UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

vs.

The Honorable 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 Oceanographic and Atmospheric Administration, **Eric C. Schwaab,** in his official capacity as Administrator of the National Marine Fisheries Service,

Defendants.
_____/

CIVIL ACTION

CASE NO: 11-cv-664-EMS

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION (DE #3)

Plaintiffs, pursuant to Local Rule LCvR 7 and this Court's April 7, 2011 Minute Order, file this Reply Memorandum in support of their Motion for Preliminary Injunction DE #3 and in reply to the Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction DE #7. Defendants will be collectively referred to herein as National Marine Fisheries Service (NMFS) or Defendants. As described below, this Court should grant Plaintiffs' Motion because the Plaintiffs meet the requirements for a preliminary injunction.

INTRODUCTION

While sometimes it is the sword and sometimes the shield, one thing that is clear in reviewing agency rules under the Administrative Procedures Act (APA), the review is limited to the administrative record. *American Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir.

2001); *see also generally Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). As such, Defendants cannot retreat from or now disown their prior admissions and statements that the final rule[1] is not "calculated to promote conservation" as required by the North Pacific Halibut Act of 1982, 16 U.S.C. § 773(a) (Halibut Act), pretending the purpose and intent of the final rule was to serve a "conservation purpose." DE #7 at 19. Unfortunately for Defendants, and as explained below, they are bound by their statements and actions in the administrative record which contains no factual support for their newfound argument.

With respect to most of their arguments, as discussed herein, Defendants' Response improperly contains speculation and suggestions that have no record basis. For example, Defendants suggest that Plaintiffs are not irreparably harmed and will not "go out of business" because they can simply purchase a Charter Halibut Permit (CHP) to fish for halibut in 2011 that will merely be an added expense to their business. DE #7 at 32-33. This argument, while convenient for Defendants, distorts the facts and the final rule. There are approximately 327 charter halibut operators that are left without a CHP because of the final rule. Moreover, there are approximately 44 charter operators that are members of Plaintiff Charter Operators of Alaska – not two as Defendants suggest in its memorandum – that need one or more CHPs. Nowhere in the record is it stated that there are 327 CHPs – or for that matter 44 – available for purchase or can be purchased at a price that is not cost-prohibitive. For the reasons discussed below, Plaintiffs are entitled to a preliminary injunction.

PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

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

[1] The final rule is entitled ***Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska*** and published in the Federal Register on January 5, 2010 (75 Fed. Reg. 554).

is not granted; (3) the burden, if any, on others' interests from an injunction; and (4) the public interest in granting or denying relief. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)). Defendants appear to challenge each of these four factors. As noted herein, Defendants' argument to each factor have no merit.

I. Plaintiffs are Likely to Succeed on the Merits

The final rule violates the Halibut Act and the limited access provisions of the Magnuson-Stevens Fishery Management Act (Magnuson-Stevens Act). *See* 16 § U.S.C. 1853(b)(6). The Halibut Act, 16 U.S.C. § 773c(c), provides in pertinent part:

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

(emphasis added).

A. *The Final Rule is not Reasonably Calculated to Promote Conservation*

Defendants accuse Plaintiffs of selectively quoting from the final rule and administrative record to demonstrate the final rule is not "reasonably calculated to promote conservation." 16 U.S.C. § 773c(c); DE #7 at 18. Defendants, however, for their part selectively cite portions of the final rule to baldy and conclusively assert that the final rule "promotes conservation" without

explaining how. DE #7 at 17-19. Defendants cite select language in the final rule in an attempt to create a conservation purpose, omitting the below fatal admission found in the section of the final rule itself that discusses compliance with the "promote conservation" requirement of the Halibut Act:

> *Promotes conservation.* **Although biological conservation of the halibut resource is not the principal purpose of this rule**, it will promote conservation by fostering a more easily managed charter halibut fishery.

75 Fed. Reg. at 562 (bold emphasis added).

This statement is an admission that the rule will not – nor was designed to "conserve" any halibut. "Conservation" is defined as the "careful preservation and protection of something." *See* Webster's Ninth New Collegiate Dictionary 279 (1991). Not only does the final rule not conserve halibut, but it is not "reasonably calculated" to do so as required by the Halibut Act. "Calculated" is defined as "planned or contrived to accomplish a purpose." *Id.* at 196.

NMFS fails to explain in the final rule how it carefully preserves or protects halibut, much less how it was calculated to do so (*i.e.*, planned or contrived to accomplish the purpose of preservation). Rather, NMFS can only state the final rule is designed to stabilize growth and "foster a more easily managed charter halibut fishery." In short, the final rule is simply a step to economically consolidate the industry and make NMFS' job easier in managing the charter halibut industry; neither of which is a conservation purpose. A close look at the effect of the final rule demonstrates this.

According to NMFS data, there were 404 guided charter operations in Area 2C in 2008. *See* DE #1 Ex. 7 at 207-08.[2] Under the final rule, an estimated 231 guided charter operations

[2] Exhibit 7 to the Complaint is the "Environmental Assessment/Regulatory Impact Review/ Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter

would qualify for a CHP while 173 guided charter operations would not. *Id.* In Area 3A, there were 450 guided charter operations in 2008. *Id.* Under the final rule, an estimated 296 guided charter operations would qualify for a CHP while 154 guided charter operations would not. *Id.* In total there were 854 guided charter operations in 2008 and only 527 would receive a CHP.[3] The final rule would likely have the effect of shutting down approximately 327 guided charter operations for no conservation purpose.

This reduction in charter operators, however, does not mean a reduction in charter halibut harvest. As NMFS admitted in the final rule:

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

See 75 Fed. Reg. at 572 (emphasis added).[4]

The effect of the final rule can be easily demonstrated through a hypothetical: Assume prior to the final rule there was an annual demand of 10,000 halibut anglers provided by 854 charter operators. These 10,000 anglers were allowed to harvest their limits of halibut which equals "amount X." Following implementation of the final rule, the same angle demand of 10,000 anglers will be provided by the remaining 527 charter operators that hold CHPs. These

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Fisheries in IPHC Regulatory Areas 2C and 3A" dated November 6, 2009. This Document is referred to throughout the final rule as the "Analysis."

[3] Each CHP has an angler endorsement that limits the numbers of anglers that can fish on the vessel. For example there are some CHP that will allow four anglers to fish and other that may allow 6, 7, 8, 9 or 10 depending on that operators' previous activity in the industry.

[4] *Id.* at 568 ("These figures indicate that the charter halibut industry will be able to meet recent charter vessel angler demand levels with the number of permits expected to be issued under this rule. Hence, no restriction in guided angler access to the halibut resource is expected under this rule.").

10,000 anglers can still harvest their limits of halibut which is still "amount X." Thus, there is no decrease in halibut harvested (amount X can be the same or greater) because of the final rule. To the contrary, the final rule □ rather than restricting halibut harvest □ allows the halibut harvest to exceed the 2008 levels. *See* 75 Fed. Reg. at 572.

Thus, the net effect of the final rule is that 527 guided charter operations will catch the same amount of halibut (or more) that 854 charter operators caught and will be become much more profitable while 327 charter operators will be put out of business. The effect of shutting down 327 guided charter operations will only serve to enrich the remaining 527 guided charter operations. There is absolutely no conservation purpose in having 527 charter operators catch the same amount (or more) of halibut in 2011 than 854 charter operators caught in 2008. The only purpose for such a rule is economic allocation. Not surprisingly, absent from the Defendants' response and the administrative record, is an explanation of how the reduction in the number of charter operators (from 854 to 527) fishing for halibut – **while the actual harvest remains the same or increases** – is "calculated to promote conservation" of the halibut resource.

The final rule and record is replete with the oft-repeated admission that the final rule is not designed to protect, preserve or conserve any halibut.[5] Perhaps the most succinct response is found in NMFS's answer to the following question asked by Plaintiff Allen Walburn through the U.S. Small Business Administration:

[5] Throughout NMFS's responses to the 156 comments, NMFS reiterated time and time again the final rule will have no impact on the number or quantity of halibut harvested. *See* 75 Fed. Reg. at 564 and responses to comments 6, 14, 18, 21, 23, 25, 26, 29, 37, 43, 134, 140, and 154 therein.

> **8. How many halibut are projected will be saved in 2011 with this program's implementation?**
>
> The limited access program was not designed to limit charter harvest or reduce halibut mortality in the charter fisheries. The Council recommended the limited access program to provide stability for the charter sector and curtail further growth of fishing capacity in the halibut charter fishery.

See DE #8 (underlined emphasis added).[6]

That is correct. Not a single halibut is projected to be saved by the final rule.

Indeed, NMFS candidly admitted such in the final rule:

> This rule limits the number of charter vessels that may participate in the charter halibut fishery and the number of charter vessel anglers that may catch and retain halibut on charter vessels. *This rule is not intended, by itself, to reduce the charter harvest of halibut or the number of fish each angler may catch and retain.* The IPHC takes into account halibut removals by all user groups in establishing the constant exploitation yield (CEY). Past increases in charter halibut harvests have created conservation and allocation concerns that the Council and NMFS have taken steps to address, *but the halibut resource in Area 2C and 3A is being managed in a sustainable manner. . . .*

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

The final rule is not about conserving or protecting halibut; if that were the case, the limits or number of halibut being harvested would in some manner be reduced (*e.g.*, a size limit, number of fish that can be kept per day, number of days in the season, etc.).[7] *See Van Valin v. Locke*, 628 F. Supp. 2d 67 (D. D.C. 2009) (wherein NMFS enacted a one-fish limit in Area 2C as a harvest reduction measure). Rather, what the final rule does in this case is regulate who can

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[6] Notice of Filing Revised Appendix Item A to Plaintiff's Memorandum of law in Support of its Motion for Preliminary Injunction, (March 30, 2011 Correspondence from the U.S. Small Business Administration to Plaintiff Allen Walburn).

[7] As NMFS admits in this case: "Any reduction in harvest by the charter halibut sector during the short term more likely will result from direct harvest controls, such as the daily bag limit reduction for charter vessel anglers in Area 2C...." 75 Fed. Reg. at 571.

catch and keep the same amount of halibut.[8]

As the Defendants noted in their response, the IPHC estimates the total amount of halibut (in net pounds) to be removed from the resource in each year. 74 Fed. Reg. 18178 (April 21, 2009). This estimate or target level is known as the Constant Exploitation Yield (CEY).[9] A CEY is set for each IPHC management area. Only areas 2C and 3A are involved in this case. The CEY of halibut is then allocated among all of the various halibut fisheries which include commercial, sport, and subsistence. Currently, the IPHC estimates the amount of halibut removed by the non-commercial industry (i.e., sport/charter, subsistence, bycatch, and wastage) and subtracts that amount from the CEY leaving the amount of halibut to be harvested by the commercial sector. *Id.* Thus, in any give year the CEY is the amount of halibut that will be removed from the resource by all of the fisheries. As the non-commercial industries' harvest levels rise, the commercial industry's harvest level declines so as not to exceed the CEY.

For example, if the CEY is 20 million pounds for 2011 and the non-commercial industry harvests five million pounds, the commercial industry can harvest 15 million pounds. If, however, the non-commercial industries harvest eight million pounds, the commercial industry can harvest 12 million pounds. The North Pacific Fishery Management Council (North Pacific Council) then estimates a pre-season guideline harvest level (GHL) that is the estimate of the halibut resource that the charter industry should harvest relative to the other non-commercial fisheries. When halibut harvests exceeded the GHL, the Council may seek to enact harvest reduction measures such as it did in 2009 with a one fish limit. *See Van Valin v. Locke*, 628 F.

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[8] Defendants, in numerous memorandums developing the final rule, never mention the word "conservation" or even suggest a conservation purpose; rather, they always describe the final rule as one relating solely to allocation of the resource between commercial and charter operators. *See* Admin. Record bates # 1501-02, 871, 893-94, 896.

[9] In calculating the CEY, the IPHC estimates the exploitable biomass of halibut based on various data and studies.

Supp. 2d 67 (D. D.C. 2009).

As this regulatory scheme indicates, in any give year only the CEY amount of halibut will be harvested. This is the basis for NMFS's conclusion that "the halibut resource in Area 2C and 3A is being managed in a sustainable manner. . . ." *See* 75 Fed. Reg. at 568.[10] The final rule has no impact or effect on the CEY nor does it affect or change how many halibut are being removed from the resource. From a conservation standpoint, it matters not whether a halibut is caught by a tourist on a charter vessel, an Alaskan native, an Alaskan resident, or a commercial vessel; what matters is that a halibut was caught and removed from the resource.

The Defendants cite to *Alliance Against IFQs v. Brown*, 84 F.3d 343 (9th Cir. 1996), an inapposite case that involves a 1993 rule adopting individual fishing quotas for halibut and sablefish ("1993 IFQ rule"), and suggest generally that any limited access program is a "management tool for promoting conservation of the resource." DE #7 at 19. Such a generic broad statement could not be any more inaccurate. More importantly, reference to the *Alliance* case is inappropriate as that case discussed only the "present participation in the fishery" and the "fair and equitable to all fisherman" criteria of any limited access program under the Magnuson-Stevens Act. *See* 16 § U.S.C. 1853(b)(6). The Court did not discuss whether the 1993 IFQ rule promoted conservation as it was not an issue.

Unlike the final rule here, the 1993 IFQ rule in *Alliance* was specifically designed to conserve halibut by reducing "deadloss from lost gear, bycatch loss, discard mortality [and] excess harvesting capacity" among other things. *See* 58 Fed. Reg. 59375, 59376 (Nov. 9, 1993). The conservation purpose of the 1993 IFQ rule in *Alliance* that changed the fishing regime for halibut was aptly explained by NMFS in the rule:

[10] NMFS admits that halibut is not overfished . See http://www.nmfs.noaa.gov/fishwatch/species/pacific_halibut.htm

> Large amounts of fish may be killed but not harvested in this race due to lost or excessive amounts of fishing gear that is set but not retrieved. More halibut and sablefish are wasted when they are caught incidental to the harvest of other species but must be discharged because the season for halibut and sablefish is closed. In addition, harvested halibut must occasionally be returned to the sea because they have been mishandled and are rejected by processors as inferior product.

Id. at 59389. Thus, it was obvious that a conservation purpose existed since the 1993 IFQ rule in *Alliance* was designed to reduce the number of halibut that were killed but not harvested (*i.e.*, wasted). *See* 58 Fed. Reg. 59375, 59376 (Nov. 9, 1993).

The final rule in this case is not "calculated to promote conservation." *See* 75 Fed. Reg. at 568 ("the halibut resource in Area 2C and 3A is being managed in a sustainable manner. . . ."). To the contrary, it does not conserve a single halibut, and worse, is not calculated to do so as required by the Halibut Act. It is merely an economic regulation that forces 327 charter operators out of business. The rule is not intended to protect the reproduction and harvest of halibut; the rule is intended to protect an arbitrary declaration of what constitutes the established halibut charter fleet. In sum, the final rule protects the old guard from newcomers.

In short, the Defendants' recent claim that the rule "promotes conservation" is an afterthought not supported by the administrative record. Because the final rule serves no conservation purpose as evidenced by a current healthy managed halibut resource, the final rule is invalid under the Halibut Act. Accordingly, Plaintiffs are likely to succeed on the merits.

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

The final rule is not consistent with the limited access provisions of 16 U.S.C. § 1853(b)(6) of the Magnuson-Stevens Act which by incorporation in the Halibut Act apply when the Council is creating a limited access system for the halibut fishery. Defendants argue for a

strained interpretation of this statutory section to cherry-pick select criteria from the statute. DE #7 at 21-22. A plain reading of the statute identifies the criteria which NMFS and the rule must meet.

The Halibut Act specifically requires that any "limited access regulations" for halibut "shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of this title." 16 U.S.C. §773c(c). Thus, when the Council is creating a limited access system, the NMFS must abide by the limited access criteria in 16 U.S.C. section 1853(b)(6) of the Magnuson-Stevens Act. Subsection (b)(6) provides:

> **(b) Discretionary provisions**
> Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—
> * * *
> (6) Establish a limited access system for the fishery in order to achieve optimum yield if, in developing such a system, the Council and the Secretary take into account—
> (A) present participation in the fishery;
> (B) historical fishing practices in, and dependence on, the fishery;
> (C) the economics of the fishery;
> (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
> (E) the cultural and social framework relevant to the fishery and any affecting fishing communities;
> (F) the fair and equitable distribution of access privileges in the fishery; and
> (G) any other relevant considerations.

16 U.S.C. section 1853(b)(6) (emphasis added).

1. Optimum Yield

A plain reading of this language makes clear that any limited access system pursuant to (b)(6) must be designed to achieve optimum yield. Defendants complain that the preceding language of subsection (b) and (6) should be wholly ignored and suggest the Halibut Act only really meant to incorporate the subsections of (b)(6)**(A-G)**. DE #7 at 21-22. Such a reading of

the statute is directly contrary to the plain language and violates well-established cannons of statutory construction. *See Swarts v. Siegel*, 117 F. 13 (8th Cir. 1902) ("There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction."); *accord National Trust For Historic Preservation v. Dole*, 828 F.2d 776, 779 (D.C. Cir. 1997). If Congress wanted to incorporate only subsections (A-G), it would have easily done so. For example, Congress would have said "shall be consistent with the limited entry criteria set forth in section 1853(b)(6)(A-G) of this title." Congress, however, did not draft the statute in this manner and Defendants' suggestion that this Court should rewrite the statute should be declined. *Landstar Express America, Inc. v. Federal Maritime Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("As the Supreme Court has repeatedly explained, however, neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes." citing *Norfolk S. Ry. Co. v. Sorrell,* 549 U.S. 158, 171, (2007) and *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 462, (2002)).

Defendants' microscopic focus on the term "limited entry criteria" in the Halibut Act's incorporation clause □ "shall be consistent with the limited entry criteria set forth in section 1853(b)(6)" □ does not support their case. Defendants define "criteria" as "a standard upon which judgment is based." DE #7 at 22. Yet, Defendants ignore that achieving optimum yield is a "standard upon which judgment is based" and thus a "limited entry criteria" under it own definition. Thus, if the limited entry program for halibut does not achieve optimum yield, it does not meet at least one "criteria" of 16 U.S.C. section 1853(b)(6).

The Defendants' claim that optimum yield does not apply to halibut regulation in any circumstance is wrong. DE #7 at 20-22. While no fishery management plan or determination of

optimum yield for halibut may be required under normal circumstances, it is clear that Congress desired those criteria to be applicable to halibut under the Halibut Act in the unique circumstance that NMFS wanted to adopt limited access regulations. Contrary to its current position (DE #7 at 20-22), it appears that NMFS recognized that achievement of optimum yield **was** a criterion when it adopted the 1993 IFQ rule creating commercial limited entry regulations for halibut and sablefish. *See* 58 Fed. Reg. 59375, 59377. In adopting the 1993 IFQ rule for halibut and sablefish in 1993, NMFS discussed the application of the limited entry criteria in 16 U.S.C. section 1853(b)(6) to the halibut IFQ:

> *Magnuson Act Section 303(b)(6)*
>
> Section 303(b)(6) of the Magnuson Act provides for the establishment of limited access management systems in order to achieve OY [Optimum Yield] if, in developing such a system, the Council and Secretary take into account: (1) Present participation in the fishery; (2) historical fishing practices in, and dependence on, the fishery; (3) the economics of the fishery; (4) the capability of fishing vessels used in the fishery to engage in other fisheries; (5) the cultural and social framework relevant to the fishery; and (6) any other relevant considerations. **Section 5(c) of the Halibut Act also requires any limited access regulations for halibut to be consistent with section 303(b)(6) of the Magnuson Act.**
>
> **The IFQ program will enhance the achievement of OY** by reducing the risk of overfishing, decreasing rates of fishing mortality due to deadloss and discard waste, and increasing economic benefits to fishermen and to the Nation.
>
> * * *

See 58 Fed. Reg. at 59379-80 (bold emphasis added, italics in original). Following this statement that optimum yield was met by the IFQ program, NMFS went on to discuss consistency with the other additional criteria.

Furthermore, NMFS recognized in the 1993 IFQ rule that National Standard 1 (entitled

"Optimum Yield") applied to the halibut IFQ program. *See* 58 Fed. Reg. at 59377-79.[11] With respect to National Standards 3, 5, 6 and 7, NMFS clearly indicated in the 1993 IFQ rule that they did not apply to the halibut IFQ program under the Halibut Act by using language similar to the following in the discussion of each of those national standards: "Although the requirements of national standard 5 do not apply to the halibut IFQ program developed pursuant to the Halibut Act . . ." *Id.* at 59378-79. No such language exists in the 1993 IFQ rule when NMFS discusses National Standards 1 (Optimum Yield), 2, and 4.

Having established that NMFS was required to establish optimum yield for halibut if it desired to implement a limited access regulation, it is beyond argument that no optimum yield was established. *See* 75 Fed. Reg. at 559 (NMFS admitting that "specification of optimum yield for halibut . . . has not been determined."). Accordingly, the final rule establishing a limited access system is not valid until optimum yield for halibut in Areas 2C and 3A are determined.

2. Secretary failed to consider the "economics of the fishery" 16 U.S.C. § 1853(b)(6)(C).

Even if a limited access system could be imposed upon the halibut fishery without establishing optimum yield, the Secretary failed to take the remaining section (6) criteria into account. One of the limited entry criteria requires the Council and Secretary to consider the "economics of the fishery." 16 U.S.C. § 1853(b)(6)(C). NMFS did not and could not analyze the economics of final rule on the charter halibut industry because they admit they lacked the required information to do so: the "Analysis does not estimate the number of jobs or amount of gross revenue that would be impacted by implementation of the program."[12] NMFS acknowledging a significant percentage of charter halibut operations (approximately 327

[11] NMFS also recognized that National Standard 2 (entitled "Scientific Information") and National Standard 4 (entitled "Allocations") applied to the halibut IFQ program.

[12] *See* DE #1 Ex. 7 at ix.

operations) will not receive or obtain a CHP, candidly admits that "[t]he number of jobs that would be lost [due to the final rule] was not quantified in the analysis," *See* DE #3 Appendix Item A, and that charter operations that will not receive a permit "will suffer significant adverse economic impacts." *See* DE #1 Ex. 7 at 209.

NMFS is not ashamed of the fact it lacked the data to conduct an appropriate analysis:

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

See DE #3 at Appendix Item B. NMFS even admitted such data was needed and began efforts to collect it:

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

Id.

The Defendants ignore this wholesale lack of information and claim all NMFS had to do was "consider" the "best information available" – even if that was no information – to meet the requirements of the Halibut Act. DE #7 at 26-27. If that is the extent of the Halibut Act's requirement to consider the economics of the industry, then it is no requirement at all. It must mean more. In fact, NMFS recognizes that "[i]n cases where scientific data are severely limited,

effort should also be directed to identifying and gathering the needed data." 50 C.F.R. § 600.310(l)(1).

Obvious from the above, is that NMFS did not and could not even remotely understand the charter vessel business and the impact of eliminating approximately 40 percent of the halibut charter fleet (327 operators) while not saving a single halibut from harvest. With respect to this criterion, the role of this Court is to determine whether NMFS "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). Given the lack of information on the economic impact of removing 327 charter operators from the fleet and the fact that the final rule will not save a single halibut, NMFS has failed to articulate a rational connection between its facts and choice made. Accordingly, this Court should invalidate the final rule.

3. The final rule has economic allocation as its only purpose.

The final rule violates and is inconsistent with NMFS's regulations – National Standard 5 – Efficiency (50 C.F.R. § 600.330) that implements the "economics of the fishery" criteria in 16 U.S.C. section 1553(b)(6)(C). National Standard 5, provides in part, that "no [conservation and management] measure shall have economic allocation as its sole purpose." 50 C.F.R. § 600.330(a). The final rule is designed and calculated solely to cause a consolidation of the guided sport fishery for halibut by "curtailing growth" and stabilizing that industry. As noted above, the final rule is not designed to achieve optimum yield because optimum yield has not been established. As such, any limited access system would instantly violate National Standard 5. See 50 C.F.R. § 600.330(c)(2) (National Standard 5 expressly recognizes that "[t]he Magnuson-Stevens Act ties the use of limited access to the achievement of OY.").

Further, as noted above, the net effect of the final rule is that 527 guided charter operations will catch the same amount of halibut (or more) that 854 charter operators caught and will be become much more profitable while 327 charter operators will be put out of business. There is absolutely no conservation purpose in having 527 charter operators catch the same amount (or more) of halibut in 2011 than 854 charter operators caught in 2008. The only purpose for such a rule is economic allocation. Accordingly, the final rule violates not only the Halibut Act but also is in violation of the NMFS's own regulations and must be invalidated.

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

The Halibut Act requires any such allocation of fishing rights "be fair and equitable to all such fishermen . . . [and] reasonably calculated to promote conservation." 16 U.S.C. § 773c(c) (emphasis added). For the reasons discussed above, the allocation of rights are not calculated to promote conservation. *See supra* p. 3-10. In addition, this Court has specifically noted that "[w]hen determining fairness and equity [of an allocation] the focus is not on the impact of the regulation, but on its purpose." *Van Valin v. Locke*, 671 F. Supp. 2d 1, 11 (D.D.C 2009). As noted above, the purpose of the final rule is economic consolidation – or in NMFS's word to "stabilize growth in the charter halibut fisheries." 75 Fed. Reg. at 560. The final rule will reduce the halibut charter operators from 854 to 527. The 527 remaining charter operations will catch the same amount of halibut (or more) than 854 charter operators caught. Arbitrarily reducing the numbers of charter operators from 854 to 527 and allowing the same amount (or more) of halibut to be caught in 2011 than 854 charter operators caught in 2008, demonstrates the purpose of the final rule is economic. Accordingly, based on the purpose of the final rule, the allocation is not fair or reasonable and should be invalidated. *See Van Valin v. Locke*, 671 F. Supp. 2d 1, 11 (D.D.C 2009) (noting in that case a conservation purpose □ reduction in the number of halibut

harvested □ existed).

II. Plaintiffs will Suffer Irreparable Injury

Defendants, in their response, disingenuously attempt to portray Plaintiffs as not being irreparably harmed and suggest □ with no factual basis □ that the final rule is simply a business expense that each Plaintiff can easily absorb and remain viable despite their sworn testimony to the contrary. DE #7 at 32-33. Defendants conveniently ignore the administrative record and their former admission that final rule is designed to eliminate operators from charter halibut industry. Thus, by the Defendants own admissions they intend to put at least 327 charter halibut operators out of business.

To now suggest or imply – as the Defendants do – that all 327 of the operators can merely buy a transferable CHP to stay in business assumes facts outside the record and is belied by the very purpose of the final rule to consolidate and shrink the fleet. Not all of the 527 CHPs issued are transferable and it would be unreasonable (not to mention speculative) to assume all transferable CHPs would be available for purchase. Thus, not only it is speculative to suggest that the necessary CHPs for Plaintiff are even available, but that Plaintiffs can afford from a business standpoint to buy them.

Even assuming some transferable CHPs were available, the Plaintiffs have testified that the price of the CHPs are cost prohibitive such that purchasing an expensive CHP will not and cannot save the business. The testimony reveals:

Captain Ausman and Crystal Bay Lodge:

> "Very few permits are available and the prices are prohibitive ranging from $40,000.00 for a four-angler permit to $100,000.00 and more depending upon the location and number of anglers authorized under the permit." DE #3 at Appendix C at 3.

Captain Walburn and Kodiak Island Resort (KIR):

> "Without a permanent six-person charter halibut permit, KIR is not a viable operation. Transferable permits are prohibitively costly with permit brokers demanding $70,000.00 to over $100,000.00 depending on the location and number of anglers authorized under the permit." DE #3 at Appendix D at 3.

Captain Roskind:

> "Purchasing a transferable permit is not an economically viable option. Very few such permits are available and, when they are available, range in price from $50,000.00 to over $100,000.00 for a six-pack permit. The cost of a permit would far exceed any net profit I could possibly make during the halibut season. Most COA members face the same situation in that they have been arbitrarily eliminated from the fishery and then priced-out of re-entering the fishery." DE #3 at Appendix E at 2-3.

Defendants ignore this sworn testimony from the charter operators who actually run their businesses and suggest the assumed price of a CHP, assumed to be available, compared to the capital invested in the business is somehow dispositive of whether the business can remain a viable and ongoing business. *See* DE #7 at 33-34. Such a suggestion is completely unsupported by any evidence in the record and improper. Defendants know absolutely nothing about the financial operations of Plaintiffs' businesses. These Plaintiffs have testified that they cannot continue as a business if they have to buy CHPs. Defendants' failure to concede this point considering they presented no sworn testimony to the contrary is inexplicable.

Next, the Defendants brashly suggest that "Plaintiffs have not met their burden of showing that they even require such a permit [CHP] to stay in business, given that none of them alleged that halibut fishing is their sole source of revenue." DE #7 at 34. In making this argument, Defendants must have overlooked the following sworn statements by Plaintiffs:

Captain Ausman and Crystal Bay Lodge:

> "The lodge has many pending bookings for the 2011 halibut and no permit. While the lodge provides inshore fishing for salmon from smaller craft, as an oceanfront lodge, halibut is the featured species and the target species for virtually all bookings; the lodge has no salmon only bookings.
> 6. The lodge cannot be sustained without halibut fishing and Crystal Bay Lodge, LLC, risks losing all of the funds invested to establish the lodge and

charter halibut operation. . . ." DE #3 at Appendix C at 2-3.

Captain Walburn and Kodiak Island Resort (KIR):

"KIR will fail as a business without a charter halibut permit. KIR will be unable to meet its monthly expenses and ultimately will have to go out of business." DE #3 at Appendix D at 2.

"Without a permanent six-person charter halibut permit, KIR is not a viable operation." DE #3 at Appendix D at 3.

From this sworn testimony, it is obvious that without halibut fishing the Plaintiffs' businesses will not survive, regardless if they can derive some nominal income from other services such as whale watching, salmon fishing, etc. Halibut fishing is the foundation of Plaintiffs' businesses; without it, their businesses will fail. *Id.* Thus, Defendants' citation (outside the record) to two Plaintiffs' websites to imply that because they offer services other than halibut fishing, they can somehow remain in business, is misleading at best. Moreover, Defendants fail to cite any law for its zealous claim that Plaintiffs must allege "that halibut fishing is their **sole source** of revenue", DE #7 at 34 (emphasis added), to demonstrate irrepable harm as opposed to the allegation that the inability to halibut fish will cause their businesses to fail.

As the sworn testimony has demonstrated, the final rule does not merely raise the price of doing business and lower profit margins as Defendants suggest, it threatens the very existence of the Plaintiffs' businesses. This Court has previously held that "economic loss may constitute irreparable harm where the loss threatens the very existence of the movant's business" or "where plaintiff has made a showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits." *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 67 (D.D.C. 2000). *See Bracco Diagnostics v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) (recognizing that "admittedly economic" injury amounts to irreparable harm when

"no adequate compensatory or other corrective relief" could be provided at a later date). Accordingly, Plaintiffs have demonstrated that they will be irreparably harmed.

The Defendants next suggest that the Plaintiffs have created their own injury. DE #7 at 34-35. First, this assertion is quite outlandish given that it was the Defendants' adoption of the final rule in its current form that prevents the Plaintiffs from fishing for halibut. The Defendants' reliance on a speculative "control date notice" is also far-fetched. First, the notice itself is speculative and it merely states that the Council may or may not adopt regulations affecting halibut charters and that no-one is guaranteed future participation rights in the halibut fishery. *See* 71 Fed. Reg. at 6,444 (Feb. 8, 2006).[13] Second, beyond publishing some speculative notice in the Federal Register, which NMFS admits "not everyone reads," the agency has recognized a need to expand notice beyond the federal register. *Foss v. National Marine Fisheries Serv.*, 161 F.3d 584, 589 (9th Cir. 1998). NMFS does not suggest it did so in this case. For example, NMFS could have informed the Alaska Game and Fish Department to inform every charter boat license applicant after the December 9, 2005 control date of the control date notice.

Defendants' suggestion that no charter operator should enter the halibut fishery after the December 9, 2005 date, or be prevented from legally challenging any final rule that may result, would instantly transform some speculative notice into a concrete rule that sets the December 9, 2005 date as an established cut-off date. This would defeat the purpose of the APA and make

[13] "This announcement establishes December 9, 2005, as such a control date for determining historical or traditional participation in the charter sport fishery for halibut. This action does not commit the Council or Secretary to any particular management regime or criteria for entry to the charter halibut fishery. Charter vessel operators 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. The Council may choose a different control date, or it may choose a management regime that does not make use of such a date. Finally, the Council may choose to take no further action to control entry or access to the charter halibut fishery." *Id.*

any subsequent rulemaking a futile exercise. As the notice of the control date itself states, NMFS nor fisherman could predict what the Council, a political body, may do in the future.[14]

Moreover, abiding by this control date has not prevented injuries to Plaintiffs' COA' members. Take for example, a charter boat operator that was in business in 2005 with a boat that carries six anglers and then in 2006 upgrades to a boat that can carry 10 anglers (or upgrades to two or three boats). That operator can only qualify for a CHP for the one boat with six anglers. Thus, any lodge owners or operators that were in business in 2005, that expanded their fleet after 2005 are now prohibited from getting CHPs for their fleet additions.

Next, Defendants suggest that Plaintiffs have further created their injuries by "delaying their claims for more than a year." DE #7 at 35. The final rule became effective only on February 1, 2011, a mere two months prior to the filing of this case. Since the publication of the final rule on January 5, 2010, many of the Plaintiffs sought a CHP under the final rule and have only recently been denied a CHP by NMFS. *See* DE #3, Appendix C at 2, Appendix D at 2-3, Appendix E at 2. Moreover, it was not until February 1, 2011 until the first transferable CHPs were issued when it became evident that purchasing a CHP was cost-prohibitive. The Defendants' response in this case that Plaintiffs sued too late is not surprising. Had Plaintiffs sued in January 2010, the Defendants would claim it was premature. According to Defendants, there never would be an appropriate time for Plaintiffs to sue them.

The one case cited by Defendants suggesting a Plaintiff that causes their own injury cannot demonstrate irrepable harm for a preliminary injunction is inapposite. In *Lee v. Christian Coalition of America, Inc.*, 160 F. Supp. 2d 14 (D.D.C. 2001), employees filed a racial

[14] The Council had previously established a "control date" for this very same type of halibut regulation in April of 1997 and chose not to use it in adopting the final rule. *See* 74 Fed. Reg. 18178, 18181 (April 21, 2009) ("In April 1997, during its initial review of an analysis of management alternatives, the Council added a potential cut-off date or 'control date' of April 15, 1997 . . . .").

discrimination lawsuit against the employer and sought an injunction preventing the employer from engaging in retaliatory conduct. One employee was suspended as a result of a verbal assault and threat of physical violence against another employee. Given those facts, the court refused to enjoin the employer from suspending that employee (causing the employee to suffer irreparable harm due to lack of being able to earn a living) because her own actions in assaulting an employee caused her harm in losing her job (not the alleged discrimination by the employer). *Id.* at 33. In this case, it is a government regulation enacted by NMFS that creates the harm sought to be prevented, not Plaintiffs conduct as in *Lee*. Accordingly, *Lee* is applicable.

Plaintiffs are very likely to suffer irrepable if the final rule is not enjoined as it will likely cause the loss □ not of income □ but of their very businesses. Accordingly, the Court should grant the injunction.

III. Injunctive Relief will not Substantially Injure other Interested Parties

Defendants' suggestion that other persons will be injured by the grant of an injunction is unfounded. In addition, the test is whether "the balance of equities tips in [] favor" of the plaintiff, not whether any other person is tangentially affected by the injunction. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008).

First, Defendants assert that some subset of the privileged 527 CHP holders that hold transferable CHPs will be injured because the "value" of their CHPs will be adversely affected. DE #7 at 35-36. Defendants ignore that whatever value these CHPs have is a complete windfall to the CHP holders. Moreover, the granting of an injunction will not prevent anyone of the 527 CHP holders from fishing for halibut. To the contrary, these 527 charter operators will likely benefit from the injunction as they will be able to fish for halibut free from restrictions in the CHPs.

Second, Defendants suggest the grant of an injunction will result in "uncontrolled growth" that may result in future restrictions or limits on halibut harvest. This exaggerated fear is contradicted by the existence of the final rule itself, which provides that the privileged 527 CHP holders will be able to harvest the same or more halibut in 2011 than the 854 operators did in 2008.[15] Thus, any concern that there will be some enormous growth in the halibut charter industry between the time an injunction is granted and the merits of the case is heard is completely unfounded.

Lastly, the Defendants suggest that an injunction has the "potential to adversely affect" other parties. DE #7 at 36. Besides this argument being bald speculation, the Defendants fail to identify or describe how the injunction will adversely affect any person that submitted comments in favor of the final rule, such as the Alaska Travel Industry Association, charter halibut operators that received CHPs, commercial fishing industry associations, and environmental groups.

The equities in this case tip in favor of Plaintiffs. Without the injunction, Plaintiffs and their members (~44) will be put out of business not to mention the rest of the 327 charter halibut operators that did not receive a CHP when no conservation purpose is being served by the final rule. Ensuring the huge economic windfall that NMFS bestowed upon the selected 524 operators that received the CHPs remains intact hardly outweighs the loss of up to 327 businesses and livelihoods. Accordingly, the injunction should be granted immediately to prevent irreparable harm and save the Plaintiffs' businesses as the prime season for halibut fishing begins in May.

[15] *See* text accompanying footnote four, *supra*.

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

The Defendants argue that the public interest will be harmed by disrupting the limited access system created by the final rule that only recently became effective on February 1, 2011. The foundation of the Defendants' argument is that the limited access system is legal and valid. Because the limited access system is illegal and invalid as discussed above, the Defendants argument collapses upon itself. The government has no interest in allowing an illegal limited access permitting system to continue to operate.[16] Eventually, the system must be invalidated and it benefits everyone for that to happen sooner rather than later.

As noted in Plaintiffs' memorandum, the public interest will be further served by preventing the economic waste of numerous small businesses, many in small communities, having to close down their operations. The injunction will also serve the public interest by not unnecessarily and perhaps prematurely depriving the local communities of this economic stimulus that the Plaintiffs and their members bring to communities (e.g., expenditures for fuel, equipment, supplies, and visitors patronizing local hotels, shops and restaurants).

CONCLUSION

Plaintiffs are entitled to a preliminary injunction as each of the four factors articulated in *Mova Pharm. Corp*, 140 F.3d at 1066 weigh in Plaintiffs' favor.

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[16] The public interest is served when an agency is enjoined from acting unlawfully. *See, e.g., Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp 2d 56, 66 (D.D.C. 2004) (noting a "substantial public interest" in ensuring that a federal agency "acts within the limits of its authority").

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed on April 18, 2011, using the Court's CM/ECF system and, therefore, service was accomplished upon the following counsel by the Court's CEM/ECF system:

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