocation of fishing privileges that may be considered to contribute to economic efficiency or conservation. For example, limited access may be used to combat overfishing, overcrowding, or overcapitalization in a fishery to achieve OY [Optimum Yield].

88. In considering any limited access system, National Standard 5 expressly recognizes “[t]he Magnuson-Stevens Act ties the use of limited access to the achievement of OY.” *See* 50 C.F.R. § 600.330(c)(2).

89. NMFS has failed to establish an optimum yield for halibut pursuant to a fishery management plan and as such any limited access program for halibut that is not “tied” to the achievement of an optimum yield for halibut is inconsistent with National Standard 5 and 16 U.S.C. section 1553(b)(6)(C).

90. Accordingly, the final rule does not comply with the Halibut Act and as such is invalid as contrary to the Halibut Act and the APA because it does not comply with statutory requirements. 5 U.S.C. §706 (2).

III. The Final Rule is inconsistent with 16 U.S.C. section 1853(b)(6) because it does not fairly and equitably distribute fishing privileges.

91. As noted above, one condition of any allocation program under the Halibut Act is

that it “**shall be consistent** with the limited entry criteria set forth in section 1853(b)(6) of [title 16].” 16 U.S.C. § 773c(c) (emphasis added).

92. One of the limited entry criteria requires the Council and Secretary to consider the “the fair and equitable distribution of access privileges in the fishery.” 16 U.S.C. § 1853(b)(6)(F).

93. NMFS did not fairly and equitably distribute access privileges to halibut. It is not fair or equitable to create limited entry program that allows a select group of 527 charter halibut operations to receive an economic windfall at the expense of 327 others when it serves no conservation purpose.

94. 527 charter halibut operations will be able to harvest the same (if not more) halibut that the 854 charter halibut operations were harvesting to meet angler demand. Thus, the sole effect of the final rule is to destroy the 327 charter halibut operations that will not receive a CHP. This is not fair or equitable.

95. NMFS acknowledges this massive elimination of approximately 327 businesses will cause a significant economic impact: “only currently active guided charter operations that will not receive a permit to continue to participate in this fishery, will suffer significant adverse economic impacts. *See* EA/RIR/FRFA, p. 209.

96. National Standard 4, which addresses allocations, sets forth a three-part test:

(a) *Standard 4.* Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be:

- (1) Fair and equitable to all such fishermen.
- (2) Reasonably calculated to promote conservation.
- (3) Carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

50 C.F.R. § 600.325(a).

97. The final rule does not allocate privileges fairly and equitably to **all** such halibut fisherman. To the contrary, it creates an arbitrary system that will result in numerous businesses going out of business and untold trickle down economic effect on vendors, suppliers, and ancillary service businesses in the communities while it serves no resource conservation objective.

98. National Standard 4 discusses the fairness and equity factor in making allocations and states:

(A) An allocation of fishing privileges should be rationally connected to the achievement of OY or with the furtherance of a legitimate FMP [fishery management plan] objective. Inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause. . . .

50 C.F.R. § 600.325(c)(3)(i).

99. The final rule has no rational connection to achieving the optimum yield of halibut because there is no established optimum yield for halibut.

100. The final rule has no rational connection to achieving a legitimate fisheries management plan (i.e., FMP) objective because there is no fisheries management plan for halibut; and even if there were, economic consolidation of the charter halibut industry would not be a legitimate objective of any fisheries management plan.

101. NMFS's motive for making the CHP allocation was economic consolidation of the charter halibut industry and was not justified by NMFS in terms of any conservation or management objective. The only justification provided by NMFS was to stabilize the growth in the charter halibut industry.

102. The final rule's allocation of fishing privileges is not fair to all halibut fisherman and is inconsistent with the limited entry criteria (F) of 16 U.S.C. § 1853(b)(6). As a result, the final rule violates the Halibut Act and is invalid as contrary to the Halibut Act and the APA because it does not comply with statutory requirements. 5 U.S.C. §706 (2).

COUNT THREE
(Halibut Act)

103. Plaintiffs incorporate the allegations set forth above in Paragraphs 1- 56 as if fully set forth herein.

104. The Halibut Act, provides in pertinent part:

If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, **such allocation shall be fair and equitable to all such fishermen**, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges

16 U.S.C. § 773c(c) (emphasis added).

105. The final rule violates the Halibut Act because it is not fair and equitable to “all such fisherman.”

106. NMFS did not fairly and equitably distribute access privileges to halibut to “all such fisherman.” It is not fair or equitable to create a limited entry program that allows a select group of 527 charter halibut operations to receive an economic windfall at the expense of 327 others when it serves no conservation purpose.

107. 527 charter halibut operations will be able to harvest the same (if not more) halibut that the 854 charter halibut operations were harvesting to meet angler demand. Thus, the sole effect of the final rule is to destroy the 327 charter halibut operations that will not receive a CHP. This is not fair or equitable.

108. NMFS acknowledges this massive elimination of businesses will cause a significant economic impact: “only currently active guided charter operations that will not receive a permit to continue to participate in this fishery [~327], will suffer significant adverse economic impacts” with no conservation purpose. *See EA/RIR/FRFA*, p. 209.

109. NMFS failed to explain or justify how the allocation is fair and equitable to **ALL** 854 charter halibut operators. It certainly is not fair and equitable to the 327 charter halibut operators that will be forced out of business, especially when NMFS could enact other regulations that are resource based to address any concerns with the halibut resource.

110. NMFS’s motive for making the CHP allocation was economic consolidation of the charter halibut industry and was not justified by NMFS in terms of any conservation or management objective. The only justification provided by NMFS was to stabilize the growth in the charter halibut industry.

111. The final rule’s allocation of fishing privileges is not fair to **all** halibut fisherman and is inconsistent with limited entry criteria (F) of 16 U.S.C. § 1853(b)(6). As a result, the final rule violates the Halibut Act and is invalid as contrary to the Halibut Act and the APA because it does not comply with statutory requirements. 5 U.S.C. §706 (2).

COUNT FOUR
(Violation of the APA)

112. Plaintiffs incorporate the allegations set forth above in Paragraphs 1- 56 as if fully set forth herein.

113. The final rule adopted by NMFS is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Accordingly, it is adopted in violation of 5 U.S.C. §706 (2)(A) and must be held unlawful and set aside.

114. The final rule adopted by NMFS is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” Accordingly, it is adopted in violation of 5 U.S.C. §706 (2)(C) and must be held unlawful and set aside.

COUNT FIVE
(Stay of Agency Action Pending Review Pursuant to the APA)

115. Plaintiffs incorporate the allegations set forth above in Paragraphs 1- 56 as if fully set forth herein.

116. Section 705 of the APA provides for relief pending review of agency action. Specifically, that section provides in part:

On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. §705.

117. As set forth above, Plaintiffs and COA’s members will suffer irreparable harm if the final rule is enforced against them. The halibut guiding season typically runs from May to September. As noted in the attached affidavits of Plaintiffs, they will lose their businesses if not allowed to guide for halibut.

118. Accordingly, Plaintiffs request that this Court stay “the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings” as provided by the APA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully seek an Order of this Court:

119. Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the final rule established by the Secretary and his designees is arbitrary, capricious, an abuse of discretion, and not in accordance with law (including the Halibut Act, the Magnuson-Stevens Act, and the APA), in excess of statutory jurisdiction, authority, or limitations, and short of statutory right conferred by the above-referenced law;

120. Declaring that the final rule violates the Halibut Act;

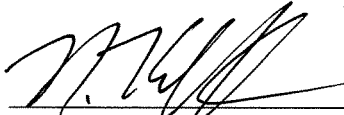
121. Enjoining the Defendants from enforcing the final rule pending conclusion of the review of the rule;

122. Granting such other relief as is just and proper.

123. A separate Motion for Preliminary Injunction is filed contemporaneously herewith.

Respectfully submitted this 4th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the following by electronic mail and/or U.S. Mail, this 4th day of April, 2011:

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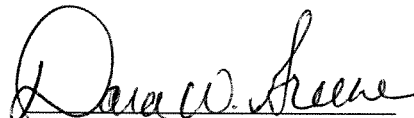
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