UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHARTER OPERATORS OF ALASKA, a non-profit corporation, et al.

Plaintiffs,

vs. Case No. 11-664-EGS

GARY W. LOCKE, in his official capacity as Secretary of the U.S. Department of Commerce, JANE LUBCHENCO, in her official capacity as Administrator of the National Oceanic and Atmospheric Administration, and ERIC C. SCHWAAB, in his official capacity as Administrator of the National Marine Fisheries Service

Defendants
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FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION (DE # 3)

Defendants Gary W. Locke, in his official capacity as Secretary of the U.S. Department of Commerce, Jane Lubchenco, in her official capacity as Administrator of the National Oceanic and Atmospheric Administration, and Eric C. Schwaab, in his official capacity as Administrator of the National Marine Fisheries Service ("NMFS") (collectively referred to as "Federal Defendants"), hereby oppose Plaintiffs' Motion for a Preliminary Injunction. As explained more fully below, Plaintiffs have failed to carry their heavy burden of showing that the extraordinary remedy of preliminary injunctive relief is warranted in this case. Plaintiff's motion therefore should be denied.

INTRODUCTION

Plaintiffs challenge the final rule creating a limited access system for charter vessels in the guided halibut sport fishery in Southeast Alaska and the Central Gulf of Alaska. 75 Fed. Reg. 554 (Jan. 5, 2010). Plaintiffs allege that the rule violates various provisions of the Northern Pacific Halibut Act of 1982 ("Halibut Act"), 16 U.S.C. § 773 et seq., including requirements that allocations be "fair and equitable," and that economic impacts be taken into account, and claim that the rule is arbitrary and capricious or contrary to law because no optimum yield has been set for halibut. Plaintiffs request preliminary injunctive relief from the rule.

As a threshold matter, to obtain injunctive relief the plaintiffs must prove that: (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm before a decision on the merits can be rendered; (3) the balance of the equities favors enjoining the rule; and (4) enjoining the rule is in the public interest. Plaintiffs, in support their motion, fail to prove any of the four requirements.

As to the merits of Plaintiffs' claims, NMFS did not act in an arbitrary and capricious

manner when it implemented the limited access system for charter vessel in the guided halibut sport fishery. In compliance with all applicable requirements of the Halibut Act, and the Administrative Procedure Act ("APA"), NMFS properly acted on a recommendation of the North Pacific Fishery Management Council to limit access to the halibut charter fishery. Plaintiffs are fundamentally incorrect in asserting that the challenged rule serves no conservation purpose in terms of protecting the halibut resource. DE # 3 at 2. The purpose of the challenged rule is to address the uncontrolled growth of the charter vessel sector, which has regularly exceeded its catch allocation in recent years. While other harvesting sectors have specified catch limits that cause fishery closures when reached, the charter sector was not managed that way. See 75 Fed. Reg. at 554. NMFS recently imposed daily limits on the number of fish each vessel could land. However, prior to implementing the challenged rule, there has been no limit on the number of charter vessels that could enter the fishery and continue harvesting the daily bag limits throughout the fishing season. Id.

The number of vessels operating in the charter sector, as well as the volume of their catch, have increased dramatically. See id. Also, the realized harvest rate in recent years has been "substantially above the target harvest rate." Id. Exceeding the target harvest rate in one sector affects future allocations in other sectors. Therefore, one conservation purpose of the challenged rule is to stabilize the charter halibut fishery and decrease the need for regulatory adjustments to keep catch to the target harvest rate. Id. Stability for a fishery sector leads to more consistent management for that sector and promotes conservation for the entire fishery. Id.

Plaintiffs are also incorrect in asserting that the final rule unfairly excludes fishers who recently entered the charter halibut fishery. As detailed below, the challenged limited access

permit system was proposed after years of public debate over the need to limit the size of the halibut charter sector. The final rule at issue here was preceded by an advance notice of public rulemaking, 71 Fed. Reg. 6,442 (Feb. 8, 2006) that established December 9, 2005 as a control date for determining historical or traditional participation in the charter sport fishery for halibut. This "control date notice" clearly stated that "anyone entering the charter sport fishery for Pacific halibut in and off Alaska after December 9, 2005 (control date) will not be assured of future access to that fishery if a management regime that limits the number of participants is developed and implemented under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act)." Id. Individuals who entered the fishery after the applicable control date, including affiants Ausman, Nettlow, Walburn, and Roskind, did so voluntarily and with full notice that their future participation was not guaranteed.[1/] Thus, Plaintiffs are not likely to succeed on the merits.

Plaintiffs have also failed to demonstrate irreparable harm that will result from continued enforcement of the challenged rule. Plaintiffs also fail to demonstrate that the public interest would be served by the requested injunctive relief. To the contrary, the requested injunction would injure the interests of existing permit holders, including permit holders who purchased permits through lawful transactions or who seek to sell their permits, and who have relied on the existence of a limited access permit system to determine a market value for their permits. Plaintiff's request for injunctive relief should be denied.

[1/] Affiant Walburn states that "[development of the resort and charter fishing operation began in 2005." It is unclear from this affidavit whether the Kodiak Island Resort commenced charter operations prior to December 9, 2005; however, in his comment on the proposed rule, Mr. Walburn stated that the fishing lodge itself was built in 2006. AR 001037.

STATUTORY BACKGROUND

The Halibut Act

The Halibut Act was enacted to implement a convention between the United States and Canada, signed in 1953 and amended by protocol in 1979. See 16 U.S.C. § 773(a); see also Convention Between the United States and Canada For the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Ottawa, 1953 ("1953 Convention"), 5 U.S.T. 5, T.I.A.S. 2900; *and* Protocol Amending Convention Between the United States and Canada For the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Washington, 1979 ("1979 Protocol"), 32 U.S.T. 2483, T.I.A.S. 9855; Add. 1. The convention and protocol continued halibut conservation measures agreed to between the two countries in earlier conventions signed in 1923, 1930, and 1937. Ibid. The Halibut Act of 1982 replaced earlier "Halibut Acts" enforcing the earlier conventions. See Pub. L. 97-176, § 14, 96 Stat. 84 (1982) (repealing previous law).

The current halibut convention (as amended) authorizes the International Pacific Halibut Commission ("IPHC") to adopt regulations for conservation of halibut in "convention waters," (*i.e.*, waters off the west coasts of the United States and Canada). *See* 1979 Protocol, 32 U.S.T. 2483, 2487; T.I.A.S. 9855; Add. 1 (amending 1953 Convention, Art. III, ¶ 3); see also 16 U.S.C. § 773(d). Regulations developed by the IPHC become effective upon the approval of the Secretary of State and concurrence by the Secretary of Commerce. See 16 U.S.C.§ 773b. Approved regulations of the IPHC are published annually in the Federal Register. The Halibut Act authorizes the Secretary of Commerce (through NMFS) to adopt rules to carry out the purposes of the convention, including implementation of the IPHC regulations. 16 U.S.C. §

773c(b); 50 C.F.R. §§ 300.60-65.

The Halibut Act grants supplemental regulatory authority over halibut to the regional councils created under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"). 16 U.S.C. § 773c(c).[2/] In particular, the Halibut Act states that the regional fishery management council "having authority for the geographic area concerned" may develop regulations to govern halibut fishing in the U.S. portion of "convention waters," as long as the regulations are "not in conflict with" the IPHC regulations. Id. The Act specifically provides that such regulations may limit access to halibut fisheries, and allocate shares of halibut among individual fishermen, so long as the allocation is "fair and equitable to all such fishermen based upon rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges. " Id.

In addition to the criteria enumerated at 16 U.S.C. § 773c(c), the Act specifies that regulations shall be "*consistent with* the limited entry criteria set forth in section 1853(b)(6) of

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[2/] As is relevant to this case, the North Pacific Fishery Management Council ("North Pacific Council" or "Council") is the regional Council with jurisdiction to regulate fisheries in the Gulf of Alaska. Id. § 1852(a)(1)(G). The North Pacific Council has eleven voting members: six from Alaska, three from Washington, one from Oregon, and a federal representative, the Alaska Regional Director of NMFS. The non-federal voting members represent state fisheries agencies, commercial and recreational fisheries, fishing communities, and the general public. The Council also has four non-voting members representing the U.S. Coast Guard, U.S. Fish and Wildlife Service, the Pacific States Marine Fisheries Commission, and the U.S. Department of State. The Council meets five to six times each year, four times in communities around Alaska, and once in Washington or Oregon. Council business is conducted at public meetings and through written procedures established by each Council, subject to statutory requirements. Id. § 1852(h),(I); see also 50 C.F.R. § 600.135.

this title" (emphasis added). This provision refers to Section 1853(b)(6) of the Magnuson-Stevens Act, which authorizes a council or NMFS to establish a limited access program[3/] after taking into account specified criteria including: present participation in the fishery; historical fishing practices in, and dependence on, the fishery; the economics of the fishery; the capability of fishing vessels used in the fishery to engage in other fisheries; the cultural and social framework relevant to the fishery and any affected fishing communities; the fair and equitable distribution of access privileges in the fishery; and any other relevant considerations. 16 U.S.C. § 1853(b)(6). The Halibut Act does not refer to or otherwise incorporate any other provisions of the Magnuson-Stevens Act.

Thus, the IPHC and the North Pacific Council manage halibut in a different manner than fish managed under the Magnuson-Stevens Act, which sets forth criteria for achieving the "optimum yield" from each fishery regulated under the Magnuson-Stevens Act. See 16 U.S.C. § 1851(a)(1) (requirement that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry"); 16 U.S.C. § 1802(33) (definition of "optimum" with respect to the yield from a fishery). The Halibut Act does *not* include any requirements with respect to optimum yield; therefore optimum yield has not been determined with respect to halibut. "Nevertheless, the IPHC takes a conservative approach in setting the commercial fishery catch limits for the areas in and off Alaska while leaving economic and social balance questions to the Council." 75 Fed. Reg. at 559 (Final Rule).

[3/] A "limited access system" is defined as "a system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation." See 16 U.S.C. § 1802(27).

MANAGEMENT OF THE HALIBUT FISHERIES

I. Constant Exploitation Yield

The harvest of halibut occurs in three fisheries: the commercial[4], sport, and subsistence fisheries. 74 Fed. Reg. 18,178, 18,179 (Apr. 21, 2009). Additional fishing mortality occurs as bycatch or incidental catch while targeting other species and wastage of halibut that are caught but cannot be used for human food. Id. The IPHC annually determines the amount of halibut that may be removed from the resource without causing biological conservation problems on an area-by-area basis in all areas of Convention waters. Id. It imposes catch limits, however, on only the commercial sector in areas in and off of Alaska. Id.

The IPHC estimates the exploitable biomass of halibut using a combination of harvest data from the commercial, sport, and subsistence fisheries, and information collected during scientific surveys and sampling of bycatch in other fisheries. Id. The target amount of allowable harvest for a given area is calculated by multiplying a fixed harvest rate by the estimate of exploitable biomass. Id. This target level is called the total constant exploitation yield ("CEY"), as it represents the target level for total removals (in net pounds) for that area in the coming year. Id. As noted above, the IPHC and the North Pacific Council do not manage halibut under the provisions of the Magnuson-Stevens Act, so the determination of CEY is not based on "optimum yield" of the fishery.

To determine the maximum catch or "fishery CEY" for a management area's directed commercial fixed gear fishery, the IPHC subtracts estimates of all non-commercial removals

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[4] A limited access "individual fishing quota" program for the commercial halibut fishery was reviewed and upheld in Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996).

(sport, subsistence, bycatch, and wastage) from the total CEY. Id. Thus, as other non-commercial uses increase their proportion of the total CEY, the commercial fishery's use of the resource decreases. Id. This method for determining the limit for the commercial use of halibut has worked well for many years to conserve the halibut resource, provided that the other non-commercial uses of the resource have remained relatively stable and small. Id. Although most of the non-commercial uses of halibut have been relatively stable, growth in the guided sport charter vessel fishery in recent years, particularly in Area 2C, has resulted in the guided sport charter vessel fishery harvesting ever-larger amounts of halibut, thereby reducing the amount available to the commercial fishery. Id.

II. Guideline Harvest Levels

Guideline harvest levels ("GHLs") are determined annually by the North Pacific Council to represent a pre-season specification of acceptable halibut harvests in the charter vessel fisheries in IPHC Regulatory Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). Id. The GHLs serve as benchmarks for monitoring the charter vessel fishery relative to the commercial fishery and other sources of fishing mortality. Id. It is the North Pacific Council's policy that the charter vessel fisheries should not exceed the GHLs; however, until recently no constraints were imposed on the charter vessel fisheries to avoid exceeding the GHL.

Meanwhile, there has been uncontrolled growth in the levels of participation and harvest in the charter sector. See Exhibit 1. In Area 2C, the number and pounds of charter halibut caught more than doubled from 1995-2005. See Final EA/RIR (Pl. Complaint Exhibit 7) at 18. The number of active vessels in the charter sector in Area 2C during that period increased by 15 percent and halibut charter anglers increased by 21 percent. Id. In Area 3A, the number and

pounds of charter halibut increased by 50 and 29 percent, respectively. Id. The number of active vessels in Area 3A during that period increased by 13 percent and halibut charter anglers increased by 23 percent. Id.; see also 75 Fed. Reg. at 588. These increases in both participation and harvests within the charter sector meant that the charter sector exceeded the GHL each year during the period of 2004-2007.[5/] See Van Valin v. Locke, 628 F. Supp. 2d 67, 71 (D.D.C. 2009); Van Valin v. Locke, 671 F. Supp. 2d 1, 5 (D.D.C. 2009). See also Exhibit 2 (graph depicting exceedence of GHL in Area 2C.

III. Prior Regulatory Action

The Council considered the possibility of implementing a limited access system to address the problem of open access in the charter vessel fleet several years prior to promulgating the challenged rule. In April 1997, the Council announced a potential "control date" of April 15, 1997 after which new entrants in to the charter vessel fishery would not be assured of qualifying for participation under a moratorium on new entry or other limited access program. See 74 Fed. Reg. at 18,181. The Council did not promulgate a limited access program at that time, although the Council considered a series of such proposals over the next nine years. See id. In December 2005, the Council decided to create a charter halibut stakeholder committee to examine a suite of management options proposed by the State of Alaska representative on the Council. Id. at 18,182. The committee had representation from the sport guided, unguided, and commercial sectors. 75 Fed. Reg. at 565. The Charter Halibut Stakeholder Committee and the Charter Halibut Guideline Harvest Level Committee recommended a limited entry program as "one

[5/] The GHL remained steady until 2008, because it was tied to the CEY and not fishing effort. See generally, 74 Fed. Reg. at 18,179-18,181. However, in recent years, with the decrease in the CEY, the GHL has been reduced based on the regulatory formula. See id.

initial step to controlling charter harvest." See Final EA/RIR at 2 (Pl. Complaint Exhibit 7).

On February 8, 2006, NMFS published an announcement that the Council had established a control date of December 9, 2005, providing notice to the industry that anyone entering the fishery after that date would not be assured of future access should a moratorium or other limited access system be developed. See 71 Fed. Reg. 6,442 (Feb. 8, 2006). By establishing this control date, the Council and NMFS sought to discourage speculative entry into the charter sport fishery as potential entry or access control management measures were being developed by the Council. Id. at 6,443. On March 31, 2007, the Council passed a motion recommending a moratorium and limited entry program for Areas 2C and 3A. See Council Motion on Charter Halibut Moratorium in Areas 2c and 3A, March 31, 2007 (Administrative Record ("AR") 00619); see also 74 Fed. Reg. at 18,182.

Meanwhile, as the Council was considering whether to implement a limited access system, it began imposing measures to constrain fishing effort within the charter sector, in response to the GHL overages that had been observed in that sector. In June 2007, the Council recommended a suite of charter vessel fishery restrictions to achieve the GHL, which would be determined based on a reduced CEY to be issued in January 2008. Id. On May 28, 2008, NMFS published a final rule implementing three restrictions to reduce the harvest of halibut by the charter sector: a one-fish daily bag limit, a prohibition on harvest by the charter vessel guide and crew, and a line limit equal to the number of charter vessel anglers onboard, not to exceed six lines. 73 Fed. Reg. 30,504 (May 28, 2008). NMFS was preliminarily enjoined from enforcing the rule in an order dated June 20, 2008. Van Valin v. Gutierrez, Civ. No. 08-941 (RMC), 2008 WL 7759964 (D.D.C. Jun. 20, 2008). NMFS subsequently rescinded the final rule. See Van

Valin v. Locke, 587 F. Supp. 2d. 118 (D.D.C. 2008).

NMFS promulgated a new proposed rule to limit charter fishermen to a one-fish daily bag limit in Area 2C. See 73 Fed. Reg. 78,276 (Dec. 22, 2008). NMFS issued a final rule on May 6, 2009. 74 Fed. Reg. 21,194. That rule was reviewed and upheld by this Court. Van Valin v. Locke, 628 F. Supp. 2d 67 (D.D.C. 2009) (order denying motion for preliminary injunction); Van Valin v. Locke, 671 F. Supp. 2d 1 (D.D.C. 2009) (order granting summary judgment in favor of Federal Defendants.

NMFS issued a proposed rule to implement a limited access system for charter vessels in the guided sport fishery for Pacific halibut on April 21, 2009. 74 Fed. Reg. 18,178. The proposed rule recognized that a limitation on the number of charter vessels that can enter the fishery was needed to promote long-term stability in the charter sector and avoid the need for further restrictions on harvest to attain the GHL. Id. at 18,192. Consistent with the control date notice, the proposed rule included a qualifying period corresponding with the sport fishing season established by the IPHC in 2004 and 2005 (i.e., February 1 - December 31 both years). Id. at 18,182. The proposed rule also established a recent participation period corresponding with the year prior to the eventual implementation of the proposed rule. Id. Under the proposed rule an applicant would not qualify for a permit unless an applicant met both criteria by demonstrating participation in the fishery during both the qualifying period and the recent participation period. Id. This provision is consistent with the requirements of the Halibut Act, 16 U.S.C. § 733c(c), that limited access programs be consistent with the Magnuson-Stevens Act's enumerated criteria, which provide for NMFS to consider present participation and historical fishing practices and dependence on the fishery. 16 U.S.C. § 1853(a)(6)(A),(B).

The Council's policy recommendation to grant charter halibut permits based in part on participation in at least two years—one of the qualifying years, 2004 or 2005, and the recent participation year, 2008—served several purposes. One was to comply with the Magnuson-Stevens Act Section 303(b)(6) criteria of taking into account present and historical participation. 75 Fed. Reg. at 560. Another purpose was "to establish an objective and measurable indicator of dependence on the fishery. The Council reasoned . . . Fishermen with a relatively greater participation in a fishery likely have a relatively greater dependence on the fishery for their livelihood than do other fishermen with relatively less participation." Id. The rule further refines this approach by combining both historic and recent participation, which "demonstrates dependence on the fishery to a greater extent than using only one year of participation as a qualifying criterion." Id. Furthermore, the use of a recent participation year was also needed in recognition that developing the rule could take time, and "[s]pecifying minimum participation criteria in a recent participation year in addition to a qualifying year served the purpose of discouraging new entry into the affected charter halibut fisheries during the intervening years" that the rule was being developed. Id. Thus, the Final Rule met the Council's and NMFS' purpose to issue permits to long-term and consistent participants in the charter halibut fishery. See 74 Fed. Reg. at 18,192; 75 Fed. Reg. at 564.

Several of the Plaintiffs in this action commented on the proposed rule. For example, Plaintiff Alan Walburn of Alaska Kodiak Island Resort commented on April 29, 2009, that the rule would force his lodge out of business and requested that the control date be changed from 2005 to 2008 or later. Crystal Bay Lodge commented on February 25, 2009, May 11, 2009, and May 28 2009 to argue that the rule was not fair and equitable and to allege a variety of legal,

factual, and analytical insufficiencies in the rule and the rule-adoption process. Crystal Bay's February 25, 2009 comment also argued that the control date of 2004-2005 was unfair. COA member Roger Nettlow submitted comments on May 7, 2009, and April 27, 2009 that also argued against the adopted control dates and claimed that these were unjust and illegal. COA members Jenni and Rick Zielinski submitted comments on June 3, 2009 that their lodge and charter operation would be forced out of business by the rule, called attention to alleged economic impacts of the rule, and argued, among other things, that it was based on outdated data. NMFS carefully considered and responded to the comments submitted. See 75 Fed. Reg. at 563-595.

IV. The Final Rule

NMFS published the final rule on January 5, 2010. 75 Fed. Reg. 554. The Final Rule creates a limited access system for charter vessels in the guided sport fishery for Pacific halibut in waters of International Pacific Halibut Commission Regulatory Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). This limited access system limits the number of charter vessels that may participate in the guided sport fishery for halibut in these areas, based on past participation in the charter halibut fishery.

To receive an initial allocation of a charter halibut permit, an applicant must demonstrate participation in the charter halibut fishery during an historic qualifying period and during a recent participation period. The historic qualifying period is the sport fishing season established by the IPHC in 2004 and 2005. The sport fishing season in both of those years was February 1 through December 31. Minimum participation criteria need be met in only one of these years--2004 or 2005. The recent participation period is the sport fishing season established by the

IPHC in 2008. This year was selected as the recent participation period, because it is the most recent year for which NMFS has a complete record of saltwater charter vessel logbook data from the State of Alaska Department of Fish and Game (ADF&G).

The minimum participation qualifications include documentation of at least five logbook fishing trips during one of the qualifying years-2004 or 2005-and at least five logbook fishing trips during 2008. Meeting these minimum participation qualifications could qualify an applicant for a nontransferable charter halibut permit. The minimum participation qualifications for a transferable charter halibut permit include at least 15 logbook fishing trips during one of the qualifying years-2004 or 2005-and at least 15 logbook fishing trips during 2008. 75 Fed. Reg. at 555. The Final Rule became effective on February 1, 2011. See id.

STANDARD OF REVIEW

I. Grant of a Temporary Restraining Order/Preliminary Injunction

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). Plaintiffs have the burden of proving the need for injunctive relief; Defendants bear no burden to defeat the motion. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 442-43 (1974). Moreover, because preliminary injunctive relief is an extraordinary remedy, the power to issue such an injunction "should be 'sparingly exercised.'" Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (quotation omitted).

To prevail on a motion for temporary restraining order or preliminary injunction, plaintiffs must satisfy a four-part test: (1) there must be a substantial likelihood of success on the merits; (2) there must be a showing of irreparable injury if an injunction is not granted; (3) an

injunction must not substantially injure other parties; and (4) the public interest must be furthered by the proposed injunction. See e.g., Cityfed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). The four factors have typically been evaluated on a "sliding scale," whereby if the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor. Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) (citing Davenport v. Int'l Bhd. of Teamsters, 166 F.3d 356, 361 (D.C. Cir. 1999)). It is unclear whether the "sliding scale" survives in light of the Supreme Court's decision in Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 365 (2008).[6] See Sanofi-Aventis U.S. LLC v. Food & Drug Admin., 733 F. Supp. 2d 162, 167 (D.D.C. 2010). However, the Court need not decide this issue, because Plaintiffs' request for a preliminary injunction here fails even under the less stringent "sliding scale" analysis of Davenport, as none of the four injunctive relief factors weighs in Plaintiffs' favor. Davis, 571 F.3d at 1292 (declining, given the facts of the case, to decide if Winter created a "stricter standard" to obtain interim injunctive relief); Northern Air Cargo v. U.S. Postal Serv., No. 10-2076(EGS) 2010 WL 5209340, at *3 (D.D.C. Dec. 23, 2010) (same). Specifically, Plaintiffs cannot show a substantial likelihood of success on the merits; they cannot demonstrate

[6] In Winter, the Supreme Court struck down the standard applied by the Ninth Circuit that a preliminary injunction may be entered where there is only a "possibility" of irreparable harm if plaintiff has demonstrated a "strong likelihood" of prevailing on the merits. 555 U.S. at 375. ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). While Winter did not explicitly address other variations on the "sliding scale" approach, it described the four-part test for the granting of a preliminary injunction as follows: "A plaintiff seeking a preliminary injunction must establish that he is *likely to succeed on the merits*, that he is *likely to suffer irreparable harm* in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Id. at 374. (emphasis added).

a likelihood of irreparable injury; other parties will be injured if injunctive relief is granted; and an injunction is not in the public interest.

II. Standard of Review

In assessing Plaintiffs' likelihood of success on the merits, the Court must apply the standard of the APA, 5 U.S.C. § 706, which generally permits a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." Environmental Def. Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citing, inter alia, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971)). There is a particularly strong presumption in favor of upholding agency action in cases such as this where it is acting within the scope of its expertise in technically complex areas. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 375, 378 (1989); Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983); Ethyl Corp. v EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc) (the court "must look at the [] decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality"). As one court in this District noted in the analogous context of the Magnuson Stevens Act, as to fishery management decisions, it is:

> [E]specially appropriate for the Court to defer to the expertise and experience of those individuals and entities - the Secretary, the Councils, and their advisors - whom the Act charges with making difficult policy judgments and choosing appropriate conservation and management measures based on their evaluations of the relevant quantitative and qualitative factors.

National Fisheries Inst. v. Mosbacher, 732 F. Supp. 210, 223 (D.D.C. 1990).

The Court's essential function in an APA review case is to determine whether the Secretary has "'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Carlton v. Babbitt, 26 F. Supp. 2d 102, 106 (D.D.C. 1998) (citations omitted). If so, the agency action must be upheld. Id. at 106. The APA standard "mandates judicial affirmance if a rational basis for the agency's decision is presented . . . even though [a court] might otherwise disagree." Costle, 657 F.2d at 283 (citations omitted). A reviewing court "is not empowered to substitute its judgment for that of the agency." Overton Park, 401 U.S. at 416; accord National Wildlife Fed. v. Burford, 871 F.2d 849, 855 (9th Cir. 1989) (an agency's action "need be only a reasonable, not the best or most reasonable, decision"). The court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." National Ass'n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518, 2530 (2007) (citations omitted). A reviewing court should determine agency compliance with the law solely on the administrative record on which the decision was made. Overton Park, 401 U.S. 402; Camp v. Pitts, 411 U.S. 138, 142 (1973).

ARGUMENT

I. Plaintiffs Are Unlikely To Succeed on the Merits.

The final rule complies with all requirements of the Halibut Act, 16 U.S.C. § 773c(c) and is fully consistent with the limited access criteria set forth in the Magnuson-Stevens Act, 16 U.S.C. § 1853(b)(6).

A. The Final Rule is Reasonably Calculated to Promote Conservation.

A significant portion of Plaintiffs' argument is that the Final Rule is invalid because it

lacks a conservation purpose. Plaintiffs selectively quote from the Final Rule and incorrectly assert that the Final Rule has no conservation purpose. DE # 3 at 5. These arguments are simply wrong and, accordingly, the foundation for most of Plaintiffs' legal arguments falls away.

Defendants acknowledge that 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 vessels, which was reviewed and upheld in Van Valin v. Locke, 671 F. Supp. 2d 1 (D.D.C. 2009). See 75 Fed. Reg. at 566 (Response to Comment 14). Nevertheless, the challenged rule will promote conservation over the long term by stabilizing the growth of the charter sector and fostering a more easily-managed charter halibut fishery. Id. at 562. NMFS determined that limited entry could serve to better stabilize fishing effort than the status quo, because only permitted vessels would be capable of increased effort. Id. at 567. The final rule will "make existing and future harvest restrictions more effective because conservation gains from individual harvest restrictions will not be eroded by unlimited growth in the fleet of charter vessels fishing for halibut. In this manner, this rule will contribute to the achievement of the overall target harvest rate of halibut established by the IPHC." Id. at 563. Thus, the rule is needed to meet the conservation goals that motivated adoption of GHLs.

Moreover, the challenged rule is "a first step in developing a long-term solution to ongoing conservation concerns," one that will "stabilize the fishery and provide a foundation for additional market-based management programs such as individual quotas." Id. at 594. See also Final EA/RIR at 35 (Pl. Complaint Exhibit 7) (AR[7] 001517) (the rule may "serve to define the members of the charter sector that would be eligible for future charter rationalization programs,"

[7] Citations to the Administrative Record in this case will be noted as "AR [Bates Number]."

and "provide a foundation on which other management measures can be built."). Meanwhile, as these other management measures are implemented, the challenged rule is also "expected to minimize the potential for speculative investment and participation in the charter fishery" as other management measures are implemented. Id. at 101. These are legitimate conservation purposes and are consistent with the regulatory approach adopted by NMFS in regulating the commercial sector of the halibut and sablefish fishery.[8/]

Limiting access to a fishery is a well-recognized management tool for promoting conservation of the resource. As noted above, a limited access "individual fishing quota" system was reviewed and upheld by the U.S. Court of Appeals for the Ninth Circuit in Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996). As noted by that Court, "[u]nlimited access tends to cause declining fisheries. The reason is that to get title to a fish, a fisherman has to catch it before someone else does." Id. (citing Pierson v. Post, 3 Caines 175, 2 Am. Dec. 264 (N.Y.1805)). "This gives each fishermen an incentive to invest in a fast, large boat and to fish as fast as possible. As boats and crews get more efficient, fewer fish escape the fishermen and live to reproduce." Id. The Ninth Circuit upheld the limited access regulations for the commercial halibut and sablefish fishery in deference to the agency's "judgment about conservation of fish and efficiency of the industry." Id. at 350. The Court should similarly defer to the Defendant's conclusions about the conservation purposes of the final rule at issue here. Van Valin v. Locke,

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[8/] The individual fishing quota ("IFQ") system at issue in Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996), differed from the final rule at issue here, among other respects, in that the IFQ system pertained to both halibut and sablefish. Because sablefish are regulated under the Magnuson-Stevens Act, the IFQ system in that case had to conform with various provisions of the Magnuson-Stevens Act, including the requirement to achieve optimum yield within the fishery. Because the final rule at issue here pertains solely to halibut, the Magnuson-Stevens Act's requirements concerning optimum yield, for example, are not applicable here.

671 F. Supp. 2d 1, 7 (D.D.C. 2009) ("Regarding fishery management decisions like the one at issue here, it is especially appropriate for a court to defer to the agency's choice of 'appropriate conservation and management measures based on [its] evaluations of the relevant quantitative and qualitative factors.'") (quoting National Fisheries Inst. v. Mosbacher, 732 F. Supp. at 223). Plaintiffs are not likely to succeed on the merits of their claim that the final rule is not "reasonably calculated to promote conservation."

B. The Final Rule Is Consistent With Applicable Limited Access Provisions of the Magnuson-Stevens Act.

The Halibut Act provides that regulations shall be "*consistent with* the limited entry criteria set forth in section 1853(b)(6) of this title." 16 U.S.C. § 773c(c) (emphasis added). Plaintiffs claim that this provision of the Halibut Act required the preparation of an FMP and designation of optimum yield for the halibut fishery before any limited access program could be implemented. However, Plaintiffs are incorrect in suggesting that other, non-enumerated provisions of the Magnuson-Stevens Act are incorporated into the Halibut Act under this provision. Indeed, Plaintiffs cite to no statutory language, legislative history, or authority in support of their assertion that this provision requires that a fishery management plan be prepared prior to the establishment of any limited access system for halibut. See DE # 3 at 7.

The Magnuson-Stevens Act includes detailed procedures and criteria for the regional fishery management councils to prepare and submit "fishery management plans" for fish and fishery resources within their regions, 16 U.S.C. § 1852(h), in accordance with requirements set out in the Act. Id. § 1853. As explained in the Final Rule:

> The U.S. halibut fisheries are not managed under an FMP because the halibut fisheries are governed under the authority of the Halibut Act, not the Magnuson-Stevens Act. The Halibut Act does not require the U.S. halibut

fisheries to be managed under an FMP.

75 Fed. Reg. at 559. The Halibut Act simply does not impose any requirement for Defendants to prepare an FMP as a condition precedent to promulgating limited access regulations.

It follows that the Halibut Act does not require Defendants to specify "optimum yield" for halibut for purposes of the rule at issue here. Optimum yield is specified in an FMP under the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(1). As with the preparation of an FMP under the Magnuson-Stevens Act, there is no corresponding requirement to specify optimum yield under the Halibut Act. 75 Fed. Reg. at 559.

Nevertheless, Plaintiffs suggest that a requirement to specify optimum yield should be inferred in conjunction with the Magnuson-Stevens Act's criteria for establishing a limited access system. DE # 3 at 7. The Halibut Act expressly provides that limited access rules "shall be consistent with the limited entry criteria set forth in section 1853(b)(6)," 16 U.S.C. § 773c(c). In their memorandum, Plaintiffs quote from the authorizing language that *precedes* the limited entry criteria:

> (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;"

The quoted language preceding the seven enumerated criteria (A-G) represents Congress' authorization to implement a limited access system within the context of a fishery management plan promulgated under the Magnuson-Stevens Act. Just as this language cannot reasonably be read to impose a requirement for Defendants to develop an FMP for halibut, it is apparent from the plain language of the statute that the references to a "fishery management plan" and "optimum yield" both *precede* the enumerated statutory criteria referenced in the Halibut Act. The "criteria" are the factors following the phrase "take into account." See Webster's New College Dictionary (2006) (defining "criterion" as "[a] standard on which judgment is based."). As noted in the responses to comments in the Final Rule, "an FMP is not required to make these criteria effective in the regulatory process." 75 Fed. Reg. at 565.

If Congress wanted to require Defendants to develop a fishery management plan or specify optimum yield for halibut, it could have said so. Instead, Congress referenced only the *limited entry criteria* and not the preceding authorizing language. In accordance with the canon of "*expressio unius est exclusio alterius*" (which means, when Congress leaves out a term of a statute, it is presumed that the term was considered and excluded), the Court should not impose additional conditions for development of a limited access rule beyond those specified in the Halibut Act, which requires consistency only with the seven enumerated limited access criteria and not any other provisions of the Magnuson-Stevens Act.

1. Defendants properly assessed the economic impact of the final rule.

Plaintiffs allege that NMFS "did not analyze the economics of the halibut industry and specifically did not analyze the impact on the small charter businesses" and that NMFS'

economic analysis was "deficient." DE #3 at 8. These assertions are plainly without merit. NMFS satisfied the requirements of the Halibut Act to consider the economics of the fishery. Plaintiffs cannot point to any legal deficiency. Rather, their complaints about the economic analysis are simply a pretext to restate their general dissatisfaction with a rule that imposes additional regulatory costs on their own businesses.

The Halibut Act requires that NMFS make allocations "consistent with the limited entry criteria set forth in section 1853(b)(6) of this title." This provision refers to Section 1853(b)(6) of the Magnuson-Stevens Act, which authorizes a council or NMFS to establish limited access rules that "take into account" seven factors, one of which is "the economics of the fishery." 16 U.S.C. § 1853(b)(6)(C). Therefore, with respect to this rule, NMFS was required to adopt a rule "consistent with" the need to "take into account" the "economics of the fishery." See 16 U.S.C. §§ 773c(C), 1853(b)(6), and 1853(b)(6)(C).

NMFS fully complied with these criteria. As the Final Rule explained, the rule took into account the economic analyses in the Regulatory Impact Review ("RIR") and Final Regulatory Flexibility Analysis ("FRFA"), and furthermore supplemented these analyses in response to numerous public comments addressing economic concerns. See 74 Fed. Reg. at 561. The RIR provided 58 pages of analysis and data on "the economic and socioeconomic impacts of the proposed alternatives including identification of the individuals or groups that may be affected by the action, the nature of these impacts, quantification of the economic impacts if possible, and discussion of the tradeoffs between qualitative and quantitative benefits and costs." NMFS, 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, November 6, 2009, at 134-192. The RIR also discussed the economic impacts of a status quo alternative considered by the agency, and explained why the preferred alternative was chosen. Id. at 35-109. The FRFA provides an additional seventeen pages of analysis and data on "the impact of the action on directly regulated small entities such as small businesses, non-profits and governments," and discusses ways in which the agency attempted to minimize such impacts. Id. at 193-210.

The consideration of economic factors and analysis is discussed extensively within the proposed and final rules. For example, the agency described in detail the history of unregulated expansion in the halibut charter sector and its impacts on harvest levels, see 74 Fed. Reg. at 18,180, and the resulting need to "stabilize growth in the charter halibut fisheries." 75 Fed. Reg. at 560. This problem had been under discussion in the Council since 1995, see id. at 566, and the rule was a response to the Council's concerns about "the stability, economic viability, and diversity of the halibut industry, the quality of the recreational experience, the access of subsistence users, and the socioeconomic well-being of the coastal communities dependent on the halibut resource." Id. at 562.

In formulating the rule, NMFS sought in various ways to balance the objective of reducing fishing capacity against the objective of minimizing disruption in the charter fishing industry. Noting regional fluctuations in demand for charter halibut fishing, NMFS used transferable permits as its regulatory tool in order to allow "market-based responses to changing fishing conditions," since permit holders could move operations to areas of higher demand or transfer their permits to others. Id. at 571. The allocation methodology struck a balance between the need to constrain future growth while ensuring a sufficient supply of charter fishing

opportunities and price stability. Because a large amount of the sector's fishing was currently conducted by numerous small, part-time operators, excluding them altogether "could have constrained charter vessel angler opportunities," while providing them with transferable permits would have "created a large latent capacity to expand charter vessel angler opportunities." Id. at 562. NMFS' solution was to provide an initial allocation of non-transferable permits to persons with a low level of participation, to allow them to continue fishing without fueling undue future expansion of the charter sector through permit transfers. Id.

NMFS also analyzed the overall number of permits and fishing capacity that would be allowed, and determined that sufficient permits would be issued to meet current angler demand without price increases and even accommodate some demand growth. Id. at 568, 572. Another concern was to craft a rule that avoided excessive industry consolidation. Thus, the rule imposed limits on the number of individual permits a single entity could be granted or acquire by allocation based on fishing share or by purchase on the open market. Id. at 557, 563. Thus, enough separate entities would hold permits that "none is likely to be able to control the market for these services or manipulate prices." Id. at 572.

The chosen permit allocation method considered the economic impact on individuals, basing allocations on a combination of a participant's fishing levels in both a "present" year (2008) and historical participation years (2004, 2005) in order to provide an "objective and measurable indicator of dependence on the fishery" and to help ensure that permits went to fishermen "likely to have a relatively greater dependence on the fishery for their livelihood." Id. at 560, 563. NMFS analyzed historical fishing practices and the economics of the industry and concluded that at least five logbook trips during one of the qualifying years was necessary to

qualify for a permit because a business with less activity "is not likely in most instances to generate a significant annual income." Id. at 573.

The economic analysis also considered the geographic distribution of the industry and the goal of promoting development of the charter industry in under-developed rural communities. NMFS found that there were "numerous communities with little charter vessel activity while a few communities have a well-established charter vessel industry." Id. at 561. Accordingly, the rule allocated permits to community quota entities ("CQE") in order to help rural communities become more involved in this fishery. Id. at 558, 561. Finally, Final Rule's "Comments and Responses" section devotes 16 pages of the Federal Register to discussing comments received from the public regarding the economic impacts of the rule. See 75 Fed. Reg. at 571-587.

NMFS clearly satisfied the requirement of the Halibut Act to adopt a rule "consistent with" the need to "take into account" the "economics of the fishery." See 16 U.S.C. § 773c(C), 1853(b)(6), and 1853(b)(6)(C). Plaintiffs have little if any likelihood of success challenging the rule on this basis. Judicial review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid," Costle, 657 F.2d at 283, particularly where, as here, the agency is acting within the scope of its expertise in technically complex areas. Marsh, 490 U.S. at 378. The role of the reviewing Court is to determine whether the agency "'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Carlton, 26 F. Supp. 2d at 106. The agency's extensive economic analysis clearly satisfies this standard.

Plaintiffs argue the economic analysis is "deficient" because some of it is qualitative rather than quantitative, and the agency did not have data quantifying certain impacts such as the

numbers of jobs or the amount of gross revenues that would be impacted by the program. See DE #3 at 9-10. However, the Halibut Act imposes no requirements as to the extent that NMFS must rely on quantitative rather than qualitative economic information. The only substantive requirement is that the rule be "consistent" with the MSA's criterion: the rule should "take into account" the "economics of the fishery." 16 U.S.C. §§ 773c(C), 1853 (b)(6), and 1853 (b)(6)(C).

While the Halibut Act itself does not explicitly state any standard for the kind of data that must be considered, the requirement to consider the economics of the fishery is imported from the MSA, and the MSA, 16 U.S.C. § 1851(a)(2), generally requires that the agency utilize the "best available" information. As this Court has previously noted, "[t]he Halibut Act does not indicate what type of scientific evidence the Secretary should use in making allocation decisions. However, National Standard Two of the Magnuson Act indicates that NMFS should use the 'best scientific information available.'" Van Valin v. Locke, 628 F. Supp. 2d 67, 75 (D.D.C. 2009) (citing 16 U.S.C. § 1851(a)(2).). "Far from being rigid," the Van Valin Court explained, "the standard is a practical one requiring only that fishery regulations be diligently researched and based on sound science, such that NMFS is not obliged to rely upon perfect or entirely consistent data." Id. (citing North Carolina Fisheries Ass'n v. Gutierrez, 518 F. Supp. 2d 62, 85 (D.D.C. 2007); The Ocean Conservancy v. Gutierrez, 394 F. Supp. 2d 147, 157 (D.D.C. 2005)). Thus, "Courts have upheld decisions made on the best available evidence, recognizing that some degree of speculation and uncertainty is inherent in the decision-making process." Id. This Court has also noted that under this standard, "An agency must base its determinations on information available" and the reviewing court "cannot demand more." Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150, 166 (D.D.C. 2000). The agency conducted an extensive

economic analysis based on the best data available at the time, and properly took that information into consideration in formulating the rule. Although Plaintiffs are understandably concerned by the economic impacts of the rule, they offer no reason to find the agency's economic analysis legally deficient.

Plaintiffs also have no chance of success on the merits with their claims that the economic analysis violated the MSA's National Standard 5, which requires that no management measure "shall have economic allocation as its sole purpose." DE #3 at 11. Again, the challenged rule was issued under the authority of the Halibut Act, not the MSA, so National Standard 5 does not apply. See pages 4-6 & 20-22 *supra*. Even if Standard 5 applied, however, the rule does not have economic allocation as its sole purpose. The claim that the rule serves no conservation goals is plainly false. See pages17-20, *supra*. Similarly without merit is Plaintiffs' argument that the economic analysis is deficient because the rule is not tied to achievement of an optimum yield for the halibut fishery, since there is no legal requirement that an optimum yield be set for this fishery. See pages 20-22, *supra*.

2. The final rule allocates fishing rights in a fair and equitable manner.

Plaintiffs suggest that the challenged rule does not allocate fishing rights in a fair and equitable manner because it allegedly takes away charter fishing trips from the 327 businesses that did not qualify for limited access permits based on their demonstrated historic and present participation. DE # 3 at 12. However, Plaintiffs neglect to mention that the applicable control date for determining historic participation (December 9, 2005) was announced in the Federal Register in early 2006, providing notice to the industry that anyone entering the fishery after that date would not be assured of future access should a moratorium or other limited access system

be developed. See 71 Fed. Reg. 6,442 (Feb. 8, 2006). Under the Federal Register Act, 44 U.S.C. § 1507, filing a document with the Federal Register serves as constructive notice to all affected by the program. See California ex rel. Lockyer v. FERC, 329 F.3d 700, 706 (9th Cir. 2003); Miami Free Zone Corp. v. Foreign-Trade Zones Bd., 136 F.3d 1310 (Fed. Cir. 1998). Indeed, a New Jersey District Court recently held that publication of a control date notice in the Federal Register was "legally sufficient to comport with due process requirements." General Category Scallop Fishermen v. Secretary of U.S. Dep't of Commerce, 720 F. Supp. 2d 564, 578 (D.N.J. 2010).

Other than the fact that some individuals did not obtain limited access permits under the criteria imposed in the challenged rule–and the remaining permitted charter operations will be able to make additional trips–Plaintiffs do not cite any particular aspect of the challenged rule that is unfair or inequitable. To the contrary, consistent with the requirements of the Halibut Act, 16 U.S.C. § 773c(c), the rule imposes limits to prevent any particular individual, corporation, or other entity from acquiring an excessive share of the halibut fishing privileges. See 75 Fed. Reg. 563, 568, 572. Existing daily bag limits will help ensure that the opportunity to fish for halibut will be spread among the remaining charter operations. See 75 Fed. Reg. at 590. NMFS also promoted equity by allocating non-transferrable permits to operators with lower levels of qualifying participation. Id. at 562. The rule further promotes equity by issuing "community quota entity" permits to help rural communities develop their charter sectors. Id. at 561.

At bottom, Plaintiffs complain that they did not receive limited access permits. However, avoiding overcapitalization is one of the purposes of any limited access program, and an

inevitable consequence is that vessels that joined the fishery after the control date will be excluded. Limited access is a well-recognized, legally-accepted tool for fishery management. Here, as in Alliance Against IFQs, the Court should find that the resulting allocation of limited access permits under the challenged rule was both fair and equitable, in compliance with the Halibut Act:

> The plan adopted will undoubtedly have an adverse impact on the lives of many fishermen who have done nothing wrong. Their entirely legitimate interest in making a living from the fishery has been sacrificed to an administrative judgment about conservation of fish and efficiency of the industry. That is, however, an unavoidable consequence of the statutory scheme. Despite the harshness to the fishermen who were left out, there is no way we can conclude on this record that the Secretary lacked a rational basis for leaving them out.

84 F.3d at 350. Indeed, the federal regulations interpreting the MSA note that "[i]nherent in an allocation is the advantaging of one group to the detriment of another." 50 C.F.R. § 600.325(c)(3)(i)(A). A rule does not violate the "fairness and equity" criterion if it is "rationally connected" to the "furtherance of a legitimate" fishery management objective. Id.

Thus, in Valin v. Locke, 671 F. Supp. 2d 1 (D.D.C. 2009), this Court rejected halibut charter operators' claim that a one-fish-per-day bag limit in the charter sector was not fair and equitable merely because it favored the commercial sector over the charter sector. See id. at 7-8. The Court noted that the restrictions were rationally related to legitimate goals such as reining in the uncontrolled expansion of the halibut charter industry. See id. at 10. "When determining fairness and equity the focus is not on the impact of the regulation, but on its purpose. So long as the motive behind the regulation is justified in terms of the fishery management objective, advantaging one group over another is permissible." Id. at 11 (citing 50 C.F.R. § 600.325(c)(3)(i)(A)). Here, the challenged rule is justified in light of the need to constrain the

unrestricted growth of new entrants into the charter halibut fishery and the associated exceedences of the GHL.

Moreover, the record before the Court demonstrates that Plaintiffs were aware of the applicable control dates and submitted comments on the proposed rule. Defendants responded to these comments in detail in the final rule. 75 Fed. Reg. at 564-595. Thus, the challenged rule, including the use of control dates to determine historic and present participation, is also consistent with the fairness and equity considerations enumerated in the Magnuson-Stevens Act at 16 U.S.C. § 1536(b)(6)(F). "The very language of Section 1853(b)(6) indicates that its enumerated factors must be balanced against each other and against 'any other relevant considerations.' As long as the Council and the Secretary took these factors into account, the Court may not second-guess the accuracy of the balance struck." Sea Watch Intern. v. Mosbacher, 762 F. Supp. 370, 378 (D.D.C. 1991).

II. Plaintiffs Have Failed To Demonstrate That They Will Suffer Irreparable Injury.

Federal Defendants do not deny that charter operators who do not qualify for permits will be harmed by the rule. However, Plaintiffs have not met their burden to clearly show a likelihood of irreparable injury sufficient for the extreme remedy of a preliminary injunction. The D.C. Circuit has "set a high standard for irreparable injury." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). In Winter, the Supreme Court recently explained that a plaintiff must establish not merely a "possibility" of injury but demonstrate that "irreparable injury is *likely* in the absence of an injunction." Winter, 129 S. Ct. at 375 (emphasis added). See also Chaplaincy, 454 F.3d at 297 (the moving party must show that "[t]he injury complained of is of such imminence that there is a 'clear and present' need for

equitable relief to prevent irreparable harm.") (citations, brackets, and internal quotation marks omitted); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time'") (quoting Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931)). Furthermore, the moving party must establish that the injury is "beyond remediation." Id. "[E]conomic loss does not, in and of itself, constitute irreparable harm." Wisconsin Gas, 758 F.2d at 674. See also Sampson v. Murray, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy expended in the absence of a stay are not enough.") Sampson v. Murray, 415 U.S. 61, 90 (1974) (quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)). Thus, as a court in this District recently noted, "it is well-settled that monetary loss constitutes irreparable harm 'only where the loss threatens the very existence of the movant's business.'" Bill Barrett Corp. v. U.S. Dep't of Interior, 601 F. Supp. 2d 331, 335 (D.D.C. 2009) (quoting Wisconsin Gas, 758 F.2d at 674); accord United Farm Workers v. Chao, 593 F. Supp. 2d 166, 168 (D.D.C. 2009).

Plaintiffs allege that they will not qualify for permits under the new limited entry system. Such injury is economic harm. Permits are transferable and available for purchase. See Final Rule, 75 Fed. Reg. at 561; see also DE #3 at 15. The rule thus imposes an added business expense on those entities who do not qualify for a permit and wish to continue running halibut sport charters. An added business expense does not constitute irreparable harm. See Wisconsin Gas, 758 F.2d at 674.

Plaintiffs attempt to obscure this with repeated but unsupported assertions that the rule will cause all the affected charter operators to "go out of business." See, e.g., DE # 3 at 1, 2, 8,

12, 15. In reality, the effect of the rule is that operators who are denied permits under the rule must incur an additional business expense by obtaining a license. That in itself is not irreparable harm. See, e.g., Second City Music, Inc. v. City of Chicago, Ill., 333 F.3d 846, 850 (7th Cir. 2003) (Noting that where a challenged rule requires a business to obtain a license, "two things could keep it in business; an injunction or a license. If the license can be had, then the lack of an injunction does not lead to irreparable harm."). Assuming Plaintiffs' own allegations are true, an operator would be able to purchase a permit in 2011 for Area 3A, for a one-time expense of approximately $60,000 and in Area 2C for a one-time expense of $37,000. See DE # 3 at 15.

While this could be a significant cost, the available evidence does not support the claim it would drive the Plaintiffs out of business. For example, Plaintiffs rely on the affidavit of Nicholas Ausman, who states that his business, Crystal Bay Lodge, LLC, "cannot continue" without a halibut permit. Ausman Aff. at ¶ 8. According to Plaintiffs, a permit in Area 2C, where Ausman operates, would cost approximately $37,000. See DE # 3 at 15. This would represent about 3% of the $1.1 million already invested in setting up this lodge to date. See Ausman Aff. at ¶¶ 1, 6. Plaintiff's affiant Allen B. Walburn operates Kodiak Island Resort, LLC in Larsen Bay, Alaska. Walburn Aff. at ¶ 1. He asserts that due to the rule he will be forced to go out of business "forever." Walburn Aff. at ¶ 9. However, in reality, purchasing a permit would simply be an added business expense. Walburn says that $1.5 million has been invested in the lodge to date. Walburn Aff. at ¶ 1. Purchasing a permit in Area 3A where he operates would, according to Plaintiffs, require an additional one-time expenditure of about $60,000. DE # 3 at 15. For comparison, the Kodiak Island Resort already incurs *annual* boat fuel costs of $36,000. Id. at ¶ 3.

In addition to not showing that the added business expense of a permit would put them out of business, Plaintiffs have not met their burden of showing that they even require such a permit to stay in business, given that none of them allege that halibut fishing is their sole source of revenue. To the contrary, the Kodiak Island Lodge's website states: "We built our lodge in Larsen Bay on Kodiak Island for one specific reason. Nowhere in all of Alaska are the opportunities to catch salmon better than Larsen Bay." Kodiak Island Lodge, http://www.kodiakresort.com/salmon.php (last viewed April 7, 2011). As for Crystal Bay Lodge, it offers its guests, in addition to halibut fishing, "trolling for salmon on one of our skiffs, whale watching, glacier tours, site-seeing, or any number of activities Petersburg has to offer," not to mention fishing for lingcod and rockfish. Crystal Bay Lodge, Alaska Vacation and Fishing Resort, http://www.crystalbaylodge.com/, http://www.crystalbaylodge.com/Merchandise.html (last viewed April 7, 2011).

Furthermore, Plaintiffs have, to a significant extent, created and compounded their own alleged injuries. By their own admission, they invested significant resources in charter fishing businesses, businesses they allege cannot survive without revenues from halibut tours, well after being put on notice that they "are not guaranteed future participation in the charter halibut fishery regardless of their date of entry or intensity of participation in the fishery before or after the control date" See Control Date Notice, 71 Fed. Reg. 6,442, 6,444 (Feb. 8, 2006). The Control Date Notice further put Plaintiffs on notice that it was issued to "discourage speculative entry into the charter sport fishery for Pacific halibut in convention waters off Alaska while potential entry or access control management measures are developed by the Council." Id. at 6,443. Plaintiffs chose to ignore the Control Date Notice and invest in businesses that they claim

cannot be sustained without the very halibut fishing privileges they were warned could not be assured. Plaintiffs now try to paint the consequences of their own risky investment decisions as "irreparable injury" caused by someone else. However, "[t]he case law is well-settled that '[a] preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." Lee v. Christian Coal. of America, Inc., 160 F. Supp. 2d 14, 33 (D.D.C. 2001); see also Ausman Aff. at ¶ 1-2 (noting that nearly all the alleged $1.1 million worth of investments in Crystal Bay Lodge allegedly put in jeopardy was invested in 2008 and 2009); Nettlow Aff. ¶ 2 (stating he started his charter company in 2007); Roskind Aff. at ¶ 3 (stating he started his charter company in 2007).

Plaintiffs have further compounded their self-inflicted injuries by delaying their claims for more than a year, and then urging the Court to find their need for relief so urgent as to warrant the extraordinary remedy of a preliminary injunction. Although the final rule only recently became effective, and the active portion of the 2011 charter season will begin in May, the final rule was published on January 5, 2010. See 75 Fed. Reg. 554. Plaintiffs waited until fifteen months later, April 4, 2011, to file this action. Although their present challenge is not time-barred, it is untimely to the extent Plaintiffs now seek a preliminary injunction based on the imminence of alleged irreparable injuries. To the extent their alleged injuries would occur before this Court could evaluate their claims on the merits, such injuries would be self-inflicted by their own delay.

III. The Requested Injunctive Relief Will Substantially Injure Other Interested Parties.

Apart from the general public interest in efficiently administering the halibut fishery and avoiding future exceedences of the halibut GHL, other unrepresented parties have a substantial

interest in the outcome of this litigation. Granting the requested injunctive relief has the potential to adversely affect the value of limited access permits held by individuals who qualified for permits under the regulatory criteria or otherwise obtained permits through lawful private transactions. The challenged rule was published over a year ago, and although it became effective only recently, it is likely that many individuals made business decisions and otherwise relied on the prospect that their limited access permits would have tangible value. The requested injunctive relief has the potential to injure the interests of such individuals.

Continued, uncontrolled growth of the charter sector in the event of a preliminary injunction would also likely contribute to continued exceedences of the GHL, which would, in turn, necessitate reductions in the allowable catch for the commercial sector. See 74 Fed. Reg. 18,178, 18,179. Thus, continued exceedence of the GHL by the charter halibut fishery in 2011 has the potential to adversely impact the commercial sector's allocation in future years. This is another example of the way in which granting the requested preliminary injunctive relief could adversely impact the interests of parties that are currently unrepresented in this litigation.

Granting the requested injunctive relief further has the potential to adversely affect parties other than current charter permit holders and fishers in other sectors of the halibut fishery. For example, the Alaska Travel Industry Association, which represents over 1,000 member businesses, submitted comments in support of the proposed rule, citing the importance of limited access in the charter halibut fishery in the broader context of tourism and the Alaskan economy. AR 00606. Several other stakeholders also submitted comments in support of the proposed rule, noting its conservation goals and economic importance. See, e.g., AR 001249 (comment of lodge owner David Lesh) ("The charter boat industry growth and catch of halibut is

entirely out of control and completely unsustainable."); AR 001242 (comment of charter operator Capt. Rod. Van Saun) ("By passing the Moratorium the NMFS will finally accomplish a major step in giving the Charter Industry long term stability and keep fishing pressure at a sustainable rate."); AR 001329 (comment of Southeast Alaska Fishermen's Alliance) ("[I]mplementation of this limited access program is so important, in order to identify the participants and move forward on a long term regulatory program that will hopefully provide stability for both the charter and commercial sectors."); AR 001413 (comment of Cordova District Fishermen United) (Limited access "will curtail growth and define the group of charter operators and businesses who will be able to formulate a long term solution"). There may also be environmental groups that would object to the proposed injunctive relief, although they have not yet been able to participate in this litigation. For example, the Environmental Defense Fund recently issued a report on the benefits of limited access fishery management programs. See http://www.edf.org/documents/6119_sustainingfisheries.pdf (last accessed April 11, 2011). In short, Plaintiffs' interests are not the only interests at stake here, and the Court should hesitate strongly before enjoining a fishery management regulation that was duly promulgated through public notice-and-comment proceedings.

IV. The Public Interest Would Be Disserved By The Requested Injunctive Relief.

The government has a strong interest in the efficient administration of the limited access system at issue here. See generally Foss v. NMFS, 161 F.3d 584, 589-90 (9th Cir. 1998). To this end, the final rule includes several provisions for transferability of certain permits. 75 Fed. Reg. at 555, 557-558. "Transferability of permits will allow limited new entry into the charter halibut fishery while preventing an uncontrolled expansion of the charter halibut fishery." Id. at

558. Over time, transferable permits will migrate to those operators and areas where they will be most efficiently used. Id. at 566.

Thus, the rule creates a market in transferrable halibut charter permits, and encourages such permits to be bought and sold in order to efficiently allocate the supply of charter fishing privileges. Several factors beyond the government's control--such as natural fluctuations in the stocks of halibut and sablefish--affect the market value of permits. In re Applications of George M. Ramos and Roy O. Pederson, NOAA Appeal Nos. 94-0-008 and 94-0-002 (April 21, 1995) at 4 n. 6. However, establishing a finite pool of permits with a relatively stable, continuing market value through time facilitates subsequent transfers of permits among fishers. Id. As the rule itself explains, "[m]arkets function well when they are founded on clearly defined rules that explain the nature of the privileges each market participant has to the scarce resources needed to operate their businesses. This rule creates permits that will provide fishing privileges and provide the charter halibut fishery stability necessary for effective conservation and management of the halibut resource." 75 Fed. Reg. at 572.

Plaintiffs ask the court to block implementation of the rule and inject new regulatory uncertainty about the value of such permits. Purchasers who already bought permits in reliance on the rule would likely see the value of their permits drop, and potential purchasers would be deterred from entering the market while a court order was in effect blocking implementation of the rule. Thus, enjoining the implementation of the limited access permit rule in this case would frustrate the government's goal in limited access systems of establishing a relatively fixed pool of permits with a stable market value. See Foss 161 F.3d at 590.

Moreover, granting Plaintiffs' requested injunctive relief would also thwart the intent of

the North Pacific Council and NMFS to promote adherence to the GHL, over time, by constraining the overall number of participants in the charter halibut fishery. 75 Fed. Reg. at 568-571. By stabilizing growth in the charter industry, NMFS sought to enable other harvest control regulations to be more effective. Id. at 569. Limited entry will provide a basis for the development of a long-term comprehensive effort limitation program for the charter halibut fishery, if it is determined that such a program is needed in the future. Id. at 567. Thus, enjoining the limited access rule would interfere with NMFS' ability to manage the resource. The requested injunctive relief would also undermine the original goal of the control date notice, 71 Fed. Reg. 6,442, to discourage speculative entry into the halibut charter fishery after the control date.

CONCLUSION

The challenged limited access rule was promulgated in compliance with the Halibut Act and applicable federal law. Therefore Plaintiffs are unlikely to succeed on the merits of their claims. Moreover, Plaintiffs have failed to demonstrate that they would be irreparably harmed if the Court denies the requested preliminary injunctive relief while the Court adjudicates the merits of Plaintiffs' claims at summary judgment. Moreover, the requested injunction has the potential to injure the interests of permit holders and environmental interests and would generally disserve the government's interest in the efficient administration of the charter halibut fishery. For the foregoing reasons, the Court should deny Plaintiff's request for preliminary injunctive relief.

Respectfully submitted,

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Date: April 12, 2011

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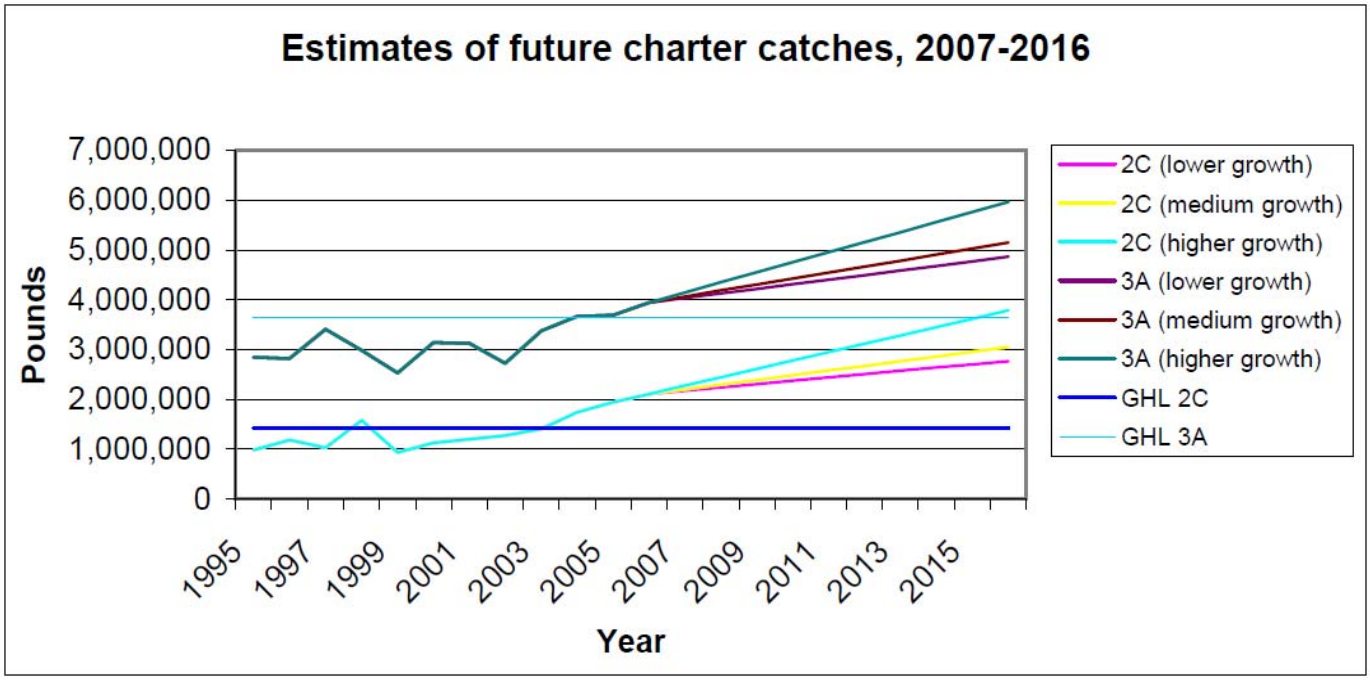
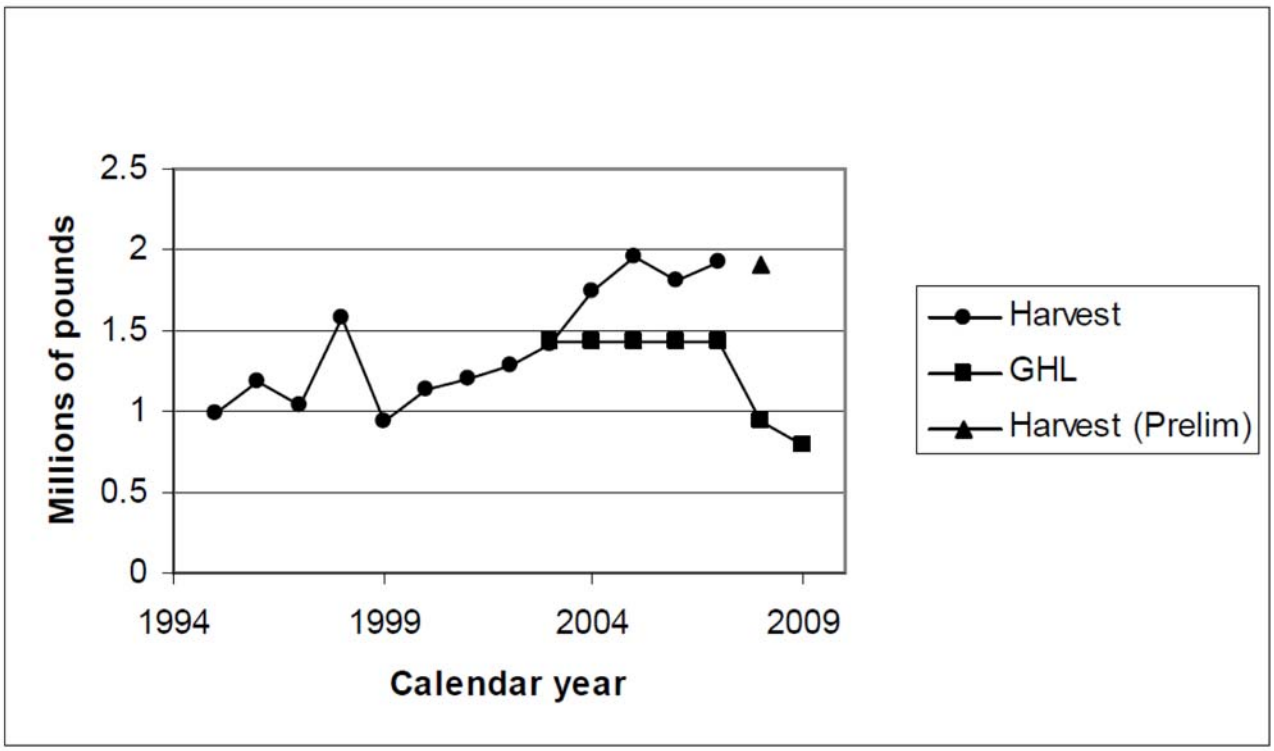


Figure 8 10-year projections of Areas 2C and 3A halibut charter harvests

Source: 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 - November 6, 2009 (AR 001592)

EXHIBIT 1



Area 2C Guided Sport Halibut Guideline Harvest Level (GHL) and Guided Sport Harvest, 1995-2008

Source: Regulatory Amendment to Implement Guideline Harvest Level Measures in the Halibut Charter Fisheries in International Pacific Halibut Commission Regulatory Area 2c - Regulatory Impact Review/Final Regulatory Flexibility Analysis/ Environmental Assessment - March 2009

EXHIBIT 2