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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CHARTER OPERATORS OF Docket No. CA 11-664  
ALASKA, ET AL,  
Plaintiffs,  
v. Washington, D.C.  
**April 26, 2011**  
2:40 p.m.  
GARY LOCKE, ET AL,  
Defendants.  
-----X

**PRELIMINARY INJUNCTION HEARING**  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: HOPPING GREEN & SAMS  
By: Mr. D. Kent Safriet  
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For the Defendants: U.S. DEPARTMENT OF JUSTICE  
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ALSO PRESENT: Mr. John Lepore, NOAA

Court Reporter: Catalina Kerr, RPR, CRR  
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Proceedings recorded by mechanical stenography, transcript  
produced by computer.

1 would the halibut species be regulated?

2 MR. BROWN: I believe it could be regulated under  
3 the Magnuson-Stevens Act.

4 THE COURT: Absolutely, right. And what you're  
5 saying is, Look to that, Judge, we haven't departed from --  
6 we're managing the halibut the same way in which species are  
7 regulated under the Magnuson-Stevens Act; is that correct?

8 MR. BROWN: Not the same. Well, if we're going back  
9 to the 1993 language, there was discussion of consistency --

10 THE COURT: Right.

11 MR. BROWN: -- with the Magnuson-Stevens Act. And  
12 as far as this regulation under the Halibut Act, the only  
13 criteria are these seven enumerated criterias that are  
14 specifically referenced in the Halibut Act, not anything else  
15 from the Magnuson Act.

16 THE COURT: All right. Fair enough. Thank you.  
17 Let me do this. I'm going to issue a ruling from the bench.  
18 I need some time. I'm going to take a recess until 4:30, all  
19 right.

20 MR. SAFRIET: Thank you, Your Honor.

21 THE COURT: All right. Thank you.

22 THE DEPUTY CLERK: This honorable court now stands  
23 in a short recess.

24 (A BRIEF RECESS WAS TAKEN.)

25 THE DEPUTY CLERK: Please remain seated and come to

1 order.

2 THE COURT: All right, Counsel. It's a very  
3 interesting case. These are fascinating cases that come to  
4 the attention of judges in this court.

5 Pending before the Court is, as we know, Plaintiffs'  
6 motion for preliminary injunction. I've -- the Court's  
7 considered it, the opposition and the reply and certainly the  
8 excellent arguments that were presented in court today. At  
9 this time, though, on the record developed before the Court,  
10 the Court's going to deny the request for extraordinary  
11 injunctive relief.

12 To briefly summarize the background of this case,  
13 Plaintiffs challenged a final rule issued by the Secretary of  
14 Commerce through the National Marine Fisheries Service,  
15 referred to as NMFS or the Agency in this ruling. That rule,  
16 which is entitled the "Pacific Halibut Fisheries Limited  
17 Access for Guided Sport Charter Vessels in Alaska," 75 -- and  
18 it appears at 75 Federal Register 554, I'll refer to it as the  
19 Final Rule, became effective on February the 1<sup>st</sup> of this year.

20 The Final Rule creates a limited access system for  
21 charter vessels engaged in guided sport fishery for halibut in  
22 a designated area in the Central Gulf of Alaska. It seeks to  
23 restrict the number of charter operators by requiring that all  
24 guided sport fishery vessels obtain a permit. Permits will  
25 only be issued to vessels who, one, have documented at least

1 five fishing trips in 2004 or '5, and two, at least five trips  
2 in 2008. Individuals who demonstrate that they have made at  
3 least 15 documented trips in the requisite timeframes will be  
4 entitled to transferable permits, that is, permits may be sold  
5 to other owners or operators, and as demonstrated during the  
6 hearing this afternoon, for allegedly significant sums of  
7 money.

8           Now, Plaintiffs are the Charter Operators of Alaska  
9 whose members will not receive a permit under the Final Rule  
10 as well as two businesses and two individuals who will also  
11 not receive a permit. Plaintiffs filed their complaint on  
12 April the 4<sup>th</sup> of this year alleging that the Final Rule  
13 violates the Northern Pacific Halibut Act of 1982 referred to  
14 by the parties as the Halibut Act, as well as relevant  
15 portions of the Magnuson-Stevens Fishery Conservation and  
16 Management Act and the Administrative Procedure Act.

17           Plaintiffs simultaneously moved for a preliminary  
18 injunction to enjoin the implementation of the Final Rule.

19           In a brief telephone conversation with counsel for  
20 the parties three weeks or so ago, the Court offered to -- the  
21 Court inquired whether the Court should, under Rule 65(a)(2),  
22 consolidate the request for injunctive relief with a merits  
23 determination, and the parties, at that time, persuaded the  
24 Court that it might be too premature to do that, recognizing  
25 that the Administrative Record had not been assembled at that

1 point, et cetera, and those were compelling reasons, and the  
2 Court accepted those reasons.

3 In a pleading filed late Friday, the parties  
4 informed the Court that they wish to avail themselves of the  
5 opportunity to have the Court treat the pleadings as cross  
6 motions for summary judgment and issue a decision on the  
7 merits. That came in late Friday. Indeed, the Court was  
8 not -- the Court was not sitting that day. I learned about it  
9 very late Friday or early Saturday or so, and because there  
10 are additional requirements for summary judgment under our  
11 local rules, Federal Rule 56, the Court's of the opinion that  
12 it's just too late for the Court to shift gears and focus on a  
13 strictly a merits determination at this point.

14 But what the Court will do is to put in place a  
15 briefing schedule for the filing of cross motions for summary  
16 judgment and make -- and issue a final ruling on the merits.  
17 The Court may or may not schedule a hearing, I don't know. I  
18 won't know until after I've seen the pleadings. So this  
19 ruling focuses strictly on the Plaintiffs' request for a  
20 preliminary injunction.

21 As we know, a plaintiff seeking a preliminary  
22 injunction must, quote, establish that he is likely to succeed  
23 on the merits, that he's likely to suffer irreparable harm in  
24 the absence of preliminary relief, that the balance of  
25 equities tips in his favor and that an injunction is in the

1 public interest, and that's citing to the *Winter versus NRDC,*  
2 *Inc.* case, 129 Supreme Court 365.

3           These four factors have typically been evaluated on  
4 what we call a sliding scale whereby if the movant makes an  
5 unusually strong showing on one of the factors, then it does  
6 not necessarily have to make as strong a showing on another  
7 factor, again citing to *Davis v. Pension Benefit Guarantee*  
8 *Corporation* from our circuit, 571 F.3d 1288, 1291.

9           As the Supreme Court has stated in *Mazurek versus*  
10 *Armstrong*, 520 U.S. 968, a 1997 decision, and I quote, a  
11 preliminary injunction is not an extraordinary and drastic  
12 remedy -- strike that -- A preliminary injunction is an  
13 extraordinary and drastic remedy, one that should not be  
14 granted unless the movant, by a clear showing, carries the  
15 burden of persuasion, end quote.

16           While it's unclear whether the sliding scale is  
17 still controlling in light of the Supreme Court's decision in  
18 *Winter*, the Court need not decide this issue because  
19 Plaintiffs' request for preliminary injunction fails even  
20 under the less stringent sliding scale analysis of *Davenport*.

21           The Court will begin by addressing Plaintiffs'  
22 likelihood of success on the merits. The Court concludes in  
23 that regard that Plaintiffs have failed to demonstrate that  
24 they are likely to succeed on the merits.

25           The Court evaluates the Plaintiffs' likelihood of

1 success on the merits under the Administrative Procedure Act,  
2 5 U.S. Code Section 701 to 706 which provides a right to  
3 judicial review of final agency actions.

4 Under the APA, federal agency actions are to be held  
5 unlawful and set aside where they are, and I'm quoting from  
6 the Act, arbitrary, capricious, an abuse of discretion, or  
7 otherwise not in accordance with law. To make this finding,  
8 the Court must determine whether the Agency, quote, considered  
9 the relevant factors and articulated a rational connection  
10 between the facts found and the choice made, citing to *Keating*  
11 *versus FERC*, 569 F.3d 427, a D.C. Circuit opinion issued in  
12 2009.

13 The key provision of the Halibut Act is Section  
14 773c(c), "c" in parens, which provides as follows, and I  
15 quote, regulations shall be consistent with the limited entry  
16 criteria set forth in Section 1853(b)(6) of this title. If it  
17 becomes necessary to allocate or assign halibut fishing  
18 privileges among various United States fishermen, such  
19 allocation shall be fair and equitable to all -- to all such  
20 fishermen, reasonably calculated to promote conservation and  
21 carried out in such a manner that no particular individual,  
22 corporation or other entity acquires an excessive share of the  
23 halibut fishing privileges.

24 With respect to 773c(c) of the Halibut Act,  
25 Plaintiffs' argument that the Final Rule does not comply with

1 the requirement that allocations of halibut fishing privileges  
2 be reasonably calculated to promote conservation is  
3 unpersuasive. Although the Agency does acknowledge that the  
4 short-term impact of the rule will not necessarily limit the  
5 halibut harvest, the Agency persuasively explains that the  
6 Final Rule is intended, quote, to enable other harvest control  
7 regulations to be more effective, end of quote, and that's set  
8 forth in 75 Fed. Register 554 and 569.

9           Furthermore, the Agency repeatedly explains that the  
10 purpose of the rule is to, and I quote, be a step toward  
11 establishing a comprehensive program of allocating the halibut  
12 resource among the various halibut fisheries, parens, guided  
13 and unguided recreational, commercial, and subsistence, end of  
14 parens.

15           To accomplish this objective, the Council in NMFS  
16 found a need to stabilize growth in the charter halibut  
17 sector, and that's articulated at 75 Federal Register 554,  
18 562. The Final Rule expressly states that it will -- excuse  
19 me -- and I quote -- that it will, and I quote, make existing  
20 and future harvest restrictions more effective because  
21 conservation gains from individual harvest restrictions will  
22 not be eroded by unlimited growth in the fleet of charter  
23 vessels fishing for halibut. In this manner, this will  
24 contribute to the achievement of the overall target harvest  
25 rate of halibut, and also this rule will, in this manner,

1 contribute to the achievement of the overall target harvest  
2 rate of halibut. That's at 75 Federal Register, 554, 563, end  
3 of quote.

4 Plaintiffs have not provided any persuasive  
5 arguments that would discredit these statements by the Agency,  
6 nor have Plaintiffs convinced the Court the Final Rule  
7 violates the Halibut Act's requirement that regulations be  
8 reasonably calculated to promote conservation, end quote.

9 In particular, the Plaintiffs offer no statutory or  
10 regulatory basis for their assumption that the Halibut Act  
11 requires a specific conservation purpose that limits halibut  
12 harvest in the short term. The Court finds that the Agency's  
13 determination that the Final Rule complies with the Halibut  
14 Act in this respect an entirely reasonable one.

15 Plaintiffs' argument that they are likely to succeed  
16 on the merits because the Final Rule violates the portion of  
17 the Magnuson-Stevens Act incorporated into the Halibut Act,  
18 namely 16 U.S. Code Section 1853(b)(6), is also not  
19 persuasive. With respect to the argument that the Final Rule  
20 violates Section 1853(b)(6) because it does not set an optimum  
21 yield, the Court does not agree with Plaintiffs' reading of  
22 the statute.

23 The Halibut Act merely states that any regulation  
24 shall be, quote, consistent with the limited entry criteria  
25 set forth in Section 303(b)(6) of the Magnuson-Stevens Act,

1 and the citation at -- end of quote. The citation is 16 U.S.  
2 Code Section 733c(c). [sic]

3 The referenced portion of the Magnuson-Stevens Act,  
4 namely 1853(b)(6), however, does not require the use of an  
5 optimum yield as Plaintiffs would have the Court conclude.

6 The Halibut Act's specific reference to the criteria  
7 set forth in 1853(b)(6) makes it clear that Congress intended  
8 to require that any regulation under the Halibut Act be  
9 consistent with the seven criteria laid out in that provision,  
10 namely (A) through (G).

11 Nowhere in the Halibut Act does it require the  
12 Agency to establish a fishery management plan containing an  
13 optimum yield. As Defendants correctly explain, and I quote,  
14 it is apparent from the plain language of the Magnuson-Stevens  
15 Act that the references to a fishery management plan and  
16 optimum yield both precede the enumerated statutory criteria  
17 referenced in the Halibut Act, and if Congress wanted to  
18 require Defendants to develop a fishery management plan or  
19 specify optimum yield for halibut, they could have said so,  
20 end of quote.

21 Plaintiffs' reliance upon the Agency's Regulation 50  
22 CFR Section 600.330, National Standard 5 in support of their  
23 position that the Agency was required to establish an optimum  
24 yield is even less persuasive. This regulation, particularly  
25 the language relating to optimum yields, clearly relates to

1 fishery management plans under the Magnuson-Stevens Act.  
2 Plaintiffs fail to provide any basis for asserting that it  
3 applies to the Halibut Act in the same manner.

4 Plaintiffs' next argument that the Final Rule is  
5 invalid because the Agency failed to take the, quote,  
6 economics of fishery, end quote, into account is also not  
7 likely to succeed on the merits. Plaintiffs argue that the  
8 Agency, quote, did not analyze the impact on the small charter  
9 businesses that the Final Rule will put out of business with  
10 the effect of making the qualifying charter businesses more  
11 profitable, end quote.

12 Plaintiffs also argue that the Agency should have  
13 considered the effect the Final Rule would have on revenue and  
14 employment in the affected regions and assert that the Agency  
15 failed to take into account that certain charter businesses  
16 will receive a windfall resulting from the smaller size of  
17 fleet. The Court finds that these arguments are likewise  
18 unpersuasive.

19 Indeed, Plaintiffs' argument that the Agency, quote,  
20 did not analyze the impact on the small charter businesses  
21 that the Final Rule will put out of business, end quote, is  
22 contradicted even in Plaintiffs' own submissions. Plaintiffs  
23 themselves use data considered by the Agency to argue that 327  
24 businesses will not receive a permit, for example.

25 The Court finds that the Final Rule contains ample

1 evidence that the Agency did in fact recognize the impact the  
2 Final Rule would have on the charter businesses and considered  
3 this aspect of the Final Rule; specifically, the Agency's  
4 Regulatory Impact Review and the Final Regulatory Flexibility  
5 Analysis which contain extensive economic analyses, include an  
6 analysis of potential costs and benefits as well, as an  
7 analysis of potential impacts on small entities.

8           Furthermore, the Regulatory Impact Review also  
9 compares the impacts of various alternatives on affected  
10 groups in the commercial and charter halibut fisheries. In  
11 addition, the Final Rule also responds to many comments and  
12 concerns raised regarding economic issues from the public.  
13 The Court is also persuaded by Defendants' argument that, and  
14 I quote, in formulating the rule, NMFS sought in various ways  
15 to balance the objective for reducing fishing capacity against  
16 the objective of minimizing disruption in the charter fishing  
17 industry. The allocation methodology struck a balance between  
18 the need to constrain future growth while ensuring a  
19 sufficient supply of charter fishing opportunities and price  
20 stability, and that's -- end of quote. And that's stated at  
21 Defendant's memorandum at 24 and 25.

22           The Agency reasoned that transferable permits would  
23 allow permit holders to move operations to areas of higher  
24 demand or transfer them. Furthermore, the Final Rule explains  
25 that transferable permits actually allow the possibility for

1 expansion of the charter fishing industry to some extent.

2 That's stated at Federal Register at pages 571 to 587.

3           Merely because the NMFS decided upon an action that  
4 has a negative impact -- that has a negative economic impact  
5 on the Plaintiffs does not mean that the Agency failed to take  
6 the economics of the fishery into account.

7           Plaintiffs' arguments that the NMFS failed to take  
8 the, quote, economics of fishery, end quote, into account  
9 ignore the extensive economic analysis that is evident in the  
10 Regulatory Review Impact, the Final Regulatory Flexibility  
11 Assessment and the Final Rule itself.

12           Finally, Plaintiffs argue that they are likely to  
13 succeed on the merits because the allocation of fishing  
14 privileges set forth in the Final Rule is not, according to  
15 Plaintiffs, fair and equitable.

16           Plaintiffs assert that the Final Rule, therefore,  
17 violates both the Halibut Act requiring, and I quote, that if  
18 it becomes necessary to allocate or assign halibut fishing  
19 privileges among various United States fishermen, such  
20 allocation shall be fair and equitable to all such fishermen,  
21 end of quote, and that's found at 16 U.S. Code Section  
22 773c(c), and the criterion in the relevant portion of the  
23 Magnuson-Stevens Act requiring that the Secretary take into  
24 account, quote, the fair and equitable distribution of access  
25 privileges in the fishery, end quote. 16 U.S. Code Section

1 1853(b)(6)(F). The Court also finds this argument  
2 unpersuasive.

3           The first major flaw in Plaintiffs' argument is that  
4 the Agency, recognizing that it would take a considerable  
5 amount of time to finalize a rule, provided notice in the  
6 Federal Register in early 2006 that the Agency was considering  
7 using 2005 as a cutoff date for a historic participation. The  
8 announcement specifically warned, and I quote, Anyone entering  
9 the charter sport fishery for Pacific halibut in and off  
10 Alaska after December 9, 2005, the control date, will not be  
11 assured of future access to that fishery if a management  
12 regime that limits the number of participants is developed  
13 and -- excuse me -- implemented under the number -- strike  
14 that -- is developed and implemented under the authority of  
15 the Northern Pacific Halibut Act of 1982. This notice is  
16 necessary to publish the intent of the North Pacific Fishery  
17 Management Council that participation credit may not be  
18 granted for operating under the charter halibut fishery if  
19 initial entry into the fishery occurs after the control date.  
20 That quote comes from the Federal Register at 71 -- 71 Federal  
21 Register 6,442.

22           The purpose of the announcement was to discourage  
23 new entrants into the industry while the Agency considered  
24 whether and how access to charter sport fishery should be  
25 limited. The announcement would also discourage speculative

1 participation in charter fishing, that is, individuals who  
2 made the requisite number of trips solely for the purpose of  
3 qualifying later for a potentially valuable permit.

4 In light of this announcement, the Court finds that  
5 Plaintiffs have not shown that the selection of the control  
6 date was arbitrary and capricious, nor have they shown the  
7 Agency's actions violate the fair and equitable requirement.

8 The second major flaw with Plaintiffs' position is  
9 they have failed to offer any legal authority that a  
10 regulation under the Halibut Act is not fair and equitable  
11 merely because it advantages one group over another. On the  
12 contrary, this court recently rejected that argument in *Valin*  
13 *versus Locke*, 671 F.Supp. 2d 1. In *Valin*, the Court  
14 considered the regulation issued by the NMFS that limited  
15 customers on guided sport charters to a catch of one halibut  
16 per calendar day. Plaintiffs in that case argued that the  
17 rule was inequitable because it imposed hardships on the  
18 charter fishing industry. They were outweighed by the benefit  
19 received by the commercial industry.

20 However, the Court held that, and I quote, when  
21 determining fairness and equity, the focus is not on the  
22 impact of the regulation but on its purpose. So long as the  
23 motive behind the regulation is justified in terms of the  
24 fishery management objective, advantaging one group over  
25 another is permissible under Standard 4, end of quote.

1           Similarly, the Ninth Circuit in *Alliance Against*  
2 *IFQs versus Brown*, 84 F.3d 343, a 1996 Ninth Circuit  
3 decision, held that a rule which allocated individual halibut  
4 quotas to commercial fishing boats did not violate the Halibut  
5 Act or the incorporated portion of the Magnuson-Stevens Act.  
6 In *Alliance*, the Ninth Circuit ruled in favor of the Agency  
7 stating that, and I quote, despite the harshness to the  
8 fishermen who were left out, there is no way we can conclude  
9 on this record that the Secretary lacked a rational basis for  
10 leaving them out, end of quote. That appears at page 350.

11           In the instant case, the Final Rule does acknowledge  
12 that, and I quote, those persons that receive an initial  
13 allocation of charter halibut permits will have a competitive  
14 advantage over those that will have to pay for transfer of  
15 these permits, end of quote, and that appears in the Federal  
16 Register at 75 Federal Register 554 and 561.

17           However, the Agency explained that the rationale for  
18 making this distinction was to, quote, end the opportunities  
19 for unlimited growth in charter vessel operations that may  
20 fish for halibut by establishing a finite number of charter  
21 vessels authorized for guided sport halibut fishing based on  
22 the historical and present participation criteria, end of  
23 quote.

24           The Agency further explained that the Final Rule was  
25 intended to, quote, allocate the halibut resource among all

1 fishing sectors and provide continued participation by those  
2 operations most dependent on the halibut resource, end of  
3 quotes.

4           As the Agency explained in the Final Rule, and I  
5 quote, the hardship of not qualifying for an initial  
6 allocation of a charter halibut permit will be borne by those  
7 who entered the charter halibut fishery after 2005, despite  
8 Council's control date notice that such persons would not be  
9 assured of future access to this fishery if a limited access  
10 system is implemented, end of quote, and that's at the Federal  
11 Register, pages 564 and 562.

12           Furthermore, the Final Rule relies upon the  
13 conclusion that, and I quote, an operator or business with a  
14 halibut fishing clientele but that does not qualify for an  
15 initial allocation of one or more charter halibut permits  
16 would have to obtain a transferable charter halibut permit by  
17 transfer. Alternatively, a charter vessel business that had  
18 such minimal participation that is not -- that it does not  
19 qualify for charter halibut permit under the Council's  
20 qualification criteria could change its business model to one  
21 that does not involve fishing for halibut, end quote, and  
22 that's at Federal Register 75, pages 554 and 561.

23           Accordingly, the Court finds the Agency's  
24 explanation to be a reasonable one under the statute and  
25 concludes that Plaintiffs failed to show that the regulation

1 is not, quote, fair and equitable, end quote. The Agency  
2 clearly took into account the fair and equitable distribution  
3 of access privileges and it provided a rational basis for its  
4 conclusion that the permit system established by the rule was  
5 in fact fair and equitable to all halibut fishermen.

6 Plaintiffs' argument, which relies heavily on the  
7 mere fact that some individuals will not receive a permit in  
8 the initial allocation, is an insufficient challenge to the  
9 Agency's actions.

10 In sum, for all the reasons just articulated by the  
11 Court, the Court concludes that Plaintiffs have failed to  
12 demonstrate a likelihood of success on the merits. Although  
13 the Court will briefly address the remaining factors for  
14 preliminary injunctive relief, the Court finds it appropriate  
15 to emphasize this circuit's admonition just as recently as  
16 April the 1<sup>st</sup> of this year, and I quote, that even if the  
17 remaining three factors strongly favor interim relief,  
18 preliminary injunction is inappropriate absent a serious legal  
19 question on the merits, and that comes from the *Ord versus*  
20 *District of Columbia* decision, 2011 U.S. App. Lexis 7017, a  
21 decision, as I indicated, from our circuit court just a few  
22 days ago, April the 1<sup>st</sup>.

23 Although mere monetary harm is insufficient to  
24 demonstrate irreparable harm for the purpose of a preliminary  
25 injunction, Plaintiffs argue that, and I quote, economic loss

1 may constitute irreparable harm where the loss threatens the  
2 very existence of the movant's business. And this is from  
3 Plaintiffs' memorandum at page 15, quoting a F.Supp. 2d  
4 decision from this circuit, the *World Duty Free Americas* case  
5 *versus Summers*, 2000 opinion.

6           The Court is persuaded that at least some of the  
7 Plaintiffs may ultimately suffer a loss of their businesses;  
8 however, ultimately, any persuasive aspect of this argument is  
9 outweighed by the weakness of Plaintiffs' argument relating to  
10 the other factors.

11           In evaluating the balance of the equities, the Court  
12 concludes that the potential injury to the Plaintiffs if the  
13 injunction is not granted, as weighed particularly against the  
14 potential injury to charter operators who are already hold  
15 permits if the injunction is granted does not weigh in favor  
16 of Plaintiffs.

17           Although it's a close call, the Court notes that  
18 Plaintiffs have provided affidavits in support of their  
19 argument that at least some charter operators will be put out  
20 of business by the Final Rule, but Plaintiffs have not made  
21 the required clear showing that the harm to Plaintiffs  
22 outweighs the harm to others. In such a situation, the Court  
23 concludes this factor is essentially a wash. In this regard  
24 the Court will cite to *Serono*, 158 F.3d 1326, and the *Delaware*  
25 *& Hudson Railway Company* case *versus United Transportation*

1 *Union*, 450 F.2d 603, a D.C. circuit opinion, and I quote, that  
2 it often happens that one part or the other will be injured  
3 whichever course is taken. A sound disposition must then  
4 depend on a reflective and attentive appraisal as to the  
5 outcome of the merits, end of quote.

6 Finally, with respect to the public interest factor,  
7 the Court concludes that the public interest weighs in favor  
8 of the Defendants. Although Plaintiffs are correct, that the  
9 public has an interest in a government agency obeying  
10 statutory requirements, the Court is persuaded that because  
11 Plaintiffs are unlikely to succeed on the merits, a grant of a  
12 preliminary injunction would harm the public interest by  
13 delaying the efficient administration of the limited access  
14 system set up in the Final Rule injecting instability into the  
15 market for transferable permits and by delaying the Agency's  
16 efforts to stabilize growth of the charter industry.

17 Accordingly, for all those reasons, the Court denies  
18 Plaintiffs' motion for preliminary injunction. This decision,  
19 however, does not foreclose the possibility that upon a more  
20 fully developed record, if that's possible, Plaintiffs may be  
21 able to establish that the Final Rule did indeed violate the  
22 relevant statutes. The Court holds only that upon the current  
23 record, Plaintiffs have failed to demonstrate by a clear  
24 showing that they are entitled to the extraordinary and  
25 drastic remedy of a preliminary injunction.

1           That's the Court's ruling, and I'll give a copy of  
2 this to the court reporter and counsel can obtain a copy of  
3 the transcript if they want to. We'll issue a minute order  
4 that for all the reasons articulated by the Court this  
5 afternoon, the Plaintiffs' motion for preliminary injunction  
6 is denied.

7           Now, I can spend some time talking about a briefing  
8 schedule for cross motions for summary judgment. How much  
9 time do the Plaintiffs need to prepare Plaintiffs' motion for  
10 summary judgment?

11           MR. SAFRIET: Well, Your Honor, in light of the  
12 ruling and unless the record is going to be more fully  
13 developed, which is going to take quite some time, we'll need  
14 a significant amount of time to --

15           THE COURT: Why don't you come forward and talk  
16 about it. Let me invite Government counsel forward also.

17           MR. SAFRIET: Sure. In light of the ruling, you  
18 know, we've got a record, preliminary record that we've agreed  
19 to be the record on appeal or for purposes of the Court,  
20 unless in light of this ruling we go back and incorporate more  
21 information into the record so we can overcome some of the  
22 legal issues which will take some time, and I think the  
23 Defendant will take some time to, you know, get additional  
24 material.

25           THE COURT: Why don't we do this. I've issued the

1 ruling. The Plaintiff -- the -- you've not filed a responsive  
2 pleading, have you? The Government, has it?

3 MR. BROWN: Your Honor, we've not filed an answer  
4 yet, but we've filed an opposition to the motion for  
5 preliminary injunction.

6 THE COURT: Right. Why don't I -- maybe I should  
7 give both sides a chance to think about how you wish to  
8 proceed. I mean, normally -- I mean, service has been  
9 effected on the Government, obviously, correct, of the  
10 complaint?

11 MR. BROWN: Yes, service has been completed.

12 THE COURT: All right. How much time does the  
13 Government need to prepare its answer to the complaint?

14 MR. BROWN: Your Honor, service was completed less  
15 than a month ago.

16 THE COURT: And you have 60 days under the rules,  
17 don't you?

18 MR. BROWN: We'd like the 60 days under the rules.

19 THE COURT: All right. Then maybe what I should do  
20 is just treat it like any other case. I've issued my ruling.

21 MR. SAFRIET: Your Honor, I would suggest maybe the  
22 Plaintiffs and Defendants get together and file a joint notice  
23 with Your Honor's suggestion.

24 THE COURT: That's fine. Why don't you do that.  
25 How much time do you need? Why don't you file a joint status

1 report and recommendation for further proceedings. How  
2 much -- I think that's only fair. How much time do you need  
3 to do that?

4 MR. BROWN: Could we file a joint notice next -- in  
5 one week?

6 THE COURT: That's fine. You need any more time  
7 than that?

8 MR. SAFRIET: No, I think that would be sufficient,  
9 Your Honor.

10 THE COURT: Why don't I do this then. We'll just  
11 issue another minute order just directing that in light of the  
12 Court's ruling, the parties are directed to file a -- their  
13 joint recommendation for further proceedings by no later than  
14 whatever a week from today is. Today is what, the 26<sup>th</sup>,  
15 whatever that is. What is that, Carol?

16 THE DEPUTY CLERK: Looks like May 3<sup>rd</sup>.

17 THE COURT: May 3<sup>rd</sup>. And if the parties are unable  
18 to agree on a joint recommendation, each side can file their  
19 separate recommendation. I would encourage the parties to  
20 really work together and give me your joint recommendation for  
21 further proceedings, and then we'll proceed accordingly, all  
22 right.

23 MR. SAFRIET: Okay.

24 THE COURT: All right. Thank you.

25 MR. SAFRIET: Thank you, Your Honor.

1 THE COURT: You bring an interesting issue to the  
2 Court. All right. The parties are excused. Thank you.

3 And again, I apologize for keeping you waiting but  
4 there are only so many hours in a day, all right. Thank you.  
5 Have a nice evening.

6 MR. SAFRIET: No problem. Thank you, Your Honor.

7 THE COURT: Sure.

8 (PROCEEDINGS END AT 5:15 P.M.)

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10 **CERTIFICATE OF REPORTER**

11 I, Catalina Kerr, certify that the foregoing is a  
12 correct transcript from the record of proceedings in the  
13 above-entitled matter.

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Catalina Kerr

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Date

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