

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Charter Operators of Alaska,
a non-profit corporation, et al.

CIVIL ACTION

Plaintiffs,

CASE NO: 11-604-EGS

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

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF THEIR
MOTION FOR PRELIMINARY
INJUNCTION**

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.

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs are owners and operators of charter halibut fishing operations in Alaska operating in International Pacific Halibut Commission (IPHC) regulatory areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). Plaintiffs are directly and significantly affected by a final rule approved by the Secretary of Commerce and issued by the National Marine Fisheries Service (NMFS) titled *Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska* as published in the Federal Register on January 5, 2010 (75 Fed. Reg. 554).¹ The portion of the rule at issue before this Court became effective February 1, 2011. See 75 Fed. Reg. 554.

The final rule deprives Plaintiffs of permits needed to continue their charter fishing operations. Without the required Charter Halibut Permits (CHPs), Plaintiffs can no longer stay in business. Although Plaintiffs have invested hundreds of thousands of dollars to build their businesses over a number of years, and heretofore have applied for and been granted the required guide licenses through the Alaska Department of Fish and Game (ADFG) without question, the rule summarily terminates Plaintiffs' operations because they fail to meet arbitrary minimum participation requirements.

To obtain a CHP, Plaintiffs would have to demonstrate threshold halibut fishing activity during a *qualifying period* (February 1 through December 31 of 2004 or 2005) and a *recent participation period* (February 1 through December 31 of 2008). In sum, anyone who started and developed their business during the last five years must go out of business no matter how

¹ A copy of the final rule as published at 75 Fed. Reg. 554 is attached as Exhibit 1 in Plaintiffs' Complaint. In addition the final rule was codified as 50 C.F.R. Chapter III, Part 300, Subpart E, §§ 300.61, 300.66 and 300.67.

much they have invested in their operations, how much they owe on boats, real estate and equipment and no matter how many new and return clients attempt to book fishing trips with them.

Plaintiffs purchased boats, equipment and real estate within the last five years and, prior to the implementation of the final rule, applied for and were granted permits from ADFG allowing them to operate charter fishing operations which included the taking of halibut. None of the plaintiffs meet the minimum participation criteria for a CHP under the new rule. None of the plaintiffs can obtain an initial CHP and ensure the continued viability of their halibut charter operations. The most egregious and unconscionable aspect of the rule, is that the *rule is not intended to protect halibut*. NMFS candidly 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.

The rule is actually intended to put charter boats out of business and consolidate the fleet. In sum, the rule is not intended to protect the reproduction and harvest of halibut; the rule is intended to protect an arbitrary declaration of what constitutes the established halibut charter fleet from newcomers.

Neither the North Pacific Halibut Act of 1982 (Halibut Act), nor the limited entry criteria of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), allow access to a fishery to be denied without a conservation purpose specifically tied to maintaining an optimum yield of a regulated fish species. No optimum yield has been determined for the Pacific halibut. Consequently, the final rule violates both the Halibut Act and the Magnuson-Stevens Act and puts Plaintiffs out of the halibut charter fishing business for reasons unrelated to Pacific halibut conservation.

Absent an order from this Court enjoining implementation of the final rule, Plaintiffs will suffer immediate and irreparable injury for which there is no remedy at law. Plaintiffs have had to turn away new bookings, cancel existing reservations and return deposits and will be unable to generate income to keep their businesses viable; some may lose their boats, equipment and real estate as debt service comes due but no income is available.

**THE COURT HAS JURISDICTION TO GRANT
THE RELIEF REQUESTED BY PLAINTIFFS**

This Court has jurisdiction over this action under the Halibut Act, which provides that “[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).

In addition, this Court has jurisdiction under Section 705 of the Administrative Procedures Act to grant 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.

PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

In deciding whether to grant a preliminary injunction, the Court must assess (1) the likelihood of success on the merits; (2) the irreparable injury to the plaintiff if preliminary relief

is not granted; (3) the burden, if any, on others' interests from an injunction; and (4) the public interest in granting or denying relief. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)). These factors interrelate on a sliding scale under a traditional equitable analysis, and relief may be afforded "where there is a particularly strong likelihood of success of the merits even if there is a relatively slight showing of irreparable injury." *City Fed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 736, 747 (D.C. Cir. 1995); *see also Cuomo v. U.S. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (justifying injunction with "either a high probability of success and some injury or *vice versa*.")

Each of these four factors articulated in *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D. C. Cir. 1998) weigh in Plaintiffs' favor as demonstrated herein, and entitle them to the injunctive relief requested in that: 1) Plaintiffs are likely to succeed on the merits; the rule violates both the Halibut Act and the limited entry provisions of the Magnuson-Stevens Act; 2) Plaintiffs have and will suffer irreparable injury; without a CHP, Plaintiffs are out of the halibut charter business; 3) any injunction granted by this Court will have no impact upon the legitimate interest of others; as explained herein, the rule is not intended to protect halibut but to prevent newcomers into the halibut fleet; and, 4) granting such relief is in the public interest in that, without impacting halibut reproduction, recruitment or harvest, hundreds of small business owners will be able to remain in business providing jobs and traveling angler dollars to their local communities and the State of Alaska.

I. Plaintiffs are Likely to Succeed on the Merits

The final rule violates the Halibut Act and the limited access provisions of the Magnuson-Stevens Act. The Halibut Act, 16 U.S.C. § 773c(c), provides in pertinent part:

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.

(Underline and bold emphasis added; italics as in original).

A. *The Final Rule is not Reasonably Calculated to Promote Conservation in Violation of the Halibut Act*

Under the Halibut Act, “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.” 16 U.S.C. § 773c(c) (emphasis added). However, the Defendant agencies have conceded that this rule serves no identified conservation purpose stating in the preamble to the final rule that curtailing *growth* of guided sport fishing capacity will not limit halibut harvest. “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.” 75 Fed. Reg. at 571. “Any reduction in 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....” *Id.*

By NMFS's own admission, the final rule is not calculated, designed, or intended to promote conservation: "[t]he limited access program was not designed to limit charter harvest or reduce halibut mortality in the charter fisheries." *See* Appendix Item A, (March 30, 2011 Correspondence from the U.S. Small Business Administration to Plaintiff Allen Walburn). In contrast, NMFS concedes there is no halibut resource concern: "the halibut resource in Area 2C and 3A is being managed in a sustainable manner. . . ." *See* 75 Fed. Reg. at 568. Because the final rule serves no conservation purpose as evidence by a current healthy managed halibut resource, the final rule is invalid under the Halibut Act the allocation of fishing privileges is not "reasonably calculated to promote conservation."

B. The Final Rule Fails to Comply with Limited Access Provisions of Magnuson-Stevens Act

The final rule, as approved by the Secretary of Commerce, is a part of an effort by the North Pacific Fishery Management Council (Council) to develop a regulatory program to manage the guided sport charter vessel fishery for halibut.² The final rule is not consistent with the limited access provisions of 16 U.S.C. § 1853(b)(6) of the Magnuson-Stevens Act which by incorporation in the Halibut Act apply when the Council is creating a limited access system for the halibut fishery. Thus, when the Council is creating a limited access system, the NMFS must abide by the limited access provisions of 16 U.S.C. section 1853(b)(6) of the Magnuson-Stevens

² *See* 75 Fed. Reg. 554. In the preamble to the final rule it is explained that the final rule was a product of the International Pacific Halibut Commission (IPHC) but that, under the Halibut Act, the North Pacific Fishery Management Council (Council) has authority to develop regulations, including limited access regulations, subject to approval by the Secretary of Commerce. It is noted in the preamble that the "Council also has been developing a regulatory program to manage the guided sport charter vessel fishery for halibut." The final rule "is a step in the development of that regulatory program and has been approved by the Secretary pursuant to section 773c(c)."

Act. These provisions require a fishery management plan be prepared prior to the establishment of any limited access system.

16 U.S.C. section 1853(b)(6) provides:

(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 a 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 affecting fishing communities;
- (F) the fair and equitable distribution of access privileges in the fishery; and
- (G) any other relevant considerations.

(emphasis added).

NMFS admits that no fishery management plan has been developed for the Pacific halibut (*Hippoglossus stenolepis*) by the Council or itself. *See* 75 Fed. Reg. at 559. It is also critical to understand that a limited access system under section (6) must be necessary to achieve “optimum yield” for halibut. In this case, NMFS readily admits in the final rule that “specification of optimum yield for halibut . . . has not been determined.” *See* 75 Fed. Reg. at 559. In short, until a fishery management plan that establishes an optimum yield for halibut is adopted, a limited access system for the halibut fishery cannot be valid.

Even if a limited access system could be imposed upon the halibut fishery, the Secretary failed to take the section (6) criteria into account. The rule became final in January of 2010,

effective February of 2011 but is retroactive—for purposes of obtaining a CHP—to 2005. At a minimum, the retroactive application of the qualifying criteria fails to properly 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; or (F) the fair and equitable distribution of access privileges in the fishery. The capability of fishing vessels used in the fishery to engage in other fisheries, paragraph (6)(D), was also largely ignored. As noted in the affidavits attached to the Complaint and incorporated herein by reference, potential clients will not book trips solely for salmon once told they cannot fish for halibut. *See* Appendix, containing Exhibits 3-7 to the Complaint.

i. Defendants failed to properly assess the economic impact of the final rule

The Halibut Act requires any allocation program “**shall be consistent** with the limited entry criteria set forth in [the Magnuson-Stevens Act] section 1853(b)(6) of [title 16].” 16 U.S.C. § 773c(c) (emphasis added). 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). 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 with the effect of making the qualifying charter businesses more profitable (and not related to any resource conservation objective). NMFS recognized that its analysis of the economics was deficient in the final rule wherein it stated:

The Analysis 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).³

Notwithstanding that there is no real conservation purpose for the rule, forty-three percent (43%) of halibut charter businesses active in IPHC area 2C in 2008 (173 businesses of 404) will not qualify for permits. See *Analysis*, p. 207-208. In IPHC area 3A, thirty-four percent (34%) of the businesses active in 2008 (154 businesses of 450) will not qualify for a permit. *Id.* “[A]ctive guided charter operations that will not receive a permit to continue to participate in this fishery, will suffer significant adverse economic impacts.” *Id.* at 209. (emphasis added).

In their *Analysis* defendants admit that up to 327 businesses will suffer significant adverse economic impacts—nearly 40 percent (327 of 854) of all halibut charter operations that were active in areas 2C and 3A combined in 2008—but concede in the preamble to the rule that 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. 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 one or more CHPs.

Nor did NMFS appropriately consider the economic impacts on small businesses. In response to inquiries from the Small Business Administration on behalf of Plaintiff Allen Walburn, NMFS conceded it lacked the information to conduct an appropriate analysis:

The economic activity resulting from charter halibut fishing activities generates revenue and employment for residents of the communities where expenditures occur. However, employment and revenue information for the charter sector and the secondary

³ The *Analysis* referred to in this quotation is the *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*, National Marine Fisheries Service, November 6, 2009, Executive Summary at ix. Hereinafter “*Analysis*.”

industry sectors that are impacted by charter fishing is not available to assess the current economic contribution of the charter halibut fishery or the anticipated effects of the limited access program on expenditures and jobs in coastal communities in the State of Alaska.

See Appendix Item B, (March 11, 2011 Correspondence from the U.S. Small Business Administration to Plaintiff Allen Walburn). In short, NMFS concedes that the “Analysis does not estimate the number of jobs or amount of gross revenue that would be impacted by implementation of the program.” *Id.*⁴ While acknowledging the information and data to assess economic impacts was currently unavailable, NMFS admitted its own economic analysts have begun research projects but such research is ongoing:

NOAA Fisheries economic analysts have recently initiated research projects to estimate the regional employment and income impacts associated with changes in the attributes of guided halibut fishing trips and the relationship between the halibut fishing sectors and the Southeast Alaska economy. These research projects may provide baseline information about the economic impacts of the charter sector on coastal communities and the State of Alaska. Such information would improve NOAA Fisheries’ ability to analyze the impacts of proposed fishery management actions in the future.

Id.

Without fully understanding the charter vessel business or angler demand, the Defendants simply and prematurely decree that 40 percent of the halibut charter fleet cannot have permits to continue their—in most cases—well established and ongoing operations. This is a reckless action and inconsistent with the statute and its own regulations.

⁴ More recently, NMFS acknowledging a significant percentage of charter halibut operations (approximately 327 operations) will not receive or obtain a CHP, candidly admits that “[t]he number of jobs that would be lost [due to the final rule] was not quantified in the analysis.” *See* Appendix Item A, (March 30, 2011 Correspondence from the U.S. Small Business Administration to Plaintiff Allen Walburn).

It is axiomatic that agencies must follow their own rules. *See, e.g., Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40, 59 (2005). If an agency desires to change its rules, the APA requires that it must do so only under a proper notice and comment procedure. *See* 5 U.S.C. § 553. The D.C. Circuit has held:

[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (citation omitted). *See also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (Scalia, J.) (“It is axiomatic that an agency must adhere to its own regulations . . .”).

The final rule violates and is inconsistent with NMFS’s regulations – 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). National Standard 5, provides in part, that “no [conservation and management] measure shall have economic allocation as its sole purpose.” 50 C.F.R. § 600.330(a). 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. 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].

In considering any limited access system, National Standard 5 expressly recognizes that “[t]he Magnuson-Stevens Act ties the use of limited access to the achievement of OY.” 50 C.F.R. § 600.330(c)(2). NMFS has failed to establish an optimum yield for halibut 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 1853(b)(6)(C). Accordingly, the final rule violates not only the Halibut Act but also is in violation of the NMFS’s own regulations. Accordingly, the final rule is invalid and must be enjoined.

ii. The final rule does not allocate fishing rights in a fair or equitable manner

Ignoring that the final rule has nothing to do with halibut conservation – “the halibut resource in Area 2C and 3A is being managed in a sustainable manner” *see* 75 Fed. Reg. at 568 – the Defendants attempt to explain away the impact upon businesses that cannot get a permit by noting the surviving operations will have to take more trips. “The Analysis . . . indicates that the number of permits issued under this rule will allow permitted vessels to meet 2008 levels of charter trips by increasing the average number of trips they make in Area 2C from 36 to 52, and in Area 3A from 38 to 56.” *See* 75 Fed. Reg. at 572.

This is directly inconsistent with unambiguous language in the Halibut Act which requires that such allocation shall be fair and equitable to all such fishermen and reasonably calculated to promote conservation. 16 U.S.C. § 773c(c) (emphasis added). The limited entry provisions of the Magnuson-Stevens Act also require the fair and equitable distribution of access privileges in the fishery. The final rule simply takes away charter fishing trips from 327 ongoing businesses, based upon 2004, 2005, and 2008 activity, and hands those trips over to others within the fleet. The final rule—without any benefit to the Pacific Halibut population—puts one charter operation out of business in favor of a windfall to another which may now increase its number of

trips by 44 percent (Area 2C) to 47 percent (Area 3A). There is nothing fair or equitable to such an approach.

II. Plaintiffs will Suffer Irreparable Injury

As defendants admit, "... active guided charter operations that will not receive a permit to continue to participate in this fishery, will suffer significant adverse economic impacts." Those injuries are irreparable and in certain cases personally devastating.

Nick and Amy Ausman own Crystal Bay Lodge, LLC in Petersburg, Alaska. Since 2005, the Ausman's have invested over a million dollars in securing a location for their lodge, purchasing a boat and purchasing equipment. *See* Appendix Item C, (Affidavit of Captain Nicholas Ausman which is also Exhibit 3 to the Complaint). In 2008, the Ausmans hired a captain to take clients out to fish for halibut. When the Ausman's learned of the final rule, they applied for a permit and were denied; they appealed and again were denied a permit. Expenses to maintain the lodge, including debt service, exceed \$12,000.00 per month (approximately \$150,000.00 a year). Without a permit, the Ausman's cannot fulfill advanced bookings for charter halibut fishing or accept new bookings. As an oceanfront lodge, halibut fishing is the reason clients book with the Ausmans. Alternative fisheries, e.g., salmon fishing, cannot support the lodge or provide sufficient income to cover debt service and monthly expenses. With no permit, and no income from halibut fishing, the Ausman's will be unable to remain in business. The value of the lodge is dramatically diminished without the ability to fish for halibut. Without relief from the final rule, Crystal Bay Lodge, LLC, will likely be forced to file for bankruptcy.

Captain Allen B. Walburn is the owner and operator of Alaska's Kodiak Island Resort, LLC which was established January 1, 2006, to provide guided charter fishing, lodging and meals in Larsen Bay, Alaska. *See* Appendix Item D, (Affidavit of Captain Allen B. Walburn

which is also Exhibit 4 to the Complaint). Captain Walburn has invested a total of \$1,500,000.00 in Kodiak Island Resort and has advanced bookings for the 2011 halibut season exceeding \$400,000.00 in charter fees. Not having been established in either qualifying year (2004 or 2005), Captain Walburn nonetheless applied for and was denied a permit which entitled Kodiak Island Resort to a revocable temporary 4-person permit pending an appeal of the denial which is to be heard in May 2011. Captain Walburn has been advised by the NMFS that he does not qualify for a CHP; his appeal appears futile and his loss of over \$400,000.00 in charter bookings, and a dramatic reduction, if not elimination, in revenues at the lodge, is imminent.

Captain Jack Roskind is the president of Charter Operators of Alaska a non-profit organization. *See* Appendix Item E, (Affidavit of Captain Jack Roskind which is also Exhibit 6 to the Complaint). Captain Roskind owns and operates Knot Roughin' It Charters, LLC. Captain Roskind has actively participated in the charter halibut fishery starting in Seward in 2007 and then moved his operation to Whittier, Alaska in 2008. Although not active in either qualifying year (2004 or 2005), Captain Roskind nonetheless applied for and was denied a permit which would entitle him to a revocable temporary 4-person permit pending an appeal of the denial. Captain Roskind has been advised by the NMFS that he does not qualify for a CHP; his appeal appears futile and the revocation of his temporary permit certain. After four years of active participation in the halibut fishery, Captain Roskind will no longer be able to operate his charter business unless the final rule is set aside. The demise of Captain Roskind's business is imminent.

Charter Operators of Alaska, Inc. includes members who have paid membership fees as well as numerous supporters. Supporters include approximately eleven hundred individuals who have signed an electronic petition to *Save Alaska Charter Halibut Fishing for Tomorrow* posted

on the COA website.⁵ Current members include approximately 34 charter operations and fishing lodges that offer chartered fishing that are dependent upon halibut and the ability to take guest to fish for halibut. *See* Appendix Item E, (Affidavit of Captain Jack Roskind which is also Exhibit 6 to the Complaint). These owners and operators, and COA members, are a subset of the 327 charter operations that will be forced out of business if the rule is not set aside.

Their return to the halibut fishery is virtually impossible. The rule has resulted in a sellers' market for those charter operations who qualify for a transferable CHP. Although the Defendants' *Analysis* suggested that transferable permits would be available for sale as qualifying operations shut down, and that those permits would likely cost approximately \$5,000.00, permit brokerage companies are currently offering CHPs for \$40,000.00 to \$100,000.00 and more depending upon the location and the number of anglers authorized under the CHP. *Id.* In addition, recent information from NMFS indicates that recent sales of CHPs in 2011 for Area 3A are ~\$60,000 and Area 2C is ~\$37,000. *See* Appendix Item A, (March 30, 2011 Correspondence from the U.S. Small Business Administration to Plaintiff Allen Walburn). The 327 charter operations, including COA's members, have not only been ejected from the fleet, they have been precluded from re-entering the halibut fishery due to the high price and limited availability of transferable CHPs.

This Court has previously held that "economic loss may constitute irreparable harm where the loss threatens the very existence of the movant's business" or "where plaintiff has made a showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits." *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 67 (D.D.C. 2000). This Court has further recognized that "admittedly economic" injury

⁵ *See* <http://www.change.org/petitions/save-alaskan-charter-halibut-fishing-for-tomorrow#signatures>.

amounts to irreparable harm when “no adequate compensatory or other corrective relief” could be provided at a later date. *Bracco Diagnostics v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997); *See also Hoffman Laroche Inc. v. Califano*, 453 F. Supp 900, 903 (D.D.C. 1978) (where no other corrective relief is available, “it is not one of the ‘mere’ economic injuries which . . . are insufficient to warrant a stay.”). In this case, Plaintiffs do not have a viable action against the Defendants for damages because fishing rights are not necessarily property protected by the Fifth Amendment to the U.S. Constitution. In addition, the harm threatens the very existence of their businesses and livelihoods, not just their profits.

Courts have also recognized that the required injury is present – and preliminary injunctive relief is appropriate – in cases where “time is of the essence.” *See, e.g., United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir. 1988); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). That is the case here. The effective date of the challenged portion of the final rule became effective on February 1, 2011. *See* 75 Fed. Reg. 554. Because of the rule’s effective date, Plaintiffs will be irreparably harmed unless the Court acts immediately, “when it [is] still possible to grant effective relief,” and before “all opportunity to grant the requested relief [is] foreclosed.” *Local Lodge No. 1266, Int’l Ass’n of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981).

III. Injunctive Relief will not Substantially Injure other Interested Parties

The prime season for halibut fishing begins in May and runs through September. If implementation of the rule is enjoined prior to May 2011, the charter fleet as a whole should experience similar bookings as in the 2010 season and avoid irreparable injury. The government defendants cannot be said to be burdened by a delay in implementation of the final rule. Because the final rule makes clear that halibut harvest is not likely to be affected, due to qualifying

charter operations simply increasing bookings and trips, the government defendants cannot claim any exigent circumstances related to resource protection.⁶ Consequently, no other interested parties will be substantially impacted or injured should this Court grant the relief requested.

This Court has held that issuing an injunction is proper where the only injury to a federal agency defendant is delay. *See, e.g., International Long Term Care v. Shalala*, 947 F. Supp. 15, 20 (D.D.C. 1996) (delay in administrative process was not a basis for denying preliminary injunction); *DSE, Inc. v. United States*, 3 F. Supp. 2d 1464, 1472 (D.D.C. 1998); *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993). Nor will the entry of a preliminary injunction harm any person involved in the halibut fisheries as the NMFS expects the same amount of halibut to be harvested by the now consolidated chartered halibut fleet. *See* 75 Fed. Reg. at 572 (where 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

⁶ *See* 75 Fed. Reg. at 566 wherein 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).

to expand their capacity to meet existing and higher levels of angler demand for guided halibut fishing.”).⁷

Lastly, injunctive relief would not harm or burden the general public. The Defendants have expressly admitted that the final rule does not implicate resource conservation concerns. *See* 75 Fed. Reg. at 571 (“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.”). Instead, the final rule deals only with an allocation issue. *Id.* As such, injunctive relief will not result in any environmental injury. *See* 75 Fed. Reg. at 568 (where NMFS admits “the halibut resource in Area 2C and 3A is being managed in a sustainable manner”).

IV. The Public Interest is Furthered by the Injunctive Relief Requested

Long ago, the D.C. Circuit recognized that “there is an overriding public interest... in the general importance of an agency’s faithful adherence to its statutory mandate.” *Jacksonville Port Authority v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). This adherence is all that Plaintiffs seek in this case. Similarly, it is axiomatic that an agency is required to follow Congressional mandates and its own regulations. *See Ballard v. Comm’r of Internal Revenue*, 544 U.S. 40, 59 (2005). Accordingly, it serves the public interest when an agency is enjoined from acting unlawfully. *See, e.g., Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp 2d 56, 66 (D.D.C. 2004) (noting a “substantial public interest” in ensuring that a federal agency “acts within the limits of its authority”); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (1998) (affirming preliminary injunction based in part on the public’s interest in an agency’s faithful execution of the laws); *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992).

⁷ *See 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.”).

To the extent that there is any concern that the final rule is necessary to protect the halibut resource, the Defendants have conceded that the final rule does not implicate resource conservation concerns. *See* 75 Fed. Reg. at 568 (where NMFS admits “the halibut resource in Area 2C and 3A is being managed in a sustainable manner”). The issuance of a preliminary injunction will not affect the halibut stock or have any adverse impacts on the halibut resource. Thus, there are no relevant environmental or conservation issues that serve the public interest in this case.

Should this Court grant the injunctive relief requested, Plaintiffs will be able to honor existing bookings for the 2011 halibut season and mitigate damages already sustained by word of the final rule having spread throughout Alaska, Canada, the lower forty-eight states and overseas. Due to timing of the halibut season, the 2011 season may yet be salvaged. Enjoining further implementation of the final rule will serve the public interest by preventing the economic waste of numerous small businesses, many in small communities, having to close down their operations. If the injunction is not granted, and Plaintiffs ultimately prevail, it will be too late for many charter operators to recover and begin operations anew.

Additionally, COA members are small business owners who pay employees, pay license fees and return collectively tens of thousands of dollars to the local community purchasing fuel and equipment and bringing traveling anglers to local hotels, shops and restaurants. The injunction will serve the public interest by not unnecessarily and perhaps prematurely depriving the local communities of this economic stimulus.

CONCLUSION

Plaintiffs are entitled to a preliminary injunction as each of the four factors articulated in *Mova Pharm. Corp v. Shalala*, 140 F.3d 1060, 1066 (D. C. Cir. 1998) weigh in Plaintiffs’ favor:

1) Plaintiffs are likely to succeed on the merits; the rule violates both the Halibut Act and the limited entry provisions of the Magnuson-Stevens Act; 2) Plaintiffs have and will suffer irreparable injury; without a CHP, Plaintiffs are out of the halibut charter business; 3) any injunction granted by this Court will have no impact upon the legitimate interest of others and as explained above, the rule is not intended to protect halibut but to prevent newcomers into the halibut fleet; and, 4) granting such relief is in the public interest in that, without impacting halibut reproduction, recruitment or harvest, hundreds of small business owners will be able to remain in business providing jobs and traveling angler dollars to their local communities and the State of Alaska.

Pursuant to Local Rule LCvR 7(c), Plaintiffs have included a proposed order granting a preliminary injunction in the appendix to this memorandum of law.

Respectfully submitted this 4th day of April, 2011.

HOPPING GREEN & SAMS, P. A.



D. Kent Safriet

D.C. Bar No. 467110

119 S. Monroe Street, Suite 300

Tallahassee, Florida 32301

Ph: (850) 222-7500

Fax: (850) 224-8551

Counsel for Plaintiffs

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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Adam Issenberg
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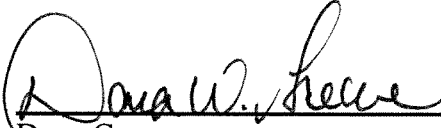
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Gary W. Locke
Secretary of the U.S. Department of Commerce,
Office of the Secretary, Room 5852
14th Street and Constitution Ave., NW
Washington, DC 20230

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

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


Dana Greene

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Charter Operators of Alaska,
a non-profit corporation, et al.

CIVIL ACTION

Plaintiffs,

CASE NO: _____

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.

**APPENDIX TO PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

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Affidavit of Captain Allen B. Walburn
(which is also Exhibit 4 to the Complaint)D

Affidavit of Captain Jack Roskind
(which is also Exhibit 6 to the Complaint) E

Proposed Order F



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE NATIONAL OMBUDSMAN

March 30, 2011

Mr. Allen Walburn
Owner
Alaska's Kodiak Island Resort
101 1st Street, P.O. Box 36
Larsen Bay, AR 99624

Dear Mr. Walburn:

As per your follow-up e-mail of February 18, 2011, regarding the National Oceanic and Atmospheric Administration's (NOAA) response to your original complaint, your follow-up questions concerning the limited access system for charter vessels in the guide sport fishery for Pacific halibut in Alaska, was forwarded to NOAA for a further high-level review and response. I have enclosed a copy of the response with this letter.

Mr. Walburn, thank you for bringing your concerns to my attention. If you have any questions or concerns in this matter, please contact José Méndez from my staff by telephone at (202) 205-2417, fax at (202) 481-5719 or e-mail at Ombudsman@sba.gov.

Sincerely yours,

Esther H. Vassar
National Ombudsman and
Assistant Administrator for Regulatory Enforcement Fairness

Enclosure
EHV/jm

The Mission of the Office of the National Ombudsman:
FOSTERING A MORE BUSINESS FRIENDLY REGULATORY ENFORCEMENT ENVIRONMENT.

409 3rd Street, SW, MC 2120, Washington, DC 20416-0005 Toll Free: (888) 734-3247 Fax: (202) 481-5719
Website: <http://www.sba.gov/ombudsman> E-mail: ombudsman@sba.gov

Appendix A

March 30, 2011

Follow-up questions from the Small Business Administration on behalf of Allen Walburn regarding the charter halibut limited access program.

1. How many businesses will be forced to close because they are unable to obtain permits for 2011?

An update to the analysis of the charter halibut limited access program (Analysis) in 2009 indicated that 43% of the charter businesses in Southeast Alaska and 34% of the charter businesses in the Central Gulf of Alaska that were active in 2008 would not qualify for a charter halibut permit (CHP). This means that those business did not meet the minimum participation requirements established for the permits (5 charter trips in either 2004 or 2005, and 5 charter trips in 2008).

Based on the Analysis, the North Pacific Fishery Management Council (Council) and NMFS determined that a level of activity that is less than 5 halibut charter trips in a year does not indicate historical dependence on halibut charter fishing. Some of these businesses may have been small scale, part time operations. Others may have been full time charter businesses that focused primarily on other species, such as salmon. NMFS cannot assume that these businesses would be forced to close because they did not qualify for initial issuance of a CHP. Further, the program provides that businesses can acquire a permit through transfer. NMFS does not know the extent of the supply and demand for transferable permits.

2. How many banks will be forced to foreclose on business loans to affected lodge and boat owners?

NMFS does not have information on the private financing relationships between banks and lodge/boat owners.

3. How many affected companies' employees will lose their jobs?

The number of jobs that would be lost was not quantified in the analysis. That type of evaluation would have required information on how many employees worked for each operation affected by the CHP requirements. That information was not available to NMFS. NMFS was able to estimate the number of businesses that would not receive a CHP because those businesses did not meet the eligibility requirements (see response to question 1).

4. How many ancillary companies and workers (airlines, flight services, fuel purveyors, grocers, mechanics, etc.) will suffer economic hardship from this new regulation?

The impact of the CHP on specific communities is difficult to quantify. Charter fishery businesses impact economies of communities—and the businesses in those communities—by providing jobs and increasing sales. The Analysis noted that the economic impacts that charter fishery businesses have on communities could not be quantified based on information currently available to NMFS. That type of evaluation would require information on expenditures and products purchased by charter businesses, expenditures by clients as a result of taking the charter

implemented by NOAA Fisheries in 2003. It establishes a guideline harvest within which charter fishery harvest is to be maintained.

Based on a 2008 recommendation by the Council, NMFS is currently developing regulations for a halibut catch sharing plan (CSP) in Southeast Alaska and the Central Gulf of Alaska. If approved, the CSP would change the annual process of allocating halibut between the charter and commercial fisheries, replace the GHM with a charter catch limit, and specify harvest restrictions for charter anglers that are intended to limit harvest to the annual charter fishery catch limit. The CSP also would allow charter operators to lease individual fishing quota from commercial halibut quota holders to offer charter clients an opportunity to harvest additional halibut. If approved, the CSP would be in place for the 2012 fishing year.

9. What is the estimated overall financial impact on the Alaska economy for 2011 and future years?

Charter fisheries impact the economies of communities by providing jobs and increasing sales. The sales generate income for charter operations and secondary businesses and tax revenue for local, State, and Federal governments. The number of jobs and expenditures could not be estimated in the Analysis. However, the communities that have the most active charter industry would be expected to realize the most benefits from charter activity.



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE NATIONAL OMBUDSMAN

March 11, 2011

Mr. Allen Walburn
Owner
Alaska's Kodiak Island Resort
101 1st Street, P.O. Box 36
Larsen Bay, AR 99624

Dear Mr. Walburn:

As indicated in our correspondence of February 3, 2011, regarding your complaint with the National Oceanic and Atmospheric Administration's (NOAA) new regulation creating a limited access system for charter vessels in the guide sport fishery for Pacific halibut in Alaska, was referred to NOAA for a high-level review and response. I have enclosed a copy of the response with this letter.

Ms. Walburn, thank you for bringing your concerns to my attention. If you have any questions or concerns in this matter, please contact José Méndez from my staff by telephone at (202) 205-2417, fax at (202) 481-5719 or e-mail at Ombudsman@sba.gov.

Sincerely yours,

Esther H. Vassar
National Ombudsman and
Assistant Administrator for Regulatory Enforcement Fairness

Enclosure
EHV/jm

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Appendix B

Fisheries conducted a thorough analysis of the impacts of several alternative approaches to manage the charter fishery. The Council's principal concern was that the Pacific halibut resource was fully utilized and harvest by the charter sector was demonstrating steady growth. The Council recommended the limited access system to provide stability for the charter halibut fishery and decrease the need for regulatory adjustments affecting charter vessel anglers while the Council continued to develop a long-term policy of allocation between the commercial and charter vessel sectors. The Council intended the limited access program to stabilize the number of operators in the charter halibut fishery, limit future growth of charter halibut fishing capacity, and maintain access to the charter halibut fishery for rural coastal communities. The Council adopted its limited access policy on March 31, 2007, and submitted it for review to the Secretary pursuant to section 773c(c) of the Halibut Act.

The Council carefully considered the impact of the limited access program on long-term charter and commercial fishery operations that could be adversely affected by unlimited growth of the charter fleet. The limited access program developed by the Council provides permits to charter halibut operators who demonstrated consistent historical and recent active participation in the charter fishery. The Council reviewed many approaches before selecting specific qualifying criteria to initially issue charter halibut permits to the owners of charter halibut businesses. Participants who did not meet the active participation criteria established by the Council do not initially receive a permit, but can receive one by transfer from another permit recipient. Charter halibut operators who did not initially qualify for a charter halibut permit most likely would incur additional costs to continue fishery participation because they would have to obtain a permit by transfer.

NOAA Fisheries published a proposed rule for the charter halibut limited access system on April 21, 2009 (74 FR 18178). The proposed rule solicited public comments on the proposal until June 5, 2009. NOAA Fisheries published a final rule to implement the charter halibut limited access program on January 5, 2010 (75 FR 554). The final rule implementing the limited access program is available on the NOAA Fisheries web site at <http://alaskafisheries.noaa.gov/rules/75fr554.pdf>.

Section 773c(c) of the Halibut Act provides the requirements that must be met by the Council and the Secretary when developing and implementing regulations for halibut. The Secretary found the limited access program final rule to be consistent with the requirements of the Halibut Act, as explained on page 558 of the final rule under the heading "Consistency with Halibut Act."

NOAA Fisheries considered the economic impacts of the limited access program on affected charter participants throughout the rulemaking process. NOAA Fisheries responded to public comments on the proposed rule in the final rule for the limited access program. The responses to comments 37 through 51 of the final rule address the economic impacts of the limited access program.

The Council and NOAA Fisheries also completed an economic analysis as part of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (Analysis) prepared for the final rule implementing the charter halibut limited access program

Issue 1:

2. NOAA did not conduct a small business economic impact study to determine the affects the rule rule will have on small businesses, consequently there is no accurate data detailing impacts this rule will have on the charter operators that do not qualify for permits.

3. The 300 primary operators, that do not qualify for a 2011 permit, pales when compared to the number of businesses that support them. IE: fuel vendors, flight services, utility companies, food purveyors, insurance agents, mechanics, equipment sales, hoteliers, restaurants, individual contract laborers, etc. Lacking an economic impact study NOAA, nor anyone else, has any way of knowing the number or adversely impacted ancillary businesses.

Had NOAA conducted an in depth financial impact study instead of relying on a Regulatory Flexibility Report they would have been aware of the un-intended consequences evolving from their recommendation and would most likely sought other avenues to obtain their objectives. Since there was no economic impact study no government official has been able to estimate the financial ramifications from this flawed policy that is set to become operation on February 1, 2011.

Response:

The charter halibut limited access program was implemented to achieve the approved halibut fishery management goals of the North Pacific Fishery Management Council (Council). The Council and the National Marine Fisheries Service (NOAA Fisheries) articulated a legitimate objective for the limited access program, that is, to be a step toward establishing a comprehensive program of allocating the halibut resource among the various halibut fisheries (guided and unguided recreational, commercial, and subsistence). To accomplish this objective, the Council and NOAA Fisheries found a need to stabilize growth in the charter halibut sector by implementing a limited access program.

The economic activity resulting from charter halibut fishing activities generates revenue and employment for residents of the communities where the expenditures occur. However, employment and revenue information for the charter sector and the secondary industry sectors that are impacted by charter fishing is not available to assess the current economic contribution of the charter halibut fishery or the anticipated effects of the limited access program on expenditures and jobs in coastal communities of the State of Alaska.

Although implementation of the limited access program could affect employment and gross revenues in the charter sector, other factors also would impact the charter sector, including the demand for charter vessel fishing trips and the charter fleet's ability to adjust operations to meet this demand. Therefore, employment and revenue impacts were addressed qualitatively in the Analysis. However, the Analysis does not estimate the number of jobs or amount of gross revenue that would be impacted by implementation of the program because the combined effects of these additional factors on the charter sector are unknown.

The Analysis indicated that the charter halibut industry in Southeast Alaska and the Central Gulf of Alaska would be able to meet recent charter vessel angler demand, and potentially an increase in demand, with the number of permits expected to be issued. Although the overall number of businesses with charter halibut permits operating under the program is limited, their estimated passenger carrying capacity exceeds levels needed to meet the demand for charter vessel fishing

Response:

See Table 7 on page 19 and Table 46 on page 160 of the Analysis.

Issue 4:

This list contains all the names of businesses that are affected by the new charter halibut requirements. Some may have now obtained permits, others have appeals pending but the vast majority are going to be in for a tough summer if they don't obtain help somewhere. As always, thanks for everything you are doing.

Response:

See the response to Comment 3 in the final rule implementing the limited access program.

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

**CHARTER OPERATORS OF ALASKA,
INC., a not-for-profit corporation, et. al.,**

Plaintiffs,

Case No.: _____

v.

**GARY W. LOCKE, Secretary of Commerce,
JANE LUBCHENCO, Administrator of the
National Oceanographic and Atmospheric
Administration, and ERIC C. SCHWAAB,
Administrator of the National Marine
Fisheries Service,**

Defendants.

_____ /

AFFIDAVIT OF NICHOLAS AUSMAN

BEFORE ME, the undersigned authority, appeared the Affiant, Nicholas Ausman, and having taken an oath, Affiant, based on personal knowledge, deposes and says:

1. I am the owner, operator and authorized agent of the Crystal Bay Lodge located in Petersburg, Alaska. Crystal Bay Lodge, LLC, was established to provide guided halibut charters along with comfortable accommodations for anglers traveling to Alaska. Approximately \$ 1,100,000.00 has been invested in the lodge, charter boat and related equipment.

2. Initial efforts, and expenditures, to establish the lodge and charter fishing operation began in 2005. Early efforts, spanning from 2005 to 2007 included traveling to Alaska to search for a suitable site and establishing an overall business plan and development strategy. Expenditures accelerated from 2008 to 2009. A parcel of land was purchased for the construction of the lodge but ultimately an alternative site with a

home was purchased and converted to the lodge. Expenditures in 2008 approached \$237,000.00 for equipment, vehicles and supplies followed by approximately \$950,000.00 in 2009 which included closing on the real estate, equipment, maintenance and miscellaneous expenditures to get the lodge up and running. The lodge provides employment for local residents and income to local vendors; fuel and supplies are purchased locally and benefit the local economy. Visiting anglers spend money on food and supplies in the community as well.

3. The lodge hired a captain to guide clients on chartered halibut fishing trips. The lodge is advertised as an Alaska fishing lodge with halibut featured as the primary sport fish pursued on guided charters. In addition to advertising, the lodge is featured at informational booths at trade shows and similar events with halibut fishing featured as the primary lodge activity.

4. After learning that the final rule had been issued, I applied for a Charter Halibut Permit for Crystal Bay Lodge, LLC. The application was submitted in April of 2010 and denied in July of 2010. I filed an appeal of the permit denial in September of 2010 and was issued a temporary permit on January 31, 2011. A few days later, February 8, 2011, the appeal was denied and temporary permit revoked. A motion for reconsideration was denied on February 18, 2011. Without the requested permit, the lodge cannot provide chartered halibut fishing—the primary reason out-of-state and Alaskan anglers visit Crystal Bay Lodge.

5. The lodge has many pending bookings for the 2011 halibut and no permit. While the lodge provides inshore fishing for salmon from smaller craft, as an oceanfront

lodge, halibut is the featured species and the target species for virtually all bookings; the lodge has no salmon only bookings.

6. The lodge cannot be sustained without halibut fishing and Crystal Bay Lodge, LLC, risks losing all of the funds invested to establish the lodge and charter halibut operation. Monthly expenses are in excess of \$12,000.00 per month at approximately \$150,000.00 per year. Without a halibut charter permit, these expenses cannot be met and the market value and marketability of the lodge, as an Alaskan fishing lodge, is greatly diminished.

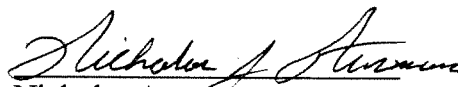
7. Permit brokerage firms have begun a listing service for the sale of Charter halibut permits. Very few permits are available and the prices are prohibitive ranging from \$40,000.00 for a four-angler permit to \$100,000.00 and more depending upon the location and number of anglers authorized under the permit.

8. Without a halibut permit, the Crystal Bay Lodge and its charter fishing operation cannot continue.

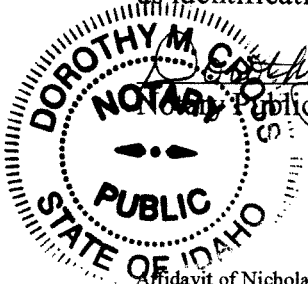
I DECLARE under penalty of perjury under the Laws of the United States and the Laws of the State of Idaho that the foregoing is true and correct.

Dated this 29 day of March, 2011.

AFFIANT:


Nicholas Ausman

Sworn to and subscribed before me this 29 day of March, 2011, by Nicholas Ausman who is personally known to me or who has produced _____ as identification.


Dorothy M. Cross
Notary Public

Dorothy Cross
Printed Name of Notary

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

**CHARTER OPERATORS OF ALASKA,
INC., a not-for-profit corporation, et. al.,**

Plaintiffs,

Case No.: _____

v.

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JANE LUBCHENCO, Administrator of the
National Oceanographic and Atmospheric
Administration, and ERIC C. SCHWAAB,
Administrator of the National Marine
Fisheries Service,**

Defendants.

_____ /

AFFIDAVIT OF ALLEN B. WALBURN

BEFORE ME, the undersigned authority, appeared the Affiant, Allen B. Walburn, and having taken an oath, Affiant, based on personal knowledge, deposes and says:

1. I am an owner and operator of Alaska's Kodiak Island Resort, LLC (KIR) located in Larsen Bay, Alaska. Approximately \$1,500,000.00 dollars was invested to establish the resort and charter fishing operation to provide lodging and chartered halibut fishing opportunities to anglers visiting Alaska.

2. Development of the resort and charter fishing operation began in 2005 and has grown to a thriving business with anglers booking well in advance to secure chartered halibut fishing. Advanced bookings for the 2011 halibut season are in excess of \$400,000.00.

3. Estimated expenses are anticipated to exceed \$240,000.00 with the majority of the money going to the local community. For the 2011 season, KIR anticipates spending: \$95,000.00 for employee salaries; \$36,000.00 to the City of Larsen Bay and other local vendors for boat fuel; \$2,400.00 to the City of Larsen Bay for fuel oil; \$6,500.00 to the City of Larsen Bay for utilities; \$35,000.00 to Kodiak Island Air for round trip transportation of guests from Kodiak to Larsen Bay; \$4,500.00 in property taxes to the Kodiak Island Borough; \$25,000.00 for shipping and transportation costs for provisions, supplies, equipment, hardware and furnishing; \$14,000.00 in contract payments to reserve additional local equipment and services; and approximately \$30,000.00 in miscellaneous costs for advertising, food, insurance, telephone and satellite communications, tackle, taxes and licenses.

4. KIR was very active in the halibut fishery from 2006 to 2010 with gross revenues directly related to chartered halibut fishing and angler lodging of \$732,000.00; revenues for 2011 are anticipated to exceed \$400,000.00 if KIR is able to provide chartered halibut fishing.

5. KIR will fail as a business without a charter halibut permit. KIR will be unable to meet its monthly expenses and ultimately will have to go out of business. Without charter halibut fishing, the ability to sell the resort will be hindered and the value of resort significantly diminished.

6. KIR has been advised by the National Marine Fisheries Service that it does not qualify for a charter halibut permit. However, KIR filed an application for a permit in the event the National Marine Fisheries Service reconsidered its policy or decided to delay implementation of the rule. The permit was denied and KIR has been given a temporary

4-person permit pending an administrative appeal of the permit denial. A hearing has been scheduled for May 18, 2011; the interim permit will be immediately revoked upon denial of the appeal which is imminent.

7. Without a permanent six-person charter halibut permit, KIR is not a viable operation. Transferable permits are prohibitively costly with permit brokers demanding \$70,000.00 to over \$100,000.00 depending on the location and number of anglers authorized under the permit.

8. KIR will be irreparably harmed and all future revenues eliminated without the ability to offer charter halibut fishing. The City of Larsen Bay will lose revenues from KIR lodging and charter fishing operations and money will be lost from the community as anglers find alternative charter halibut fishing outfitters and lodging.


9. If the KIR charter halibut operation is shut down for the 2011 halibut season, and the Court were to declare limited access rule invalid at a later date, it is unlikely that KIR will be able to salvage the 2011 season and rebuild its operations and clientele after such a devastating interruption to the business. Unless the Court forbids implementation of the rule while the suit is pending, and ultimately finds the rule invalid, my business and a substantial portion of my life's savings will be lost forever.

[Remainder of page intentionally left blank]


I DECLARE under penalty of perjury under the Laws of the United States and the Laws of the State of Florida that the foregoing is true and correct.

Dated this ___ day of March, 2011.

AFFIANT:


Allen B. Walburn

Sworn to and subscribed before me this 29th day of March, 2011, by Allen B. Walburn who is personally known to me or who has produced FL DL as identification.



Notary Public

Nichole M Scalise

Printed Name of Notary

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

**CHARTER OPERATORS OF ALASKA,
INC., a not-for-profit corporation, et. al.,**

Plaintiffs,

Case No.: _____

v.

**GARY W. LOCKE, Secretary of Commerce,
JANE LUBCHENCO, Administrator of the
National Oceanographic and Atmospheric
Administration, and ERIC C. SCHWAAB,
Administrator of the National Marine
Fisheries Service,**

Defendants.

_____ /

AFFIDAVIT OF JACK D. ROSKIND

BEFORE ME, the undersigned authority, appeared the Affiant, Jack D. Roskind, and having taken an oath, Affiant, based on personal knowledge, deposes and says:

1. I am the owner, along with my spouse, of Knot Roughin' It Charters, LLC (KRIC), an Alaskan small business, which I operate out of Whittier, Alaska. KRIC is a charter halibut fishing operation. I am also the president of Charter Operators of Alaska, Inc. (COA), a non-profit organization formed to bring together similarly situated halibut charter operators who will suffer severe and irreparable damages as their businesses lose revenues and, ultimately, are shut down. COA has several dozen dues paying sustaining members in addition to over a thousand supporters who have signed a petition to "Save Alaskan Charter Halibut Fishing for Tomorrow."

2. Currently, there are approximately 34 COA members, identified in Exhibit A attached hereto, that participate in the Charter Halibut Fishing Industry.

3. I started KRIC in 2007 and have actively participated in the Alaskan halibut fishery during the 2007, 2008, 2009 and 2010 seasons. I am presently booking clients for the 2011 season. I have invested \$150,000.00 in KRIC and anticipate income to exceed \$80,000.00 in 2011 if I am able fish for halibut as I have for the past four years.

4. Like many other COA members, I was advised by the National Marine Fisheries Service (NMFS) that I do not qualify for a charter halibut permit (CHP). Hoping that NMFS would change its policy or delay implementation of the rule, I applied for a CHP and was denied; I have filed an appeal of the denial which entitles me to a temporary four angler permit while the appeal is pending. The appeal has not been decided and I have not received the four angler temporary permit. If the appeal is decided against me, which NMFS indicates will be the case; my temporary permit will be immediately revoked if it is ever issued at all.

5. To date, I have received over fifty requests for halibut charter trips for the 2011 season and I have no permit or reasonable opportunity to obtain a permit. Even if NMFS were to issue me a temporary four angler permit pending appeal, it is indeed temporary, for a matter of days or weeks until the appeal is decided. KRIC will not be able to operate for the 2011 season or future seasons on a potential temporary (while an appeal is pending) permit. KRIC operates a six angler ("six pack") boat and is profitable only when fully chartered. A potential temporary permit will not mitigate the irreparable damages that KRIC will sustain by no longer being able to accommodate six halibut anglers per trip for the 2011 season and future years.

6. Purchasing a transferable permit is not an economically viable option. Very few such permits are available and, when they are available, range in price from

\$50,000.00 to over \$100,000.00 for a six-pack permit. The cost of a permit would far exceed any net profit I could possibly make during the halibut season. Most COA members face the same situation in that they have been arbitrarily eliminated from the fishery and then priced-out of re-entering the fishery.

7. I have reviewed the affidavit of Plaintiff Nicolas Ausman, owner and operator of Plaintiff Crystal Bay Lodge, LLC. The approximately 34 COA members that participate in the Charter Halibut Fishing Industry are similarly situated charter fishing businesses to Crystal Bay Lodge or Knot Roughin' It Charters. Several of these COA members have shared their situation on the "obituary" page of the COA website.

8. I have direct knowledge of several examples of large investments by COA members that will be substantially if not totally lost because of the operators cannot obtain a halibut permit. Examples include the owners of Poi Boy Fishing and Wilderness Lodge who invested over \$500,000.00 in retirement savings. Without a permit, the half a million dollar investment stands to be wiped out. The owners of Wild Alaska Charters, a COA member, who have operated a halibut charter operation since 2006 and purchased additional boats and a fishing lodge in 2007 which they developed into Wilderness Beach Lodge in Homer, Alaska. Without a halibut permit, Wilderness Beach Lodge's \$2,000,000.00 investment will be lost.


9. I am personally aware of many more examples of life's savings, retirement funds and bank loans having been invested in halibut charter operations only to be advised by the federal government that they are no longer in the halibut fishing business. COA members represent a combined loss of tens of millions of dollars in real estate, boats and equipment in addition to untold dollars lost to small fishing communities as

COA members disappear from the harbors and waterfronts. These losses are irreparable as COA members are forced from the halibut fishing industry with no meaningful ability to obtain permits necessary to protect their investments and businesses.

I DECLARE under penalty of perjury under the Laws of the United States and the Laws of the State of Alaska that the foregoing is true and correct.


Dated this 29 day of March, 2011.

AFFIANT:



Jack D. Roskind

Sworn to and subscribed before me this 29th day of March, 2011, by Jack Roskind who is personally known to me or who has produced ADL 69-19023 as identification.



Notary Public

State of AK
Comm Exp 4-4-14

Gloria D. OLSON
Printed Name of Notary

Charter Operators of Alaska Membership List

Charter Fishing Businesses

Knot Roughin' It Charters
Jack Roskind
6296 Fairweather Dr
Anchorage, AK 99518

Poi Boy Fishing LLC
Kent & Kari Haina
3998 Beluga Circle
Homer, AK 99603

Wilderness Beach Lodge
Debra Kennedy
999 61 St.
Pipestone, MN 56164

Captain Steve's Fishing Lodge
Steve & LeAnne Smith
PO Box 39143
Ninilchik, AK 99639

Cutting Edge Sportfishing
Chris Smith & Sarah Overson
PO Box 39121
Ninilchik, AK 99639

Spinner Dave's Sport Fishing Adventures,
Dave & Sue Kaffke
PO Box 39597
Ninilchik, AK 99639

K-Bay Charters
Steve Anderson & Monika Leiber
PO Box 3223
Homer, AK 99603

Sound Fun Charters
Roger Nettlow
10531 Constitution St.
Anchorage, AK 99515
Alaskan Song Yacht Charters

Richard Friedman
PO Box 2262
Sitka, AK 99835

Jumping Salmon Lodge
John Lunetta
PO Box 8051
Chenega Bay, AK 99574

Alaska Greatwater Adventures
Denny Bowen
16883 East Outer Springer Loop
Palmer, AK 99645

Wild Mare Charters
Bob & Marilyn Wagner
P.O. Box 84
Port Lions, AK 99550

Port Ashton Lodge
Randy & Lia Talvi
PO Box 873168
Wasilla, AK 99687

Seward Fish Company
Randy Wells
1030 Sunset Ave
Medford, OR 97501

Fish Tales Guide Service
Tom Stanton
PO Box 887
Kenai, AK 99611

Best Weigh Guide Service
Ryan McRobert
9300 NW Gales Creek Rd
Gales Creek, OR 97117

Bay Roamers Water Taxi
Carl & Tammy Jones
PO Box 1333
Homer, AK 99603

Alaska Trophy Outfitters
Frank Sanders
PO Box 4135
Soldotna, AK 99669

Skookum Charters
Jim Lavrakas
PO Box 1459
Homer, AK 99603

Arctic Envy Charters
Rick & Jenni Zielinski
860 Goldberry Court
Homer, AK 99603

Here Fishy Fishy Charters
John Kuklis
41272 Kay Ct.
Homer, AK 99603

Tower Rock Lodge
Glenn Gillam
8708 Castle Hill Ave
Las Vegas, NV 89129

Pacific Fishing Inc.
Tat Tatterson
PO Box 2875
Seward, AK 99664

Kingfisher Charters
Dave Gronseth
1563 Homer Spit Rd.
Homer, AK 99603

Brooks Alaskan Adventures
Josh Brooks
PO Box 15394
Fritz Creek, AK 99603

Muttley Crew Fishing Aventures
Dave Longley
332 Klondike Ave
Homer, AK 99603

Wild Alaska Charters
Bert Washburn & Sherrie Dyroy
4141 Pennock St
Homer, AK 99603

Ramrod Charters
Rich Deaver
1018 Blvd.
Sturgis, SD 57785

Ivory Queen Charters
Trevor Arndt
34950 Moonrise Street
Homer, AK 99603

Pelican Charters
Larry Carson
PO Box 98
Pelican, AK 99832

Crystal Bay Lodge, LLC
Nicholas Ausman
1361 Elderberry Circle
Coeur D'Alene, ID 83815

Saltwater Excursions, LLC
Kristen Labrecque
P.O. Box 742
Whittier, AK 99693

Alaska's Kodiak Island Resort
Allen Walburn
P.O. Box 36
Larsen Bay, AK 99624

Discover Alaskan Adventures, LLC
Linda Stumpff
PO Box 39278
Ninilchick, AK 99639

Trophy King Lodge
Bruce Butterwick
5008 Gladiola Way
Golden, CO 80403

Flying Dutchman Adventures
David Venekamp
PO Box 68
Homer, AK 99603

Tacklebuster Charters
Halibut King Adventures
Weldon Chivers
PO Box 2835
Kenai, AK 99611

Northstar Offshore Charters
Dan Hubble
7109 N CR 19
Fort Collins, CO 80524

Rich Adventures
Rich West
6424 E. 14th Ct.
Anchorage, AK 99504

BS Charters
Brad Scott
PO Box 675
Anchor Point, AK 99556

Katmai Wilderness Lodge
Tom Walters
PO Box 2749
Kodiak, AK 99615

Dan Hubble
7109 N CR 19
Fort Collins, CO 80524

Kodiak Lodge of Larsen Bay
Don Maschmedt
941 Powell Ave S.W.
Renton, WA 98507

Bella Misty Fishing Charters
Clayton Moore
PO Box 738
Ward Cove, AK 99928

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Charter Operators of Alaska,
a non-profit corporation, et al.

CIVIL ACTION

Plaintiffs,

CASE NO: _____

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.

_____ /

PROPOSED ORDER

The Court, having considered Plaintiffs' motion for a preliminary injunction, concludes that Plaintiffs have demonstrated a likelihood of success on the merits of their claims that the final rule adopted by the National Marine Fisheries Service is in violation of the Administrative Procedure Act and the Pacific Halibut Act of 1982. The Court also finds that Plaintiffs have demonstrated that the balance of harms tips in favor of a stay

because Plaintiffs would suffer irreparable harm if the rule is implemented and that Plaintiffs meet all factors favoring a preliminary injunction.

Accordingly, Plaintiffs' motion should be and hereby is GRANTED. It is further ORDERED that, pending the resolution of this case on the merits, Defendants, and their officers, agents, employees, and attorneys are hereby ENJOINED and RESTRAINED from giving any effect to or otherwise taking any action to enforce the final rule entitled *Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska* as published in the Federal Register on January 5, 2010 (75 Fed. Reg. 554) and codified as 50 C.F.R. Chapter III, Part 300, Subpart E, §§ 300.61, 300.66 and 300.67.

SO ORDERED

Entered this ____ day of April, 2011.

UNITED STATES DISTRICT JUDGE