EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, *et al.*, **Plaintiffs,** **v.** **GARY LOCKE, in his Official Capacity as Secretary of the U.S. DEPARTMENT OF COMMERCE, *et al.,*** **Defendants.**	**Civil Action No. 09-0961-RMC**

PROPOSED INTERVENOR-DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Pursuant to the Northern Pacific Halibut Act ("Halibut Act"), the Secretary of Commerce ("Secretary"), acting through the National Marine Fisheries Service ("NMFS"), issued a rule setting a one fish per day per fisherman limit for halibut caught aboard charter boats. 74 Fed. Reg. 21194 (May 6, 2009)("Rule"). The purpose of the Rule is to enforce the quota established for the charter industry. That quota is called the Guideline Harvest Level ("GHL"). The GHL was recommended by the North Pacific Fishery Management Council ("Council") created pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and approved by the Secretary.

Plaintiffs' motion for a preliminary injunction should be denied. Plaintiffs fail to prove that they will suffer irreparable harm between now and when a hearing on the merits can be held. Plaintiffs are not likely to succeed on the merits. The balance of equities and the public interest also weigh against a preliminary injunction. Finally, Plaintiffs' suit is barred by laches.

II. THE LEGAL STANDARDS FOR A PRELIMINARY INJUNCTION

"A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton,* 391 F.3d 251, 258 (D.C. Cir. 2004), *citing Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). It is a remedy to be granted "sparingly." *United Farm Workers v. Chao,* 593 F.Supp.2d 166, 169 (D.D.C. 2009). To obtain a preliminary injunction, a movant must demonstrate that (a) the movant is likely to succeed on the merits, (b) the movant is likely to suffer irreparable injury absent preliminary relief, (c) the balance of equities tips in the movant's favor, and (d) an injunction is in the public interest. *Winter v. Natural Resources Defense Council,* 129 S. Ct. 365 (2008).

III. PLAINTIFFS HAVE NOT ESTABLISHED IRREPARABLE HARM

A. The Legal Standard

While the factors listed in the preceding Part interrelate on a sliding scale, *CityFed Financial Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 747 (D.C. Cir. 1995), the movant must, at a minimum, demonstrate that irreparable injury is likely. *Winter v. Nat. Res. Def. Council,* 129 U.S. at 375. A movant's failure to establish irreparable harm is grounds for denying a preliminary injunction without considering other factors. *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d at 747; *Bill Barrett Corp. v. United States Dept. of the Interior,* 601 F.Supp.2d 331, 335 (D.D.C. 2009); *United Farm Workers v. Chao,* 593 F.Supp.2d at 168-169.

This Circuit has set a high standard to establish irreparable harm. *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 297 (D.C. Cir. 2006). Injunctive relief will not be granted "against something merely feared as liable to occur...." *United Farm Workers v. Chao,*

593 F.Supp.2d at 170-171, *citing Connecticut v. Massachusetts,* 282 U.S. 660, 674 (1931). The moving party must show the alleged injury "is of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d at 297. Further, the asserted injury must be beyond remediation. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Wisconsin Gas Co. v. FERC, 7*58 F.2d 669, 674 (D.C. Cir. 1985), *quoting Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958). "[I]t 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. Dept. of the Interior,* 601 F.Supp.2d at 335, *citing Wis. Gas Co. v. FERC,* 758 F.2d at 674. *See also United Farm Workers v. Chao,* 593 F.Supp.2d at 169.

Injuries resulting from compliance with governmental injury are not irreparable harm. *American Hosp. Ass'n v. Harris,* 625 F.2d 1328, 1331 (7th Cir. 1980). There, plaintiffs complained that a new regulation imposed economic burdens and costs on plaintiffs. The Court found that although not all costs could be recovered, a preliminary injunction was not warranted because plaintiffs had not shown they would suffer irreparable injury pending a final hearing on the merits.

Even the loss of 100% of income resulting from an employer's discharge of an employee rarely constitutes irreparable harm. The "plaintiff must quite literally find himself being forced into the streets or facing the spectre of bankruptcy before a court can enter a finding of irreparable harm." *United Farm Workers v. Chao*, 593 F.Supp.2d at 169, *citing Williams v. State Uni. of N.Y.,* 635 F. Supp. 1243, 1248 (E.D.N.Y. 1986). Similarly, when the government terminated a property lease where the plaintiffs were conducting business the court denied the

motion for preliminary injunction because plaintiffs "failed to demonstrate that their business could not survive, or even thrive somewhere elsewhere.... [T]he plaintiffs might face a transition or modification of their business. This, however, does not amount to a *destruction* of their business." *Barton v. District of Columbia,* 131 F.Supp.2d 236, 247 (D.D.C 2001) (emphasis in original).

Plaintiffs dispute this is the standard for measuring irreparable harm in this jurisdiction. Plaintiffs assert that the applicable legal principle is that virtually any reasonable amount of damages constitutes irreparable harm when the government is a defendant because "Plaintiffs do not have a viable action at law against the Secretary for damages...." Plaintiffs' Memorandum In Support Of Plaintiffs' Motion For A Preliminary Injunction ("Pl. Br.") at 12. Plaintiffs cite two cases for this proposition. *Id.*

Intervenors acknowledge that decisions of the Judges in this District appear to not be entirely consistent. However, the cases relied on by Plaintiffs are 1978 and 1997 cases. In 2008, the United States Supreme Court considered the standards for a preliminary injunction in *Winter v. Natural Resources Defense Council, supra.* The government was the defendant in the underlying action. The Supreme Court had the opportunity to clarify the irreparable harm standard when the government is a defendant. The Court did not read into the irreparable harm standard Plaintiffs' exception when the government is a defendant. The Court insisted on concrete and imminent harm.

Post *Winter* cases in this jurisdiction have held that the economic loss required to satisfy the irreparable harm standard must threaten the very existence of the movant's business. *See Bill Barrett Corp. v. Dept. of the Interior,* 601 F.Supp.2d 331 (D.D.C. 2009); *United Farm Workers v. Chao,* 593 F.Supp.2d 166 (D.D.C. 2009). In each case, the government was the defendant.

Even before *Winter,* Judges in this District recognized that not all decisions in the District were consistent and had begun moving away from and distinguishing the cases relied on by Plaintiffs. For example, in *Amer. Ass'n for Homecare v. Leavitt,* 2008 U.S. Dist. LEXIS 49497 (D.D.C. June 30, 2008) at *10-11, where the government was the defendant, the Court cited the cases relied on by Plaintiffs, noted that they have "not been widely followed," and proceeded to not follow them. There, the argument made by plaintiffs paralleled the argument made by Plaintiffs in the instant case. According to the Court, the argument made by the plaintiffs was that

> because their anticipated losses are not compensable by the future prospect of winning monetary damages [from the government] they need not establish financial ruin.... That reasoning might carry the plaintiffs to victory in other jurisdictions, but this Circuit requires a movant seeking the extraordinary equitable relief of a preliminary injunction to show [that] an injury is certain, great, actual and imminent. *Wisconsin Gas Co. v. F.E.R.C.,* 758 F.2d 669, 674 (D.C. Cir. 1985).

Similarly, in *Coalition for Common Sense in Gov't Procurement v. United States,* 576 F.Supp.2d 162, 168-169 (D.D.C. 2008), the Court did not follow the cases relied on by plaintiffs. The Court found that to satisfy the irreparable harm standard, the damage to the movant must cause extreme hardship or threaten its very existence. Mere economic harm was held to not be sufficiently grave to warrant the extraordinary remedy of a preliminary injunction.

In short, the legal principle Plaintiffs rely on for their definition of what constitutes irreparable harm comes from a line of cases that appear to have lost their vitality, particularly since the Supreme Court ruling in *Winter*. Plaintiffs' legal principle, carried to its logical conclusion, is that whenever the government is a defendant and reasonable monetary damages are uncollectible, then the irreparable harm standard is met. Intervenors do not believe that is the law in this Circuit or in this jurisdiction. Plaintiffs must establish that, absent a preliminary

injunction, the very existence of their business is threatened in the time between when they have moved for a preliminary injunction and when a hearing on the merits can be held. Plaintiffs fail to meet this standard.

B. The Facts

Plaintiffs do not meet the legal standard for irreparable harm and do not qualify for the extraordinary remedy of a preliminary injunction. The inquiry begins with the nature of the harm alleged by Plaintiffs.

Plaintiffs allege they will experience financial losses and that they have business and personal expenses to meet. But no Plaintiff alleges that the demise of his/her business will occur between now and when a decision on the merits is rendered. Only Plaintiff Bierman raises the potential of going out of business and even then he states only that he "could" be put out of business but not until "after September."

Plaintiffs' affidavits supporting their allegations of irreparable harm fail to mention eight facts. First, the national economic recession is a major factor, if not the principal cause, of reduced charter bookings, not the Rule. An April 24, 2009 Wall Street Journal article stated that Alaska tourism is down by as much as 50% this year. Similarly, a May 13, 2009 article in Travel Weekly reported a study showing that the percentage of consumers who said they would "definitely" not be vacationing in Alaska rose by 14% between November 2008 and March 2009. A May 29, 2009 article in the Alaska Journal of Commerce chronicles the problems for the Alaska tourism industry caused by the recession. One resort near Denali National Park, for example, is down 72%, leading one commenter to note "you are a winner in this market if you are down 20%." As to charter boat reservations specifically, press accounts chronicle declines in charter boat bookings of 30% in North Carolina, 20-25% in Florida, and 30-60% in Maryland. A

February 28, 2009 article from the Homer News indicates that charter bookings in Homer (located in Area 3A where there is a two halibut per day rule) are down 40%. Each of these articles are attached to this Memorandum as Exhibit 1.

Plaintiffs themselves admit the economic recession is or may well be the actual cause of their reduced bookings. Plaintiff Yamada, in discussing his reduced bookings, states "We don't know for sure how much is due to the slowing economy and how much is due to the anticipated 'One Halibut Rule'...." Plaintiff Weiser also recognizes that "the economy took a big nosedive." Plaintiff Bierman admits that "even without the bag limit restrictions the lodge industry in Southeast Alaska is facing hard times with the economy falling into recession."

The second fact omitted from Plaintiffs' affidavits is that if the one halibut daily bag limit were indeed the decisive factor in any decline in charter bookings in Area 2C, one would not expect to see declining bookings in Area 3A where a two halibut per day bag limit remains in effect. Following Plaintiffs' logic that clients are basing the decision to spend thousands of dollars to travel to Alaska[1] on the ability to catch a second halibut, one should expect a significant increase in Area 3A bookings as clients "run" from Area 2C so that they can catch a second halibut in Area 3A. Instead, the bookings in Area 3A have declined. Exhibit 1, February 28, 2009 article in Homer News; *see also* Affidavit of Linda Behnken, attached as Exhibit 1 to

[1] Plaintiff Dole, owner of Waterfall Lodge, for example, charges $3,975 per person for a three night/four day stay at his "resort." *See* Exhibit 2 attached to this Memorandum. Plaintiff Van Valin, owner of El Capitan Lodge, offers four nights/four days for $3,695 per person. *See* Exhibit 3 attached to this Memorandum. Plaintiff Bierman, owner of Whale's Eye Lodge, charges $500 per day per person plus a fuel surcharge equal to $25 for every $0.50 for fuel costs above $3.00 per gallon. *See* Exhibit 4 attached to this Memorandum. Plaintiff Weiser, owner of Wild Strawberry Lodge, charges $2,155 per person for three days/four nights. *See* Exhibit 5 attached to this Memorandum. Plaintiff Yamada, owner of Shelter Lodge, charges $2,445 per person for five nights/four days. *See* Exhibit 6 attached to this Memorandum. These rates do not include airfare to and from Alaska. Plaintiff Westlund does not appear to have a website.

Intervenors' Memorandum Of Points And Authorities In Support Of Motion To Intervene ("Behnken Aff."), ¶ 45.

Third, each Plaintiff makes the identical statement: "My business depends on taking recreational anglers fishing...." Conspicuously absent is the statement that the only species on which his/her business depends is halibut. Plaintiffs advertise their charters based on the Alaskan experience and on fishing for multiple species. Charter boats in Area 2C target numerous species including king salmon, coho salmon, chum salmon, pink salmon, red salmon, Pacific cod, ling cod, sablefish, red snapper, rockfish, halibut, and other species. Plaintiffs do not depend solely on halibut for their business and none of their affidavits so state. Each affidavit says the Plaintiff depends on recreational fishing. Like the leasehold plaintiffs in *Barton v. District of Columbia, supra,* Plaintiffs have other ways of doing business.

Plaintiffs' websites are instructive on this point. The most recent newsletter for clients prepared by Plaintiff Dole, Waterfall Lodge, spotlights salmon fishing, hardly mentioning other species and never mentioning halibut. The press release by his General Manager advertised as discussing "the upcoming 2009 season" never mentions halibut, talking only of salmon. The "Fish Chart" on the website showing what species is available during which summer weeks discusses King salmon, coho salmon, humpback salmon, halibut, red snapper, ling cod, and bottom fish (which is noted as having "over 20 edible species available"). After previously running through this list of species available to recreational anglers, the first sentence on the website discussing payment policy and reservations states "Demand for the Resort is extremely high." *See* Exhibit 2.

Plaintiff Van Valin, El Capitan Lodge, posts on his website a "Species Guide" explaining when fish is available during the season. Nine species are listed, of which only one is halibut. *See* Exhibit 3.

Plaintiff Bierman, Whale's Eye Lodge, advertises that "five species of salmon flood" his area. He also advertises halibut, crab, and whale watching. *See* Exhibit 4

Plaintiff Weiser, Strawberry Lodge, tells clients to come to Sitka where "you land trophy King salmon, acrobatic coho, chum, sockeye, or humpback salmon. Our area also sports a wide assortment of bottom feeders; including: Pacific halibut, Lingcod and Red snapper." The website goes on to talk of other reasons to book at Wild Strawberry Lodge including scenic and wildlife photography, crabbing, clamming, shrimping, beach combing, and sightseeing. *See* Exhibit 5.

Plaintiff Yamada, Shelter Lodge, shows his clients a chart of "Fish Runs" when fish are available. The chart lists eight species, of which halibut is only one. *See* Exhibit 6.

The fourth fact Plaintiffs fail to note is that they have cancellation policies that limit refunds and the impact of cancellations. Plaintiff Dole, Waterfall Lodge, has a policy that cancellations "made fewer than 60 days prior to arrival will be assessed a cancellation fee equal to 100% of the total package price." Cancellations fewer than 120 days prior to arrive lose "50% of the total package price." The website states "There are no exceptions to this cancellation policy." *See* Exhibit 2. Plaintiff Van Valin, El Capitan Lodge, requires full payment by April 1. His cancellation policy is that "All deposits are non-refundable." *See* Exhibit 3. Plaintiff Weiser, Wild Strawberry Lodge, requires a deposit of 50% of the package price within 14 days of booking and full payment 30 days prior to arrival. "All Deposits and Monies received are non-refundable for cancellations within 60 days of your scheduled trip, unless your cancelled

dates can be refilled." *See* Exhibit 5. Similarly, Plaintiff Yamada, Shelter Lodge, requires deposits totaling $2,000 per person and full payment by February 28. "All payments are non-refundable on their due date." *See* Exhibit 6.

Fifth, Plaintiffs fail to put their asserted and irreparable losses into perspective. For example, Plaintiff Van Valin testified before the Council in 2007 that his charter business grossed $7 million annually and he netted 15%, just over $1 million. Mr. Van Valin asserts his damages from the Rule come from 42 clients who declined to book (worth $151,200) and from $44,340 in refunds. These amounts are 2.8% of a $7 million business. Plaintiff Dole also testified before the Council in 2007 that his charter business grossed $12 million. His alleged losses from cancellations total $600,000 or 5% of a $12 million business.

Sixth, Plaintiffs imply that the ability to catch a second halibut is the lynchpin of their clients' booking decisions. Although this "critical" factor in booking decisions does not seem to be reflected in a transfer of effort into Area 3A where there is a two halibut per day bag limit and bookings appear to be down 40%, it would seem as if someone wanting to target halibut would do so for two reasons – (i) halibut is a challenging gamefish to land like marlin or swordfish (an unlikely reason given that according to the Alaska Department of Fish and Game the average charter caught halibut weighs only 19 pounds), or (ii) the food potential (again unlikely given that a 19 pound halibut will yield about 8-9 pounds of edible meat). Behnken Aff., ¶ 24. To put the food issue into perspective, it is noteworthy that the daily cost of a charter lodge is typically $500-$1,000, not including the cost of traveling to Alaska.

Seventh, Plaintiffs and their clients knew that in 2007 NMFS had proposed a one halibut bag limit for the 2008 fishing season and in December 2008 proposed that limit for 2009. Plaintiffs make no showing that people cancelling bookings did not know about the issue of the

one halibut rule at the time of the booking and are not now cancelling because of the economic recession and its effect on them. In that regard, it is interesting that Plaintiff Yamada, Shelter Lodge, explains on his website that clients will be limited to one halibut per day. *See* Exhibit 6. In contrast, Plaintiff Dole, Waterfall Lodge, tells clients they can catch two halibut per day. *See* Exhibit 2.

Finally, the affidavits from client fishermen attached to Plaintiffs' Complaint merit careful review. No doubt inserted to "prove" customers are going elsewhere, each of the affidavits says "I will not be fishing in Southeast Alaska after this year." That means they are fishing in Southeast Alaska this year and the "harm" allegedly established by these affidavits is not of the imminence to justify a preliminary injunction.

Plaintiffs attempt to portray NMFS as conceding irreparable harm by quoting the preamble to the Rule out of context. NMFS does not say that business failure and bankruptcy "will" result from the Rule, let alone that it will occur between now and when a decision on the merits will occur. NMFS does note that it is "most likely accurate" that charter operators may modify their operations to take advantage of other southeast Alaska resources. 74 Fed. Reg. 21194, 21210 (May 6, 2009), Response to Comment 63. Judging by the number of species other than halibut advertised on Plaintiffs' websites and the other activities also advertised, it would appear Plaintiffs are doing just that.

In sum, Plaintiffs may experience some harm from the Rule, but Plaintiffs fail to meet their burden of establishing the immediate, irreparable harm between now and when a decision on the merits will occur that is necessary to support a preliminary injunction.

IV. THE FAIR AND EQUITABLE ARGUMENT: PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Plaintiffs assert the Rule is unlawful because the GHL imposes unfair and inequitable restrictions on the charter industry. Pl. Br. at 5. To meet its burden of persuasion that the plaintiff is likely to prevail on the merits, there must be a "substantial" indication of likely success. *United Farm Workers v. Chao,* 593 F.Supp.2d at 168, *citing Am. Bankers Ass'n. v. Nat'l Credit Union Admin.,* 38 F.Supp.2d 114, 140 (D.D.C. 1999).

A. The Legal Standard

Regulations developed by the Council under the Halibut Act shall not discriminate between residents of different states and, if it is necessary to allocate fishing privileges among U.S. fishermen, "such allocation shall be 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 manner that no particular individual, corporation or other entity acquires an excessive share of the halibut fishing privileges." 16 U.S.C. § 773c(c).

Plaintiffs raise only the fair and equitable issue, conceding the Rule is "reasonably calculated to promote conservation," does not "discriminate between residents of different states," is structured so that no person "acquires an excessive share" of halibut fishing privileges, and is "based upon rights and obligations in existing Federal law."

The provision of the Halibut Act containing the fair and equitable standard is based on National Standard 4 ("NS 4") of the MSA.

> Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be: (1) fair and equitable to all such fishermen; (2) reasonably calculated to promote conservation; and (3) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851(a)(4).

The only difference in the fair and equitable provision of the Halibut Act and that in the MSA is the addition of the word "halibut" before "fishing privileges" in the former. There are no regulations or case law interpreting the fair and equitable standard in the Halibut Act. There are, however, detailed regulations (50 C.F.R. 600.325) and a substantial body of judicial precedent interpreting the fair and equitable standard in the MSA. It is those regulations and precedents to which NMFS and the regulated community look for guidance in applying the Halibut Act. 74 Fed. Reg. at 21214, Response to Comment 74.

Opponents of MSA fishery management plans ("FMPs") often allege the FMP is not "fair and equitable." The argument, identical to that of Plaintiffs, is that the phasing out, termination, or severe restriction of one user group cannot possibly be fair and equitable to "all" fishermen. Implicit in this reasoning is the argument that fishermen have a protected right to participate in a fishery.

The NS 4 regulations reject the "right to participate" argument. "Inherent in an allocation is the advantaging of one group to the detriment of another." 50 C.F.R. 600.325(c)(3)(i). The courts have concurred.

Amendment 14 to the Gulf of Alaska Groundfish FMP was characterized by its opponents as "effectively excluding pot fishermen and trawlers from this fishery." Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 1, *Alaska Factory Trawler Ass'n. v. Baldridge,* 831 F.2d 1456 (9th Cir. 1987). Similar to the instant case where limitations on one group (the charter industry) are justified because of the impact of their activities on other participants in the fishery and on the resource, Amendment 14 was justified as a response to the adverse social and economic impacts on hook and line fishermen and on Alaska

coastal communities occurring because of the shift away from southeastern Alaska processing plants caused by the rapidly increasing harvesting capacity of pot fishermen and trawlers. 50 Fed. Reg. 43196 (October 25, 1985). The Court considered the social and economic rationale offered by the Council and the Secretary and found the FMP consistent with NS 4's fair and equitable standard even though the complete phase-out of the pot fishery and the substantial restrictions on the trawlers might have "some discriminatory impact." 831 F.2d at 1460.

In *National Fisheries Institute v. Mosbacher,* 732 F. Supp. 210 (D.D.C. 1990), the issue was the Atlantic Billfish FMP which effectively closed the Atlantic Ocean and Gulf of Mexico to the commercial billfish fishery. The plaintiffs in that case asserted: "This kind of exclusive allocation to one user group ... is fundamentally incompatible with the 'fair and equitable' criterion." Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for Summary Judgment at 52, *National Fisheries Institute v. Mosbacher, supra.* Against this factual backdrop, *i.e.*, the elimination of commercial fishermen from the fishery, the Court said: "Merely because these provisions have a greater impact upon one type of gear user or group of fishermen does not necessarily mean that they violate National Standard 4." 732 F. Supp. at 225.

In *C&W Fish Company v. Fox,* 745 F. Supp. 6 (D.D.C. 1990), *aff'd,* 931 F. 2d 1556 (D.C. Cir. 1991), the plaintiffs challenged a ban on drift gillnets in the Atlantic king mackerel and coastal pelagic fishery. Plaintiffs argued the ban was not fair and equitable because "[i]t does not provide equitable access to the resource among competing user groups. Instead, it eliminates one user group altogether...." Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for Summary Judgment at 48, *C&W Fish Company v. Fox, supra.* Plaintiffs also asserted there was enough fish for all user groups and that the banned drift

gillnetters could be accommodated in the fishery without adversely affecting the harvest share of other user groups. *Id.* at 48-49.

The Secretary's reasons for rejecting the plaintiffs' arguments are instructive. The Secretary recognized that eliminating draft gillnet fishermen from the fishery would have "significantly adverse effects on drift gillnet operators...." 55 Fed. Reg. 14833, 14835 (April 19, 1990). Nevertheless, and as is the case here, the Secretary concluded the drift gillnet fleet disrupted the operations of the traditional user group, hook and line fishermen, and, therefore, "unfairly disadvantages the hook-and-line fishermen." *Id.* In fact, the preamble to the regulations implementing the FMP explained: "The intended effects of this rule are: (1) to prevent adverse effects on users of traditional hook-and-line gear, and (2) to prevent adverse effects on other fishery resources taken as a by catch of drift gillnets." 55 Fed. Reg. 14833, 14833-14834 (April 19, 1990).[2] In considering the fairness and equity issue, the Court found the following facts:

> A significant portion of [C&W Fish Company's] business is devoted to trade in Atlantic king mackerel and it reports that it is heavily dependent on vessels using drift gillnets for its supply of king mackerel.... Plaintiff Inlet Fisheries, Inc....reports that Atlantic king mackerel represents 30%-40% of its product. It states that 70% of its purchases of Atlantic king mackerel come from the drift gillnet fleet.... Plaintiffs James Jeffrey Allman and Bruce Stiller are commercial fishermen who use drift gillnet gear in their business.... Allman reports that between April and October, there is no other fishery in which his boat can profitably engage.... [Stiller] reports that there is no other fishery in which his vessel can readily and economically be utilized.... Both men state that their economic livelihood will be jeopardized if the Challenged Rule remains in effect.

[2] The justification advanced by the Secretary in *Alaska Factory Trawler Ass'n. v. Baldridge,* for approving the Amendment 14 phase-out of pot fishermen was very similar. The preamble to the final regulations stated: "To allow pot vessels to continue to participate and to expand their efforts in the fishery indefinitely would be unfair to the hook and line fishermen." 50 Fed. Reg. 43193, 43195 (October 24, 1985).

745 F. Supp. at 7. Nevertheless, the Court approved the FMP. This decision was appealed and upheld. *C&W Fish Co. v. Fox,* 931 F.2d 1556 (D.C. Cir. 1991).

Other cases have followed these precedents. *Sea Watch Int'l v. Mosbacher,* 762 F. Supp. 370, 376-78 (D.D.C. 1991), held that an allocation that would drive smaller fishing fleets out of business did not violate NS 4 because inherent in any allocation is the advantaging of one group to the detriment of another. In *National Coalition for Marine Conservation v. Evans,* 231 F.Supp.2d 119 (D.D.C. 2002), plaintiffs challenged area closures under the governing FMP that prohibited commercial fishing in certain areas. Finding the area closures were not an allocation, the Court went on to say even if they were an allocation, the closures (which shut down commercial fishing) did not violate the fair and equitable standard.

In *United Boatmen of New Jersey v. Mosbacher,* 1992 U.S. Dist. LEXIS 664 (D.N.J. Jan. 23, 1992), the FMP imposed a daily bag limit on recreational fishermen. The purpose of the bag limit for bluefish catches was to enforce a new allocation between the commercial and recreational sectors. The FMP awarded the commercial sector, whose highest recorded catch was 12% of the allowable harvest, 20% of the allowable harvest. The recreational sector, which previously accounted for 90% of the harvest, was cut to 80%. NMFS defended the allocation stating:

> The allocation between the recreational and commercial fisheries will insure that the traditional users and fisheries for bluefish are preserved.

55 Fed. Reg. 187289, 18730 (May 4, 1990).

Although the FMP allowed recreational fishermen to obtain commercial permits, charter boat operators and recreational fishermen argued this was only a fig leaf to justify an increased allocation to the commercial sector. These plaintiffs argued, as do Plaintiffs here, that (1) the recreational sector contributed more money to the economy than the commercial sector, (2) the

FMP ignored the importance of bluefish to "the quality of the recreational fishing experience," *Id.* at *6, (3) the regulation "significantly" expanded the commercial fishery at the expense of the recreational sector, and (4) the record contained "sparse" information and justification for this reallocation. The Court noted "the Act permits discrimination against either sector to achieve the conservation and management goals" of the FMP. *Id.* at *16. The Court went on to say that even if plaintiffs' arguments were true, "the advantaging of one group over another (*e.g.,* by increasing its allocation of the catch) does not constitute unfair treatment under the Act." *Id.* at *16-17. The Court found the FMP and the bag limit had the legitimate objective of preventing the charter boat/recreational sector from overfishing of its quota.

Plaintiffs' argument that they have a right to the fish and that an allocation restricting their fishing, even putting some out of business, is unfair and inequitable has no basis in law.

B. The Facts

But surely the agency cannot simply allocate fish without some reason. The NS 4 regulations and the courts address this issue directly. The regulations state an allocation meets the fair and equitable standard if it furthers a legitimate conservation and management objective. 50 C.F.R. 600.325(c)(3)(i). The courts have found the regulation/allocation to be fair and equitable if there is a legitimate social, economic, or conservation objective for the regulation.

One such objective is to prevent the unrestrained growth of one sector from adversely affecting other sectors. In *Alaska Factory Trawler Ass'n. v. Baldridge, supra,* a legitimate objective was redressing the adverse social and economic impacts caused by the rapid growth of certain commercial fisheries on other commercial fisheries. Regulations eliminating one commercial fishery and substantially restricting another were found to be fair and equitable in order to mitigate the impacts of these rapidly growing sectors on existing sectors. *Alaska*

Factory Trawlers Ass'n. v. Baldridge, 831 F.2d at 1460. The parallel to the instant case is remarkable.

Similarly, in *C&W Fish Co. v. Fox,* addressing the disruptive impact of one type of fishing on traditional user groups was a legitimate management objective and the ban on the new gear type was found to be fair and equitable. *C&W Fish Co. v. Fox,* 745 F. Supp. at 7, *aff'd*, 931 F.2d 1556 (D.C. Cir. 1991). In *United Boatmen of N.J. v. Mosbacher,* a reduction in the recreational quota and a daily bag limit designed to constrain charter boat operators and recreational fishermen to their quota was found fair and equitable because requiring both the recreational and the commercial sectors to live within their quota was a legitimate conservation and management objective.

The reality of the instant case is that Plaintiffs want to continue fishing at whatever level their fishing capacity allows at the expense of others. The GHL was established for legitimate fishery conservation and management objectives, consistent with the precedents cited above, and meets the fair and equitable standard.

Since the GHL was established in 2003, our inquiry into its objectives and the fair and equitable standard begins there. The origins of the GHL are found in the Problem Statement adopted by the Council in 1995. The Problem Statement, as its name implies, identifies the issues the Council, through the GHL, sought to solve. "Specifically, the Council notes the following areas of concern with respect to the recent growth of halibut charter operations ...." 67 Fed. Reg. 3867 (Jan. 28, 2002). Chief among those concerns was:

> 1. Pressure by charter operations may be contributing to localized depletion in several areas.
>
> 2. The recent growth of charter operations may be contributing to overcrowding of productive grounds and

> declining harvests for historic sport and subsistence fishermen in some areas.
>
> 3. As there is currently no limit on the annual harvest of halibut by charter operations, an open-ended reallocation from the commercial fishery to the charter industry is occurring. This reallocation may increase if the projected growth of the charter industry occurs. The economic and social impact on the commercial fleet of this open ended reallocation may be substantial....
>
> 4. In some areas, community stability may be affected as traditional sport, subsistence, and commercial fishermen are displaced by charter operators.

Id.

To address the problems, present and future, caused by no quota limits on the charter industry harvest, the Council adopted the GHL. The GHL was set to "effectively limit further growth" of the charter industry in order to avoid the economic, social, and conservation issues identified in the Problem Statement. 67 Fed. Reg. at 3868. The GHL was set at 125% of the then existing charter harvest level to allow for some growth while fully accounting for present participation in the charter fishery. *Id.* The GHL was structured so that it would fluctuate according to overall resource abundance, but always subject to the cap of 125% of the then existing harvest levels. *Id.* Because the Council had fully accounted for present participation in the fishery by the charter industry, setting the GHL well above that level, there was no need at that time to adopt measures to enforce the GHL. Nevertheless, the preamble to the proposed rule establishing the GHL specifically mentioned the imposition of daily bag limits as a tool to be used to enforce the GHL should the charter industry grow beyond 125% of its current harvest. *Id.* at 3869.

The Council had legitimate conservation and management objectives that the GHL sought to achieve. As in *Alaska Factory Trawlers Ass'n. v. Baldridge* and *C&W Fish Co. v. Fox,*

the Council and NMFS sought to limit the rapid growth of the relatively new charter boat industry in order to minimize the economic and social impacts of that growth on commercial and subsistence users of the resource. Plaintiffs do not challenge that this is a legitimate fishery management objective. Instead, Plaintiffs resort to claiming that there was no official "determination" that the GHL is fair and equitable. Plaintiffs seem to be searching for a declarative sentence "The GHL is fair and equitable because ...". No court has ever declared an FMP unlawful due to the absence of such a sentence. Rather, courts look to see if there is a legitimate fishery management objective and if the Secretary has provided a reasonable explanation of how the management plan achieves that objective.

At the outset of our inquiry into whether the establishment of the GHL was rationally connected to the Council's and NMFS' objectives, recall that to protect and balance the interests of one set of fishermen against another, the complete and total termination of a fishery sector has been held to be fair and equitable. Here, there was no elimination of a sector. Here, the charter industry was allocated more fish than it was then harvesting. It is hard to argue that allocating the charter sector more fish than all of its existing participants were harvesting is not fair. The Council and NMFS, through the Council's Problem Statement, the ten year record involving over 20 Council meetings in which the GHL was developed, and the GHL rulemaking, fully explained that the GHL cap was designed to limit growth in the charter sector in order to address the fishery management issues raised in the Problem Statement.

In the final rule approving the GHL, NMFS explained the rationale for the allocation. NMFS set the background regarding the need for the GHL by explaining that the commercial halibut quota is the amount of fish left over after the charter and other harvests are subtracted from the total allowable harvest. 68 Fed Reg. 47256, 47257 (Aug. 8, 2003). NMFS went on to

explain that "[t]his final rule is the result of ongoing efforts by the Council to address allocation concerns between the commercial IFQ halibut fishery and the guided recreational fishery." *Id.* at 47257. NMFS then explained that without a cap on the charter industry harvest, there was an "open-ended allocation" to the charter industry. *Id.* "Hence, as the guided recreational fishery expands, its harvests reduce the pounds available to be fished in the commercial halibut fishery and, subsequently, the value of quota shares (QS)...." *Id.* NMFS stated that the "ever increasing harvests in the [charter] fishery may make achievement of Magnuson-Stevens Act National Standards [including NS 4] more difficult." *Id.* Of particular concern was the:

> ability to maintain 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.

In sum, NMFS explained the GHL was a balance. The rapidly growing charter industry was new compared to the subsistence and commercial sectors. The Council and NMFS sought to accommodate and balance the needs of all users. The GHL recognized the present participation of the charter industry, allowing for a growth in that harvest, and recognized the socioeconomic issues confronting commercial and subsistence users caused by no limit on the charter industry. NMFS explained the fishery management objective and how the GHL achieved that objective by capping the participation of the charter fleet in the fishery at 125% of its current fishing level. NMFS explained that should the charter industry grow beyond 125% of its current level, then management restrictions would be imposed to enforce the GHL, including daily bag limits. *Id.* at 47259. Plaintiffs are not likely to succeed in their argument because the GHL was adopted for a legitimate fishery management objective and NMFS fully explained why that was the case.

Nevertheless, Plaintiffs seize on the statement in the final rule establishing the GHL that NMFS would later examine specific management measures. In Plaintiffs' view, this statement coupled with the absence of a declarative sentence "The GHL is fair and equitable because ..." means no one considered the fair and equitable when the GHL was established in 2002 and 2003. Not only have Plaintiffs chosen to ignore the 2002 and 2003 record, but they have taken the one paragraph out of context.

The paragraph in the final GHL rule that Plaintiffs misinterpret reads as follows:

> The suite of harvest restrictions recommended by the Council and published in the proposed rule may be one of the alternatives that is analyzed in subsequent rulemaking if the GHL is exceeded. The Council may choose other reasonable alternative harvest reduction restrictions if the GHL is exceeded.

Id. This paragraph simply recognized there was no present need to establish management measures to restrict charter fishing because the GHL was set at 125% of the current charter harvest. Given that fact, management measures were not needed. If the GHL was exceeded, then management measures would be appropriate. But those measures would enforce the GHL. They would not change the GHL allocation. Among the suite of management measures recommended by the Council at the time the GHL was established was the one halibut per day rule. 67 Fed. Reg. at 3872.

The Council devoted over 10 years and more than 20 meetings to discussing the appropriate GHL and to establishing a fair and equitable management program. Behnken Aff., ¶ 20. Not only did the Council and NMFS explain their fishery conservation and management objectives and the relationship of the GHL to those objectives, but the debate about whether the GHL was fair and equitable presented the same issues that Plaintiffs, who never challenged the GHL, are raising seven years later.

The fair and equitable issue was directly and specifically raised in comments on the proposed GHL rule in 2002. The preamble to the final rule noted that the principal reasons given by commenters supporting the proposed GHL rule was that it established "an equitable allocation between sport and commercial harvests." *Id.* at 47260. These commenters talked about the unfair and inequitable results for the commercial fishery resulting from a constant reallocation of fish from that fishery to the charter sector as the charter industry increased its harvest and that harvest was deducted from the commercial quota. *Id.* Other commenters spoke of the need to protect the health of the resource by preventing overfishing and the localized depletion caused by concentrated charter industry fishing. *Id.*

Then, as now, the charter industry opposed the GHL as unfair and inequitable. Then, as now, charter industry commenters said the charter harvest was a relatively small portion of the overall harvest. NMFS responded that the Council established the GHL as a necessary "upper limit" on the charter harvest in order "to maintain the existing harvest distribution" between the commercial and recreational sectors. *Id.* Response to Comment 1.

Then, as now, charter industry commenters argued their fishery provided greater overall economic benefits. In response, NMFS noted that the data on relative economic benefits did not show that charter operations uniformly provided a greater economic benefit to Alaska and that economic issues were only one factor in making the determination of whether the GHL was "fair and equitable." *Id.* at 47260-61, Response to Comment 2.

Then, as now, charter industry commenters asserted the GHL served no conservation purpose. In response, NMFS noted the concerns about localized depletion caused by concentrated charter industry fishing and that the International Pacific Halibut Commission ("IPHC"), created by a treaty between the U.S. and Canada, would be the entity responsible for

addressing resource concerns. *Id.* at 47261, Response to Comment 3. Subsequently, the IPHC has indicated that exceeding the GHL is an important conservation issue. The IPHC has consistently stated: "The achievement of the Commission's conservation mandate is dependent on adherence to catch limits and total yield." *See* Behnken Aff., Appendix B, Letter from Bruce Leaman, Executive Director, IPHC, to Stephanie Madsen, Chair, Council, Dec. 1, 2006.[3] The biological threat from charter overfishing was restated emphatically by the IPHC in 2009. "The Commission certainly views the recent harvests and current stock status in Area 2C as a conservation concern.... The assertion ... that overages of the GHL by the charter sector do not represent a conservation concern ... is incorrect. Lack of adherence to limits imposed on any sector can result in the Commission exceeding its management targets for a given area.... Uncontrolled harvest by the charter fishery, or harvests in excess of the identified GHL levels ... will result in negative impacts on the Commission's ability to meet its stock management goal and delivery of yield to all user groups." *See* Behnken Aff., Appendix A, Letter from Bruce Leaman, IPHC Executive Director, to Linda Behnken, April 13, 2009. Absent the Rule, there is no reason to expect the charter industry will harvest less than the 1.9 million pounds it took in 2008, or 2.4 times the 2009 GHL of 788,000 pounds. *See* Behnken Aff., ¶ 27 and Appendix A.

Then, as now, charter industry commenters asserted the GHL unfairly contradicted NMFS' commitment to promote recreational fisheries. In response, NMFS noted that this

[3] In 2007, the IPHC also wrote the Secretary about the conservation threat caused by charter boat overfishing stating that "overharvesting puts at risk the achievement of IPHC management goals for the halibut stock." *See* Behnken Aff., Appendix C, Letter from Jim Balsiger, Chairman, IPHC, to Secretary of Commerce Carlos Gutierrez, January 23, 2007. In 2008, the IPHC wrote the Council stating "[t]he lack of compliance with the GHL targets will exacerbate the present conservation problem in Area 2C. Estimates of exploitable biomass for Area 2C have decreased markedly in recent years and the lack of adherence by the charter fishery to the [GHL targets] in turn frustrates the ability of the IPHC to meet its management targets." *See* Behnken Aff., Appendix B, Letter from Bruce Leaman, IPHC Executive Director, to Council, Sept. 19, 2008.

commitment did not diminish NMFS' responsibility to address allocation issues and to manage recreational fisheries consistent with the Halibut Act, including its fair and equitable standard. *Id.* at 47261, Response to Comment 5.

Then, as now, charter industry commenters asserted the proposal to establish a GHL did not consider its socioeconomic impacts. In response, NMFS referred commenters to the existing socioeconomic analyses. *Id.* at 47262, Response to Comment 4, and 47263.

The debate over seven years ago regarding whether the GHL was fair and equitable is the same debate Plaintiffs want to have today. The question of whether the GHL is fair and equitable has been asked and answered. Plaintiffs did not challenge the GHL then and, as discussed below, are precluded by laches from doing so now.

To complete the cycle of analysis, it is helpful to also review the 2009 Rule. In the preamble to that Rule, NMFS reminded the public that (1) when the charter sector exceeds it GHL, the result is a reallocation from the commercial fishermen, thwarting the fishery management objective already established by the Council and NMFS, and (2) when the charter industry exceeds its GHL, it causes a conservation problem because the overall annual harvest limits set by the IPHC assume every sector will stay within its quota. 74 Fed. Reg. at 21194.

In commenting on the proposed rule, charter industry opponents asserted the GHL is "neither fair nor equitable," just as they did in 2002. In response, NMFS stated the GHL is intended to keep the charter harvest within limits for the reasons set forth when the GHL was established. *Id.* at 21203, Response to Comment 31. *See also id.* at 21202-21203, Response to Comment 28.

Another commenter on the 2009 Rule asserted the GHL is not fair and equitable and NMFS has never made a determination that the GHL is fair and equitable. Not only is this issue

addressed above but, in response, NMFS traced the history of the 1995 Council Problem Statement and the purpose of the GHL being to fulfill management objectives that included limiting the growth of one sector that was causing a reallocation from other sectors. NMFS also pointed out that the GHL was based on the historic usage of the resource. *Id.* at 21214-15, Response to Comment 74.

There are numerous factors that can enter into a determination of fairness and equity. Among those factors can be the achievement of legitimate fishery management objective (discussed above and also discussed in the preamble to the Rule at 74 Fed. Reg. 21214-21219), the conservation issues associated with making certain that every sector lives within its allocation (discussed at 74 Fed. Reg. 21196-21202), the nature and purpose of the allocation (discussed at 74 Fed. Reg. 21202-21208), the economics of the fishery (discussed at 74 Fed. Reg. 21208-21214), and the viability of alternate management measures (discussed at 74 Fed. Reg. 21219-21222). The fair and equitable issue has been fully debated and considered.

C. Summary and Conclusion

Courts have repeatedly rejected challenges under NS 4's fair and equitable standard even where the allocations threatened the survival of segments of the fishing industry. Balancing the needs of a new and rapidly growing industry sector such as the charter fleet with the needs of existing fishery participants is a legitimate fishery management objective that justifies an allocation under the fair and equitable standard. And recall when considering the fairness of the GHL allocation that the GHL charter industry allocation was set at 125% of their existing harvest levels. This was done at the expense of other user groups but in a way that fully accounted for the present participation of the charter industry. Once a quota allocation is established, it is also a legitimate fishery conservation objective to establish a management program designed to keep

each sector within its quota. If one sector consistently exceeds its allocation, overfishing results, to the detriment of the resource. NMFS in 2002 and 2003 and again in 2009 fully explained the rationale for the GHL and how it satisfied the Halibut Act.

V. THE PRESENT PARTICIPATION ARGUMENT – PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS

Again, Plaintiffs fail to meet their burden of showing there is a "substantial" likelihood of success. *United Farm Workers v. Chao,* 593 F.Supp.2d at 168. Plaintiffs argue the 2003 GHL and the regulations enforcing it are flawed because they fail to recognize that the charter fleet is now capable of harvesting 1.9 million pounds of halibut. The argument is "Because we can harvest more, we should get more" and the GHL should be ignored. In short, Plaintiffs want a new GHL allocation that reduces the commercial quota and adds to the charter quota.

Of course, this is a never ending argument. If Plaintiffs' legal theory is adopted, every time the charter industry increases its capacity, its "present participation" must be recognized, the commercial allocation reduced, and more fish given to the charter industry. Conveniently, Plaintiffs ignore the flip side of this argument. Plaintiffs' legal argument would apply with equal force to the commercial sector and to the consideration of that sector's "present participation." Plaintiffs forget that the commercial fleet has the capacity to harvest more than its quota. In the last four years, the commercial quota has been cut by 54%. 74 Fed. Reg. at 21207, Response to Comment 46. The capacity exists to catch more fish than allowed by the commercial quota. Unlike the charter industry, however, the commercial sector has abided by and lived within its quota. Using Plaintiffs' logic, the commercial fleet should employ the "present participation" argument and receive more fish because it has the present capacity to catch more fish.

But say the Plaintiffs, we the charter industry are actually catching 1.9 million pounds of halibut and that is our "present participation" while the commercial sector is not fishing to its

capacity and, therefore, the commercial sector's present participation is less than its present capacity. The problem with this rhetoric is that the only reason the charter industry is catching this amount of fish is because they have ignored their allocation and have been fighting its enforcement using political efforts and in court. In contrast, the commercial sector has never exceeded its quota. Behnken Aff., ¶ 25. If the legal principle advocated by Plaintiffs is adopted, then it applies to all sectors. If Plaintiffs' legal principle becomes the governing law, then the commercial sector should follow the charter industry's example, ignore its quota, fish to its capacity, and argue that its "present participation" means it must get a larger quota.

The problem is that someone has to make an allocation and enforce it in order to protect the resource from overfishing. In the case of the charter industry, that allocation was made in 2003 in the form of the GHL. Rather than admit the dysfunctional result of its "present participation" argument, Plaintiffs try to argue that the GHL was never intended to be an allocation.

Plaintiffs cannot in 2009 rewrite history to pretend the GHL was some mythical number with no meaning. "The GHLs are established as a total maximum poundage" for the charter industry. 68 Fed. Reg. 47257, 47258 (Aug. 8, 2003). "[T]he GHL was to provide a limit on the total amount of harvests in the guided fishery...." 68 Fed. Reg. at 47259. NMFS later reaffirmed "it is the Council's policy that the charter vessel fishery should not exceed the GHL." 73 Fed. Reg. 30504, 30505 (May 28, 2008). *See also* 73 Fed. Reg. 78276, 78277 (Dec. 22, 2008) ("the Council's intent [is] to limit the [charter boat] catch to the GHL.") The preamble to the Rule states: "The GHL was developed by the Council and approved by NMFS as an allowable level of harvest for the charter vessel fishery...." 74 Fed. Reg. at 21202.

Plaintiffs cannot credibly say that when the GHL was adopted that the Council and NMFS did not fully consider present participation. Present participation was fully considered and accounted for because the GHL was set at 125% of the then existing charter harvest. In other words, each and every present participant was protected. Their harvest levels could grow by 25% above current levels before reaching the GHL.

But Plaintiffs and their industry brethren ignored the GHL. They increased fishing capacity and pretended the GHL did not exist, exceeding it by 22% in 2004, 36% in 2005, 26% in 2006, 34% in 2007, and 106% in 2008. Having violated the GHL, they now ask to be rewarded by (1) having present participation "considered," (2) being awarded a larger quota, and (3) reducing the commercial quota to accommodate the charter industry harvest. But this is precisely the result the GHL was intended to prevent. The GHL, among other things, set the allocation between the commercial and charter boat sectors. Plaintiffs, who never challenged the GHL in 2003, should be presenting their arguments to the Council not this Court. The Council has established the allocation between the sectors.

Plaintiffs attempt to confuse the issue by arguing that the 2009 regulations implementing the one halibut per day rule somehow represents a new allocation of fishing rights requiring a new fair and equitable assessment. That premise is wrong. The allocation for the charter industry was made in 2003 when the GHL was set. The 2009 Rule simply selects from a suite of possible management options how to enforce the GHL limit. Typical fishery management tools to enforce catch limits include season closures, area closures, gear restrictions, catch size limits, bag limits, etc. The 2009 Rule selects one management tool, a one halibut per day rule, to enforce an existing allocation, a tool that was specifically identified when the GHL was

established. When the GHL was proposed and finalized, NMFS identified the one halibut per day rule as a means to enforce the GHL. 67 Fed. Reg. at 3869; 68 Fed. Reg. at 47259.

Moreover, NMFS did consider the issue of present participation when promulgating the 2009 Rule. *See* 74 Fed. Reg. at 21204, Response to Comment 34 and documents therein referenced. Among the documents referenced is the State of Alaska final data for 2007 (the most recent year for which final data is available) showing the current charter catch overall and the catch by port, as well as the number of active charter vessels (709), the average number of trips per vessel, and the average number of anglers per trip. Also among the referenced documents is the final Regulatory Impact Review/Final Regulatory Flexibility Analysis/Environmental Assessment ("RIR/EA") for the Rule which presents at 13-24 a detailed analysis of the charter fleet including its character and capacity. The same document at 31-38 considers the economic impact of the Rule on the Charter industry.

Any claim that NMFS did not consider current data in selecting a management program is belied by the record. Plaintiffs may not like the result, but the facts are the agency was well aware of the current state of the charter industry. In an MSA case that involved challenges under NS 4 and 16 U.S.C. § 1853(b)(6), the present participation standard in the MSA that is incorporated into the Halibut Act, the Court found "As long as the Secretary considered the fishermen's interests, and 'considered the relevant factors and articulated a rational connection between the facts found and the choice made,' the Secretary's decision will not be found to lack a rational basis." *Yakutat, Inc. v. Gutierrez,* 407 F.3d 1054, 1067 (9th Cir. 2005), *quoting Wash. Crab Producers Inc. v. Mosbacher,* 924 F.2d 1438, 1441 (9th Cir. 1990)

Here, there is a GHL in place. It is an existing regulation. Its purpose is to establish a cap on the charter industry harvest. The Rule is designed to implement that regulation. In doing so, NMFS was aware of and considered the current data and made its decisions.

Before closing this section, it is significant to note that the "present participation" standard in the Halibut Act is actually an incorporation by reference of Section 303(b)(6) of the MSA, 16 U.S.C. § 1853(b)(6). *See* Halibut Act, 16 U.S.C. § 773c(c). Section 303(b)(6) of the MSA sets standards for when a limited access system is being established. A limited access system is a permit system limiting the number of fishermen allowed to participate in the fishery to specified permit holders. *See* 16 U.S.C. § 1802(27)). Section 303(b)(1) provides that when establishing a limited access permit system, NMFS should take into account six factors, including present participation. *See, Yakutat, Inc. v. Gutierrez,* 407 F.3d at 1068-1070. Thus, section 303(b)(6) relates to a circumstance not present here, the establishment of a limited access system in which individuals cannot participate in the fishery without a permit. The hallmark of a limited access system is the requirement that one must have a permit to fish. The GHL does not limit access to the charter fishery by requiring a permit to fish. Anyone can buy or rent a boat and enter the fishery. The GHL is not a limited access system.

Although not written is artfully as one might wish, a careful contextual reading of the Halibut Act, 16 U.S.C. § 773c(c), reveals that the reference to 16 U.S.C. § 1853(b)(6) is a reference that is applicable to limited entry regulations. Within the MSA, 16 U.S.C. § 1853(b)(6), only applies to limited entry programs, not to each an every regulation. The same is true under the Halibut Act. That the Rule does not establish a limited entry program is amply demonstrated by the fact that in March 2007, the Council approved a limited entry program for the charter industry that is now undergoing review. 74 Fed. Reg. at 21220, Comment 106 and

Response. In short, although the present participation issue was fully considered, the reference to 16 U.S.C. § 1853(b)(6) in the Halibut Act actually refers to a circumstance not present here.

That said, it may be helpful to see how the courts have interpreted the MSA standard that in establishing a limited access system, NMFS should "take into account" the six factors listed in 16 U.S.C. § 1853(b)(6).

At the outset, the courts have noted that present participation is only one of six factors to be taken into account when establishing a limited access system. *Yakutat, Inc. v. Gutierrez*, 407 F.3d at 1070. Congress left the Secretary some room for the exercise of discretion, not only by leaving "present participation" undefined, but also by listing it as only one of many factors the Council and the Secretary should take into account. *Alliance Against IFQS v. Brown*, 84 F.3d 343, 347 (9th Cir. 1996), *cert. denied,* 520 U.S. 1185 (1997).

In fact, in *Yakutat*, the Court found that when the Council based its proposed recommendation on an analysis of many, but not all, of the six factors described in 16 U.S.C. § 1853(b)(6), the standard that such factors be taken into account was still satisfied.

> The Council explicitly looked at all of these factors, including historical fishing practices and dependence on the fishery, economics of the fishery, capability of fishing vessels to engage in other fisheries, other relevant considerations, and also analyzed present participation in the fishery. The only factor not explicitly examined in the record is the cultural and social framework relevant to the fishery. However, this is not fatal to the Secretary and Council's decision.

Yakutat, Inc. v. Gutierrez, 407 F.3d at 1068.

It is also important to note that in *Yakutat,* the Secretary had opted to limit the present activity analysis, entirely ignoring the most recent data on participation. The Court said this was acceptable, finding that the Secretary could balance his analysis and pursue the approach the Secretary expected to produce the best results:

> The Secretary placed a higher premium on historical participation and significant dependence, instead of focusing solely on present participation. The Secretary determined that by limiting entry of newer fishing vessels while assuring continued participation of historically dependent fishermen, the FMP amendment would conserve the fishery by reducing overcapitalization.

Id. at 1073. In another case where the Secretary chose to exclude several years from the present participation analysis, the Court found:

> 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. The choice of cut-off dates and weighting formulas thus was not arbitrary and capricious or an abuse of discretion.…

See Watch Int'l v. Mosbacher, 762 F. Supp. at 379. The Court held that the Secretary's decision, though based on conflicting, even speculative, evidence about trends affecting the resource in the future, nonetheless had a rational basis, and was not arbitrary or capricious. *Id.* at 378.

Courts have also considered the argument that the original limited access allocation system was based on old data and that new data should now be used to account for "present participation." This argument, reminiscent of Plaintiffs' argument regarding the GHL allocation, has been rejected. In *J.H. Miles & Co. v. Brown,* 910 F. Supp. 1138, 1160 (E.D. Va. 1995), the Court found that annual fishing quotas set five years after the establishment of the limited access system in the mid-Atlantic clam and quahog fisheries did not require the analysis described in Section 1853(b)(6).

> The statute provides that when the Secretary establishes a system "limiting access," he must take into account the aforementioned factors. Such a system was established by the Secretary five years ago. Amendment 8 … the overall regulatory scheme for the surf clam and ocean quahog fisheries "limits access" to the fishery, in that it established a system of "Individual Transferable Quotas (ITQ)" – a license to catch a certain percentage of the fishery annually – based on historical fishing patterns. The individual quotas for a particular year are set by applying the allocation percentages to the annual quotas. See 50 C.F.R. § 652.20. The ITQ system is a closed system, but allows for entry by the

> transfer of the quotas. The regulations explaining the term "limited access" make clear that the term applies to a management system such as Amendment 8, not the annual quotas implementing Amendment 8. See 50 C.F.R. § 602.15(c)(1) (regulation defining "limited access" system as a technique which "attempts to limit units of effort in a fishery … common forms of limited access are licensing of vessels, gear or fishermen to reduce the number of units of effort, and dividing the total allowable catch into fishermen's quotas")….

Similarly, in *Alliance Against IFQs* and *Yakutat*, the Secretary excluded the most recent period of "present participation" from the overall analysis. The Court found that these caps on participation periods made sense to discourage speculation and to ensure that the regulations would achieve their ultimate goal, preventing growth in the fleet, and, therefore, fishing overcapacity relative to the allowable harvest.

> We further believe that the Secretary had a good reason for disregarding participation in the fishery during this lengthy process, because the alternative would encourage the speculative over-investment and overfishing which the regulatory scheme was meant to restrain. Under the regulations, eligibility for quota shares depends on fishing during the years 1988, 1989, and 1990. Whatever years are used necessarily recede into the distant past. Even in 2005, assuming the regulatory scheme lasts that long, the quota shares will be based on fishing prior to 1991. Future generations of fishermen will continue to be governed by these pre-1991 allocations. Had the Secretary extended the 1990 cutoff, the incentive to pour money and time into the fishery in order to get a bigger quota share, for those who could afford a long term speculation, would have been enormous.

Alliance Against IFQs v. Brown, 84 F.3d at 347-348.

Plaintiffs are not likely to prevail on their "present participation" argument because (1) present participation has been fully considered in every rulemaking, (2) Plaintiffs' arguments lead to illogical and dysfunctional results, (3) Section 1853(b)(6) is not truly applicable here, and (4) Plaintiffs' arguments have already been rejected by the courts.

VI. PLAINTIFFS' CLAIMS ARE BARRED BY LACHES

Plaintiffs are not likely to prevail on the merits because their action is barred by laches. Plaintiffs' real target in this action is not the Rule but the GHL itself. Whether it is a one halibut rule or some other management measure to enforce the GHL, Plaintiffs' cry will be the same, "Any restriction is unacceptable." Plaintiffs' brief openly and candidly asserts their belief the GHL is unfair and inequitable and they want it rendered a nullity either by declaring it invalid or by preventing its enforcement.

The proposed rule establishing the GHL was published in 2002. The final rule was published in 2003. The charter industry participated in that rulemaking, advancing then the same arguments presented today. That rule clearly cited the one halibut bag limit as among the management tools to be used to enforce the GHL. 67 Fed. Reg. at 3869; 68 Fed. Reg. at 47259. Neither the Plaintiffs nor anyone else in the charter industry challenged that rulemaking, begun over seven years ago. They cannot do so now.[4]

A. The Law

In *Independent Bankers Association of America v. Heimann*, 627 F.2d 486 (D.C. Cir. 1980) (*per curiam*), the plaintiff, a trade association of federal and state chartered banks, challenged an interpretive ruling by the Comptroller of the Currency approximately 12 years after its promulgation. The District Court granted the plaintiff's motion for summary judgment. The United States Court of Appeals for the District of Columbia Circuit reversed. The D.C. Circuit began its analysis with the following pronouncement:

> The venerable maxim vigilantibus non dormientibus aequitas subvenit (equity aids the vigilant, not those who slumber on their rights) requires that a suit in

[4] Each of the Plaintiffs was in business long before the GHL was proposed. Plaintiff Van Valin has been in business 21 years, Plaintiff Dole 27 years, Plaintiff Bierman 14 years, Plaintiff Weiser 20 years, Plaintiff Westlund 23 years and Plaintiff Yamada 27 years.

> equity, though otherwise meritorious, be dismissed if two requirements are met: (1) unreasonable delay in bringing the claim for relief and (2) prejudice caused by that delay.

Id. at 488. Applying this rubric to the facts of the case, the Court found these two elements were satisfied. First, the Court found that while some delay might have been understandable, the 12-year delay was unreasonable in light of the fact that the trade association was a sophisticated party charged by its members with the responsibility for anticipating the impact of government rulings. *Id*. Second, the Court found that invalidating the ruling after the delay would unfairly prejudice third parties who had made substantial financial commitments in order to comply with the Comptroller's ruling. *Id*. Elaborating on the issue of prejudice, the Court stated "[e]quity will not protect a party that through years of silence has created an impression of acquiescence that has led others to make substantial financial commitments." *Id*. The Court held that the plaintiff's claim was barred by laches. *Id*.

In *United Refining Co. v. Department of Energy*, 566 F. Supp. 270, 271 (W.D. Pa. 1983), the Court affirmed that the doctrine of laches may preclude a regulatory challenge. The plaintiff had challenged the substantive and procedural validity of regulations promulgated by the Department of Energy. *Id*. at 271. The defendant asserted that laches barred plaintiff's claims. *Id*. The Court held that in light of the fact that plaintiff's claims were ripe from the institution of the regulation, that plaintiff failed to comply with the regulation from its institution, and that the plaintiff failed to challenge the regulation for over a six year period, the doctrine of laches could apply. *Id*. at 272. Despite so holding, because the parties had previously been precluded from conducting discovery on the issue, the Court declined to consider whether the doctrine of laches actually barred the plaintiff's claims until discovery was completed.

In a factually distinguishable case, *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983), the Court held that the defense of laches was not available even though the regulation at issue had been instituted almost seven years earlier. Citing Circuit precedent, the Court noted that in order "[t]o support a defense of laches, the defendant must offer evidence that the plaintiff unreasonably delayed in challenging defendant's action and that the defendant has been prejudiced by the delay." *Id*. at 962-63, *citing Independent Bankers Ass'n. of America v. Heimann*, 627 F.2d at 488. Reviewing the evidence, the Court found the defendant had failed to carry its burden on both elements. On the issue of unreasonable delay, the Court found the plaintiffs did not know or have reason to know of the defendant's challenged conduct until shortly before the filing of the action, and thus there was no unreasonable delay. *Id*. at 963. Continuing its analysis, and assuming for the sake of argument that the plaintiffs had unreasonably delayed, the Court also found that the defendant failed to demonstrate that it had "changed his position in a manner that would not have occurred but for plaintiff's delay." *Id.* at 964.

B. The Facts

The record of Plaintiffs' actions and inactions has been discussed above. Each of the Plaintiffs was in business when the GHL was established and several participated in the rulemaking process. Plaintiffs clearly knew of the GHL and its intended purpose when it was proposed in 2002 after years of debate before the Council.

What remains is the issue of whether Intervenors have been prejudiced by Plaintiffs' delay. The answer is yes. Intervenors Behnken, Moore, Wohlheuter, and Knight, like many commercial fishermen, changed positions to their detriment in reliance on the existence of the GHL as a limit on charter industry harvests. They purchased QS, often borrowing money and

pledging their homes and/or boats as collateral, in reliance on the GHL. Now, because of reductions in their QS caused in part by charter industry overfishing, they find themselves in severe economic distress. Behnken Aff., ¶ 10; Affidavits of Josh Moore, ¶ 3, Sherri and Kurt Wohlheuter, ¶ 3, and Christopher Knight, ¶ 9, each attached to Intervenors' Memorandum Of Points And Authorities In Support Of Motion To Intervene as Exhibits 1, 5, 7, and 8, respectively. They would not have purchased QS but for the GHL. They have changed position based on the GHL and will be significantly prejudiced if Plaintiffs prevail in overturning the Rule. *See* Intervenors' Memorandum of Points and Authorities In Support Of Motion To Intervene, Part II (D).

For these reasons, Plaintiffs' action is barred by laches and Plaintiffs are not likely to succeed on the merits.

VII. THE BALANCE OF EQUITIES WEIGHS AGAINST A PRELIMINARY INJUNCTION

"The [International Pacific Halibut] Commission certainly views the recent harvests and stock status in Area 2C as a conservation concern.... The assertion ... that overages of the GHL by the charter sector do not represent a conservation concern ... is incorrect." Behnken Aff., App. A, Letter from Bruce Leaman, IPHC Executive Director, to Linda Behnken, April 13, 2009.

The Pacific halibut population is declining. The biomass in Area 2C has declined 58% over the last decade. Behnken Aff., ¶ 27. With a declining resource, it is especially important to prevent overfishing. The commercial sector has not exceeded its quota since the quota share system was established in 1995 and has seen its quota cut 53% over the past few years due to the declining halibut biomass and the effects of charter overfishing. *Id.* In contrast, the charter industry has exceeded its quota in the last three years alone by 26%, 34%, and 106%. 74 Fed.

Reg. at 21195. The charter overharvest 2004-2008 totaled 3.19 million pounds. Behnken Aff., ¶ 22.

A preliminary injunction allowing the charter industry to fish as they did last year means they will be fishing at a pace to harvest 1.9 million pounds, 240% of the 788,000 pound GHL. That cannot be a positive development for the resource. The interests of the resource and of those who depend on it weigh heavily against allowing the charter industry to ignore the GHL.

If a preliminary injunction is granted, each day the charter industry fishes at a rate exceeding its GHL (*i.e.,* two fish per day per customer versus one fish per day) guarantees the IPHC's conservation targets will be exceeded and guarantees a reduction in both the halibut population and in the amount of halibut available for harvest by others. Commercial fishermen, halibut processors, subsistence users, Native peoples, and coastal communities are harmed. Charter industry overfishing in 2009 will also lead to direct compensatory cuts in commercial fishing quotas in 2009, 2010, or both. The amount of the compensatory cut is determined by the amount of charter overfishing in 2009.

For commercial fishermen, processors, subsistence users, and Native peoples, the effects of localized depletion caused by charter overfishing, are equally damaging. In 2009, these Intervenors are fishing or otherwise operating in the very same areas where concentrated charter fishing is occurring. Allowing overfishing by the charter industry through a preliminary injunction causes localized depletion and directly impacts the availability of fish for other dependent users.

The cause of each of these harms is the fishing level that will occur if a preliminary injunction is granted. Each of these issues is discussed in more detail in Parts II(C) and (D) of Intervenors' Memorandum Of Points And Authorities In Support Of Motion To Intervene.

On the other side of the scales is Plaintiffs' interest in continuing to overfish the resource. It may be that Plaintiffs will experience some harm from canceled bookings but, unlike last year, Plaintiffs and their clients have been on notice that a one halibut rule was proposed and likely to be implemented. Furthermore, as discussed in Part III (B) of this Memorandum, any harm that may befall Plaintiffs from implementing the Rule between now and when a hearing on the merits occurs is far from the harm necessary to justify a preliminary injunction.

VIII. A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST

Both charter boat owners and commercial fishermen and processors have personal and business economies. All have suppliers in the community with whom they have business relationships. Each pay taxes. However, the additional tax revenue paid to Alaska's villages and towns from the commercial fish tax (*See* Intervenors' Memorandum Of Points And Authorities In Support Of Motion To Intervene, Part II(G)) represents a unique and special interest. So too are the subsistence and cultural needs of Alaska's Native peoples and subsistence users whose access to the halibut resource is adversely affected by localized depletion caused by charter overfishing. The unique interests of Alaska's Native peoples and subsistence users are recognized as a public interest in state law. Section 801 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3111, for example, states "the continuation of the opportunity for subsistence uses by rural residents of Alaska ... is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence." Section 801 goes on to state "the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses." Most

importantly, the conservation of the resource is a public interest that weighs heavily against a preliminary injunction.

IX. CONCLUSION

Because Plaintiffs fail to satisfy any of the four requirements for the granting of the extraordinary remedy of a preliminary injunction, their motion should be denied.

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Respectfully submitted,

/s/ George J. Mannina

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