UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, KEN DOLE, RICK BIERMAN, THERESA WEISER, DONALD WESTLUND, and RICHARD YAMADA, Plaintiffs, v. THE HONORABLE GARY LOCKE, in his official capacity as the Secretary of Commerce, DR. JANE LUBCHENCO, in her official capacity as Administrator of the U.S. National Oceanic and Atmospheric Administration, and DR. JAMES W. BALSIGER, in his official capacity as the Acting Assistant Administrator of the U.S. National Oceanic and Atmospheric Administration Defendants.	)	Civil Action No. 09-cv-961

FEDERAL DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Defendants Gary Locke, in his official capacity as the U.S. Secretary of Commerce, Dr. Jane Lubchenco, in her official capacity as Administrator of the U.S. National Oceanic and Atmospheric Administration, and Dr. James W. Balsiger, in his official capacity as the Acting Assistant Administrator of the U.S. National Oceanic and Atmospheric Administration (collectively referred to as "Federal Defendants"), hereby oppose Plaintiffs' Motion for a Preliminary Injunction pursuant to LCvR 65.1(c). As explained more fully below, Plaintiffs

have failed to carry their heavy burden of showing that the extraordinary remedy of a preliminary injunction is warranted in this case. Plaintiffs' motion therefore should be denied.

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I. INTRODUCTION

This case involves an effort by the National Marine Fisheries Service ("NMFS") to put an end to years of overharvesting of Pacific halibut (*Hippoglossus stenolepis*) by guided charter vessels in International Pacific Halibut Commission ("IPHC") Area 2C of Southeast Alaska in the face of declining halibut biomass. In particular, the charter sector has exceeded its benchmark harvest amount, known as the guideline harvest level ("GHL"), by significant margins in each of the past five years. For instance, the charter sector exceeded the GHL by approximately 22% in 2004, 36% in 2005, 26% in 2006, and 34% in 2007. According to preliminary estimates for 2008, the number of charter customers and the amount of fish harvested by that sector caused the charter sector to harvest more than double the GHL. The charter sector's overharvesting poses a conservation risk, with the potential to undermine the IPHC's conservation and management goals for the overall halibut stock. In addition, the charter sector's overharvesting results in a *de facto* reallocation of the resource away from commercial halibut fishermen in future years.

Although it has been the policy of the North Pacific Fishery Management Council ("the Council") since the implementation of the GHL rule in 2003 that the charter sector should not exceed the GHL, no regulations have been imposed upon the charter sector to mandate adherence to the GHL. Rather, only the commercial sector has been subject to binding catch limits. This arrangement did not pose a problem as long as the halibut biomass remained large and non-commercial uses of the resource remained relatively stable and small. However, the halibut biomass has been declining in recent years while charter sector harvest levels have been increasing significantly, making it necessary to impose management measures to limit the charter sector to the GHL. Indeed, in January 2009, the IPHC announced that the estimated halibut

biomass has declined from 2008 levels, which translates to a GHL of 788,000 pounds in 2009 as compared to last year's GHL of 931,000 pounds.[1] Thus, if changes are not made to the existing regulatory structure, NMFS expects that the harvest of the guided charter fishery will substantially exceed the GHL in 2009. In December 2008, NMFS issued a proposed rule intended to limit the charter sector in 2009 to the 2008 GHL (*see* 73 Fed. Reg. 78276-01 (Dec. 22, 2008)) by, among other measures, reducing the current two halibut daily bag limit on charter vessel anglers in IPHC Area 2C to a one halibut daily bag limit. A final rule was issued on May 6, 2009, which takes effect on June 5, 2009. *See* 74 Fed. Reg. 21194 (May 6, 2009). Although NMFS could have imposed greater restrictions to limit the charter sector to the lower GHL for 2009, the agency opted to forego such actions as they could not have been implemented in time for the peak of the 2009 halibut fishing season, which runs from June to August.

Plaintiffs ask this Court to issue a preliminary injunction preventing the May 2009 rule from taking effect, however they have not made the showing necessary to warrant the imposition of this drastic remedy. In particular, Plaintiffs have not shown that: (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm before a decision on the merits can be rendered: (3) the balance of the equities favors enjoining the rule; or (4) enjoining the rule is in the public interest. Rather than issuing a preliminary injunction, which in essence would prevent NMFS from limiting the charter fishing sector's harvest for the 2009 fishing season, the Court should allow the case to proceed to resolution on cross-motions for summary judgment on an expedited schedule, as set forth in the attached proposed order.

[1] As explained more fully below, the GHL is determined automatically each year based on that year's estimate of stock abundance from the IPHC. *See* 50 C.F.R. § 300.65(c).

II. STATUTORY BACKGROUND

A. Northern Pacific Halibut Act of 1982

The responsibility for managing the Pacific halibut fishery rests primarily with three bodies: the IPHC, the North Pacific Council, and NMFS. Pursuant to the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea ("Convention"), signed in 1953 and amended by protocol in 1979, the IPHC is authorized to adopt regulations for conservation of halibut in "convention waters," (*i.e.*, waters off the west coasts of the United States and Canada). *See* Convention Between the United States and Canada For the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Ottawa, 1953 ("Convention"), 5 U.S.T. 5, T.I.A.S. 2900; Protocol Amending Convention Between the United States and Canada For the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Washington, 1979 ("Protocol"), 32 U.S.T. 2483, 2487; T.I.A.S. 9855; Add. 1; *see also* 16 U.S.C. § 773(d). The Convention and Protocol continued halibut conservation measures agreed to between the two countries in earlier conventions signed in 1923, 1930, and 1937. *Ibid*. Regulations adopted by the IPHC must be approved by the Secretary of State with concurrence from the Secretary of Commerce. If approved by the Secretaries of State and Commerce, IPHC regulations are published in the Federal Register as annual management measures pursuant to 50 C.F.R. § 300.62; *see also* 16 U.S.C.§ 773b.

To implement the Convention, Congress enacted the Halibut Act in 1982. *See* 16 U.S.C. § 773(a). The 1982 Halibut Act replaced earlier "Halibut Acts" enforcing earlier conventions. *See* Pub. L. 97-176, § 14, 96 Stat. 84 (1982) (repealing previous law). The primary responsibility to carry out the Halibut Act and the Convention rests with the Secretary of

Commerce, who has delegated his authority to NMFS. 16 U.S.C. 773c(a) and (b). Specifically, Section 773c(b) of the Halibut Act provides that, "[i]n fulfilling [the general responsibility to carry out the Convention and the Halibut Act], the Secretary shall . . . adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and [the Halibut Act]." 16 U.S.C. 773c(b)(1). In addition, the Halibut Act grants supplemental regulatory authority over Pacific halibut to the regional councils created under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-1883. *See* 16 U.S.C. 773c(c). In particular, the Halibut Act states that the regional fishery management council "having authority for the geographic area concerned" may develop regulations to govern halibut fishing in the U.S. portion of "convention waters," as long as the regulations "are not in conflict with" the IPHC regulations and they are approved by NMFS. 16 U.S.C. 773c(c).

Section 773c(c) of the Halibut Act provides that such regulations may limit access to halibut fisheries and allocate shares of halibut among individual fishermen, so long as the allocation is "fair and equitable to all such fishermen, based upon 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." *Id*. In addition to the aforementioned criteria, Section 773c(c) refers to the criteria set forth in Section 1853(b)(6) of the Magnuson-Stevens Act, 16 U.S.C. § 1853(b)(6), which authorizes a council or NMFS to establish a limited access program to achieve optimum yield in a fishery after taking into account the following seven factors:

> (A) present participation in the fishery;
> (B) historical fishing practices in, and dependence on, the fishery;
> (C) the economics of the fishery;
> (D) the capability of fishing vessels used in the fishery to engage in other fisheries;

(E) the cultural and social framework relevant to the fishery and any affected fishing communities;
(F) the fair and equitable distribution of access privileges in the fishery; and
(G) any other relevant considerations.

16 U.S.C. § 1853(b)(6).

B. Magnuson-Stevens Act and Regional Council Process

As noted above, the Halibut Act references Section 1853(b)(6) of the Magnuson-Stevens Act, a statute originally enacted in 1976 in response to concerns about over-fishing and depletion of fish stocks off U.S. coasts. *See* Pub. L. 94-265, § 2, 90 Stat. 331 (April 13, 1976); *see also* 16 U.S.C. §§ 1801(a) (findings) and 1801(b) (statement of purposes). The Magnuson-Stevens Act establishes exclusive U.S. jurisdiction over all fish and fishery resources in the "exclusive economic zone," *see* 16 U.S.C. § 1811(a), and over certain fish and resources beyond this zone. *See id*. § 1811(b). The fishery management councils are designed to "enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration" of such fish and resources and to "take into account the social and economic needs of the States." *Id*. § 1801(b)(5).

As is relevant to this case, the North Pacific Council is the regional council with jurisdiction to regulate fisheries in the Gulf of Alaska. *Id*. § 1852(a)(1)(G). The North Pacific Council has 11 voting members: six from Alaska, three from Washington, one from Oregon, and a federal representative, NMFS' Regional Director for Alaska. Seven of the voting members are appointed by the Secretary of Commerce upon the recommendation of the governors of Alaska (five) and Washington (two). The non-federal voting members represent state fisheries agencies, commercial and recreational fisheries, fishing communities, and the general public. The Council also has four non-voting members representing the U.S. Coast Guard, U.S. Fish and Wildlife Service, the Pacific States Marine Fisheries Commission, and the U.S. Department of State. The

Council meets five to six times each year: at least four times in communities around Alaska, and once in Washington or Oregon. The Council's staff of 15 resides in Anchorage, Alaska. Council business is conducted at public meetings and through written procedures established by each Council, subject to statutory requirements. *Id*. § 1852(h), (i); *see also* 50 C.F.R. § 600.135.

III. FACTUAL BACKGROUND

The Pacific halibut fishery is composed of three basic sectors: commercial, sport (which includes guided and unguided angling), and subsistence fisheries. 73 Fed. Reg. at 78277. Each year, the IPHC uses a coastwide population model to determine the amount of halibut (in net pounds) that may be removed by all sources of fishing mortality in the coming year without causing biological conservation problems in all areas of Convention waters. *Id*. This is known as the constant exploitation yield ("CEY"). *Id*. To determine the maximum catch limit for the commercial fixed gear fishery, the IPHC estimates all non-commercial removals (sport, subsistence, bycatch, research, and wastage) for that year and subtracts them from that year's total CEY. *Id*. The remainder becomes the "fishery CEY." 73 Fed. Reg. at 78277. The IPHC is guided by the fishery CEY in setting the commercial sector's catch limits. The commercial sector's catch limits in IPHC Areas 2C-4E are distributed among individual commercial fishermen under the individual fishing quota ("IFQ") system. Fishing is limited by the amount of each fisherman's IFQ, thus assuring that the commercial catch limit is not exceeded. 74 Fed. Reg. at 21217.

Unlike the commercial sector, which is subject to binding annual catch limits, the sport fisheries are governed primarily by daily bag and gear limitations, and the sport fisheries are not required to stop fishing when an overall annual limit is reached. *Id*. In 2003, NMFS implemented the GHL rule to serve as an annual benchmark for monitoring the charter vessel

fishery relative to the commercial fishery and other sources of fishing mortality. 73 Fed. Reg. at 78277. The GHL was intended to represent a pre-season specification of acceptable halibut harvests in the charter vessel fisheries in management Areas 2C and 3A. *See* 50 C.F.R. § 300.65(c). Although it was the North Pacific Council's policy that the charter sector should not exceed the GHL, no regulations were imposed upon the charter sector to mandate adherence to the GHL. The GHL was intended to accommodate limited growth of the guided recreational fleet while approximating historical harvest levels, and as such the GHL for each area was calculated based on 125% of the average of the 1995-1999 guided recreational harvest estimates, which was a period of historically high levels of halibut abundance. 72 Fed. Reg. 74257, 74259 (Dec. 31, 2007). The GHL for any given year is determined automatically according to that year's CEY. *See* 50 C.F.R. § 300.65(c). Because the GHL is designed to be responsive to annual reductions in stock abundance, in the event of a reduction in Area 2C or 3A's halibut stocks, as determined by the IPHC, that area's GHL is reduced incrementally in a stepwise fashion in proportion to that year's stock reduction as compared to the average 1999-2000 stock abundance. *Id.*

Although as noted above the GHL provided for 25% growth in the charter sector, charter vessel fishery harvests have greatly exceeded that allowance, increasing by 107% between 1999 and 2005. 74 Fed. Reg. at 21203. Thus, although Area 2C's GHL remained unchanged from 2004 to 2007 at 1.432 million pounds and the charter sector exceeded that GHL by significant margins in each year: by 22% in 2004, by 36 % in 2005, by 26 % in 2006, and by 34% in 2007. 73 Fed. Reg. at 78277-78. In 2008, an estimated decline in the Pacific halibut biomass from 2007 levels lead to a 4.3 million pound reduction in the CEY (from 10.8 million to 6.5 million pounds), which triggered an automatic reduction in the 2008 Area 2C GHL from 1.432 million

pounds to 931,000 pounds. *Id*. Notwithstanding the decline in the halibut biomass and the reduced GHL, the number of charter customers and the amount of fish harvested by that sector in 2008 were high enough that the charter sector harvested more than double the 2008 GHL. *Id*. In contrast to the charter sector's increasing harvests, the commercial sector has seen its annual catch limits reduced by 54% between 2005 and 2009. 74 Fed. Reg. at 21207. In fact, considering 2008 and 2009 alone, the halibut catch limit for Area 2C commercial fishermen was reduced by approximately 19%. *Id*. at 21215.

As NMFS explained in the May 2009 final rule's response to comments, this decline in the commercial sector's catch limits "is indicative of a large adverse impact to the longline fishery," which is attributable in part to the charter sector's GHL overages. *Id*. at 21212. In particular, because the commercial sector's catch limit is determined only after estimated non-commercial harvests are deducted from the total CEY, the charter sector's overharvesting decreases the amount of halibut available to the commercial sector in subsequent years when the IPHC accounts for the overages, thereby creating a *de facto* reallocation of the resource from the commercial sector to the charter sector in future years. 73 Fed. Reg. at 78277. In addition to allocation concerns, the charter sector's overharvesting undermines the IPHC's overall harvest strategy and creates a conservation concern. *Id*. As noted previously, the CEY represents the amount of halibut that the IPHC has determined may be removed by all sources of fishing mortality in the coming year without causing biological conservation problems. When the IPHC establishes the CEY, it assumes that the charter sector will not exceed the GHL. *Id*. Thus, when the charter sector exceeds the GHL, more halibut are removed from the fishery as a whole in that year than the IPHC has determined may be removed without causing biological conservation

problems. As NMFS has explained, "leaving fish unharvested contributes to biomass and Total CEY in subsequent years ." 74 Fed. Reg. at 21212.

The charter sector's overharvesting has prompted all three bodies responsible for halibut management to take action. Specifically, at its annual meeting in January 2007, the IPHC adopted a motion to recommend reducing the daily bag limit for charter vessel anglers in Area 2C from two halibut to one halibut during certain time periods (June 15 - July 30) because it believed its management goals were at risk by the magnitude of charter halibut harvest in excess of the GHL. *Id*. The IPHC took this action reluctantly, indicating that its preference was for domestic agencies to resolve allocation issues. The IPHC therefore delayed the effective date of the reduced bag limit to afford NMFS time to resolve the issue under U.S. domestic law with regulations that would achieve "comparable reductions" in halibut harvest by charter vessel anglers in Area 2C. *Id*. NMFS determined that it could achieve comparable reductions to that proposed by the IPHC regulations in a manner that would have less of an impact on the charter sector than imposing a one halibut limit for certain portions of the season, and thus implemented alternate management measures on its own initiative, without utilizing the Council process. *Id*.; *see also* 72 Fed. Reg. 30714 (June 4, 2007). While those measures (*i.e.*, a daily bag limit of one halibut of any size and one halibut 32 inches or less) minimized the adverse impacts in demand for halibut fishing charters, they failed to reduce the harvest of halibut by charter anglers to the GHL for Area 2C (which was exceeded by 34% in that year).

While NMFS was implementing the aforementioned regulations, in early 2007, the North Pacific Council also was considering management alternatives for the charter vessel halibut fishery in Area 2C. Unlike the IPHC and NMFS actions, however, the Council's action was designed specifically to maintain the charter vessel fishery to its GHL. In particular, the Council

recommended to NMFS that, in the event that the IPHC issued a reduced CEY in 2008, a one halibut daily bag limit be imposed upon the charter sector along with several other measures, including line limits and no harvest of halibut by skippers and crew on a charter vessel. As noted above, the IPHC did in fact issue a reduced CEY in 2008 that triggered a reduced GHL. NMFS therefore published a final rule in May 2008 that would have implemented the Council's recommendation to limit the charter sector to the 2008 GHL by, among other measures, introducing a one halibut daily bag limit. *See* 73 Fed. Reg. 30504 (May 28, 2008).

However, a group of charter vessel owners and operators (which included several of the Plaintiffs in the instant suit) filed a lawsuit and obtained a temporary restraining order ("TRO") and preliminary injunction from this Court that prevented the May 2008 rule from taking effect. *See Van Valin et al. v. Gutierrez et al.*, No. Civ. 08-941 (D.D.C.). In issuing the TRO and preliminary injunction, the Court found, in particular, that the plaintiffs had demonstrated a likelihood of prevailing on the merits of their argument that, notwithstanding NMFS' undisputed statutory authority to enact the rule in question, NMFS had bound itself to use certain procedures found in the preamble to the 2003 rule by which the GHL is set each year (*see* 68 Fed. Reg. 47256 (Aug. 8, 2003)), namely a requirement that the GHL must be exceeded before management measures can be implemented (*i.e.*, that NMFS cannot proactively manage to the current year's GHL). Following entry of the preliminary injunction, in September 2008 NMFS rescinded the May 2008 rule and began work on a new rule that would eliminate any confusion that may have occurred because of the May 2008 rule's perceived connection to statements in the preamble to the 2003 rule. *See* 73 Fed. Reg. 52795 (Sept. 11, 2008). In light of NMFS' rescission of the May 2008 rule, the Court granted NMFS' motion to dismiss the case as moot in November 2008. *See Van Valin v. Gutierrez*, 587 F. Supp. 2d 118, 120-121 (D.D.C. 2008)

(finding that "[t]he rescission of the Final Rule has 'completely and irrevocably eradicated' the effects of the alleged violations of the Halibut Act and the APA").

In December 2008, NMFS published a new proposed rule that, like the May 2008 rule, would implement the Council's previous recommendation that the charter sector be held to the GHL by instituting, among other measures, a one halibut daily bag limit for charter vessel anglers in IPHC Area 2C. *See* 73 Fed. Reg. 78276-01. The December 2008 proposed rule made clear that NMFS was taking the action pursuant to its statutory authority under the Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773c(a) and (b), and that the agency was expressly "repudiating" any policy that would limit NMFS' statutory authority to proactively limit the charter sector to any given GHL. 73 Fed. Reg. at 78277. After providing the appropriate public notice and comment period, NMFS issued a final rule on May 6, 2009. *See* 74 Fed. Reg. 21194.

The new rule differs from the May 2008 rule in at least two key respects. First, the new rule clarifies that NMFS possesses the authority to manage proactively to any given GHL. Although NMFS has the authority to manage to the lower 2009 GHL, the new rule is intended to manage to the higher 2008 GHL because the IPHC's stock estimate, and hence the 2009 GHL, was not determined until after the proposed rule in this case was published, and thus an analysis of additional, possibly more restrictive management measures necessary to manage to the 2009 GHL could not have been completed in time for such measures to be in place before the start of this year's peak halibut season. 73 Fed. Reg. 52795; 73 Fed. Reg. at 78277. In fact, to ensure that measures would be in place for the 2009 summer fishing season, NMFS promulgated the instant rule pursuant to its authority under Section 773c(b) of the Halibut Act, without utilizing the Council process (although this rule is based on the Council's 2007 recommendation and the Council was aware of and endorsed this action). 73 Fed. Reg. at 78276. Second, unlike the May

2008 rule, which waived the 30-day delayed effectiveness period under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(d)(3), the May 6, 2009 rule does not waive the delayed effectiveness period and thus does not take effect until June 5, 2009. 74 Fed. Reg. 21194. To analyze the potential economic impacts of this rule on the charter fishing sector, NMFS completed a combined "EA/RIR/FRFA" in March 2009, which represents an environmental assessment ("EA") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, a regulatory impact review ("RIR") pursuant to Executive Order 12866, and a final regulatory flexibility analysis ("FRFA") pursuant to the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et seq*. (hereinafter the "2009 EA"). *See* Ex. A attached hereto.

IV. STANDARD OF REVIEW

A. Grant of a Preliminary Injunction

As the Supreme Court has explained, "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *accord Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (noting that, because preliminary injunctive relief is an extraordinary remedy, the power to issue such an injunction "should be 'sparingly exercised'") (quotation omitted). The burden of proving the need for injunctive relief lies entirely with the movant; the defendant bears no burden to defeat the motion. *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 442-43 (1974). To obtain a preliminary injunction, a plaintiff must demonstrate that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008). Although a district court has the flexibility to balance the strengths of the moving party's

arguments offered in support of each of the four factors in deciding whether or not to grant an injunction, "'[t]he basis of injunctive relief in the federal courts has always been irreparable harm.'" *Cityfed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). Thus, a movant's failure to establish irreparable harm is grounds for denying a motion for preliminary injunction without considering the other factors. *Cityfed Financial Corp.*, 58 F.3d at 747.

B. Applicability of the Administrative Procedure Act

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

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

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

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

V. ARGUMENT

As explained more fully below, Plaintiffs' request for a preliminary injunction against the May 2009 rule should be denied because Plaintiffs have failed to make a "clear showing" that such an "extraordinary and drastic remedy" is warranted in this case. *Mazurek*, 520 U.S. at 972. Specifically, Plaintiffs have not shown: (1) that they are likely to overcome the presumption in favor of upholding the May 2009 rule; (2) that they are likely to suffer irreparable harm before a decision on the merits can be rendered: (3) that the balance of the equities favors enjoining the rule; or (4) that enjoining the rule is in the public interest. Because Plaintiffs have failed to make

the necessary showing, the Court should deny Plaintiffs' motion for a preliminary injunction and enter the attached proposed order, which sets forth an expedited schedule for resolution of the case on cross-motions for summary judgment.[2]

A. Plaintiffs Have Not Demonstrated That They Are Likely to Succeed on the Merits of Their Claims.

As noted above, the applicable standard of review on the merits of this case is "highly deferential" and "presumes the agency's action to be valid." *Envtl. Def. Fund*, 657 F.2d at 283. NMFS' May 2009 rule must be upheld has long as NMFS has "'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *Carlton*, 26 F. Supp. 2d at 106 (citations omitted). Thus, for purposes of the instant motion for a preliminary injunction, Plaintiffs must make a "clear showing" that they are likely to overcome the presumption in favor of the May 2009 rule by demonstrating that NMFS failed to consider the relevant factors and articulate a rational connection between the facts found and the choice made. *Mazurek*, 520 U.S. at 972. In fact, Plaintiffs' showing on the merits must be very strong because, as discussed below, the remaining preliminary injunction factors weigh against issuing a preliminary injunction.

Plaintiffs have failed to carry this heavy burden. While Plaintiffs purport to level three "independent" challenges to the merits of the May 2009 rule, Plaintiffs in reality offer three different grounds for the same claim (addressed together below), which is that it is not "fair and

[2] A common theme that pervades Plaintiffs' motion for preliminary injunction is the suggestion that, because they succeeded in obtaining a TRO and preliminary injunction against the May 2008 rule, they are entitled to similar relief against the May 2009 rule. As the Court is aware, because the prior case initially presented itself in a TRO posture, Federal Defendants were afforded very little time to prepare their defense (just 24 hours for their initial opposition brief and 24 hours for their supplemental opposition brief following the initial TRO hearing on June 4). While all factors for issuance of a TRO and preliminary injunction were addressed over the course of three hearings held in June 2008, the discussion at those hearings and in the briefs focused on Plaintiffs' procedural argument that the preamble to the 2003 GHL rule precluded NMFS from proactively managing to the 2008 GHL before it had been exceeded. That issue has been resolved in the May 2009 rule. Given the procedural history of the prior action, and the fact that the instant case challenges a new rule based on a new administrative record, Federal Defendants believe that the instant case is deserving of a full and renewed discussion of the merits of the various claims and defenses.

equitable" to hold the charter sector to the GHL. While it is clear that Plaintiffs, as charter sector owners and operators, would prefer a two-fish daily bag limit to a one-fish limit, the fact of the matter is that, as the court noted in *Nat'l Fisheries Inst.*, Congress has charged NMFS with making "difficult policy judgments and choosing appropriate conservation and management measures based on [its] evaluation[] of the relevant quantitative and qualitative factors," and NMFS has done that in this case. 732 F. Supp. at 223. The May 2009 rule followed an open and transparent rulemaking process in which Plaintiffs were given notice[3] of the proposed rulemaking and an opportunity to submit comments thereon, which were carefully considered by NMFS. In fact, the May 2009 rule implements a 2007 recommendation of the North Pacific Council, which includes a representative on behalf of the recreational sector. Plaintiffs may weigh the available evidence differently than NMFS did, however the law is clear that courts are to "'defer to the evaluations of agencies when the evidence presents conflicting views.'" *Cactus Corner, LLC v. USDA*, 450 F.3d 428, 435 (9th Cir. 2006) (citation omitted); *accord Marsh*, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"). In sum, NMFS acted entirely rationally and in compliance with the Halibut Act and the APA in promulgating the May 2009 rule. Plaintiffs have failed to show that they are likely to overcome the presumption in favor of upholding NMFS' rational action.

Plaintiffs' lead argument is that, as a matter of procedure, NMFS failed to make an express "determination" that the May 2009 rule is "fair and equitable." Pls' Mem. In Supp. Pls' Mot. for a Prelim. Inj. at 24 (Dckt. No. 2-1) (hereinafter "Pls' Mem."). This argument assumes,

[3] As noted previously, unlike the May 2008 rule, which waived the APA's 30-day delayed effectiveness period, the May 2009 rule provided the full 30-day period and thus does not take effect until June 5, 2009. 74 Fed. Reg. 21194.

of course, that the Halibut Act requires that an express "determination" be made in the first instance, which it does not. Rather, what the Halibut Act requires, by its plain terms, is that, "[i]f 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." 16 U.S.C. § 773c(c) (emphasis added). Nowhere in the statute is there a requirement that a "fair and equitable" determination be made.[4] If Congress wanted to impose such a requirement, it could have done so, but it did not. Thus, the issue here is not whether or not NMFS made an express determination that the May 2009 rule is "fair and equitable," but rather whether or not the administrative record demonstrates that the agency considered the relevant factors and information that allowed it to make a rational determination that, in its expert judgment, the regulations are fair and equitable.

Plaintiffs cannot credibly contend that NMFS did not consider whether or not the one-fish bag limit is "fair and equitable." The very purpose of the May 2009 rule is to maintain a fair and equitable fishery by managing one sector of the fishery that has been growing out of proportion to the other members of the fishery, to the detriment of those other members and the resource itself. As such, the equities involved in the one-fish bag limit are a common theme that

[4] Plaintiffs attempt to create a "procedural shortcoming" where none exists, referring back to a statement in the preamble to the 2003 GHL rule that states that "harvest restrictions could be implemented as needed under normal APA rulemaking with the accompanying analyses" to account for GHL overages. Pls' Mem. at 28, 33. Plaintiffs baldly assert that the term "accompanying analyses" "clearly" referred to a requirement that NMFS make a "fair and equitable" determination with respect to any regulation that addresses a GHL overage. *Id*. at 28. As is true throughout Plaintiffs' brief, Plaintiffs do not provide the full quotation. The full quotation states that "harvest restrictions could be implemented as needed under normal APA rulemaking with the accompanying analyses (e.g., EA/RIR/IRFA)." 68 Fed. Reg. at 47258. Thus, NMFS expressly identified the "accompanying analyses" as an environmental assessment ("EA") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), regulatory impact review ("RIR") pursuant to Executive Order 12866, and final regulatory flexibility analysis ("FRFA") pursuant to the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et seq*. Certainly, this analysis may include an analysis of whether the proposed rule is "fair and equitable," however that is a far cry from creating a mandatory requirement to make an express "fair and equitable" determination labeled as such. Furthermore, a vague statement such as that cited by Plaintiffs from the preamble to the 2003 GHL rule would not create a legally binding commitment upon NMFS in any event. *See Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 313 (D.C. Cir. 1992) (where the text of a preamble is too vague it is not reviewable); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) ("The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations").

pervades NMFS' analysis underlying the May 2009 rule. For instance, Section 2.5 of the March 2009 EA[5] examines the economic impacts of the one-fish bag limit on various sectors and groups involved in the fishery, including: (a) guided charter clients, (b) half-day charter providers and crew, (c) full-and multi-day charter providers and crew, (d) commercial longline operators and crew, (e) local residents of communities serving as bases for commercial longline or charter operations, (f) halibut consumers, and (g) the general public, through the impact on administrative and enforcement costs. *See generally* EA/RIR/FRFA at 31-49. This analysis may not be labeled as a "fair and equitable determination," but the purpose of the analysis clearly is to analyze the economic impacts of the one-fish bag limit to the aforementioned entities as compared to the status quo, and in so doing evaluating the equities involved with the proposed action. In addition to the 2009 EA, the consideration of "fairness and equity" runs throughout NMFS' response to comments in the May 2009 rule, with the issue having been raised in no less than 28 comments. *See generally* 74 Fed. Reg. 21194 (Comments 19, 31, 32, 33, 34, 42, 46, 74-95). In sum, Plaintiffs are wrong to assert that NMFS' discussion of fairness and equity is limited to "two places" and the Court should reject Plaintiffs' procedural argument that NMFS failed to make a "determination" that the May 2009 rule is "fair and equitable." Pls' Mem. at 23.

Indeed, what should a "fairness and equity" determination look like? Neither the Halibut Act nor any implementing regulations define the "fair and equitable" standard, and there is no reported case law interpreting the standard. However, the Halibut Act's "fair and equitable" language is virtually identical to National Standard Four of the Magnuson-Stevens Act, 16

[5] As noted previously, this document represents an environmental assessment pursuant to NEPA, 42 U.S.C. § 4321 *et seq*., a regulatory impact review pursuant to Executive Order 12866, and a final regulatory flexibility analysis pursuant to the RFA, 5 U.S.C. § 601 *et seq*.

U.S.C. § 1851(a)(4),[6] and as such National Standard Four's implementing regulations and case law are instructive for assessing a "fairness and equity" claim under the Halibut Act. The implementing guidelines for National Standard Four first provide that "[a]n allocation of fishing privileges should be rationally connected to the achievement of OY [optimum yield] or with the furtherance of a legitimate . . . objective." 50 C.F.R. § 600.325(c)(3)(i)(A). The guidelines acknowledge that, "[i]nherent in an allocation is the advantaging of one group to the detriment of another." *Id*. The regulations expressly authorize allocations that "impose a hardship on one group if it is outweighed by the total benefits received by another group or groups." *Id*. at § 600.325(c)(3)(i)(B). In particular, "[a]n allocation need not preserve the status quo in the fishery to qualify as 'fair and equitable,' if a restructuring of fishing privileges would maximize overall benefits." *Id*. Caselaw interpreting National Standard Four therefore makes clear that "[m]erely because . . . [fishery management regulations] have a greater impact upon one type of gear user or group of fishermen does not necessarily mean that they violate National Standard 4." *Nat'l Fisheries Inst*., 732 F. Supp. at 225; *see also Nat'l Coal. for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 131-32 (D.D.C. 2002) (noting same); *Alliance Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996) (noting that "[t]he Secretary is allowed, under [§ 1851], to sacrifice the interests of some groups of fishermen, for the benefit as the Secretary sees it of the fishery as a whole") (citing *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456 (9th Cir. 1987)).

Thus, courts routinely uphold regulations against "fair and equitable" challenges under National Standard Four even where the challenged regulation results in severe consequences for one sector of a fishery. For instance, in *Alaska Factory Trawler Ass'n*, an association of trawl

[6] National Standard Four states: "If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) 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).

fishermen in the Gulf of Alaska sued to overturn Amendment 14 to the Gulf of Alaska Groundfish Fishery Management Plan. Amendment 14 prohibited directed trawl fishing for sablefish in the Eastern Gulf of Alaska, limited the trawl sablefish fisheries in the Central and Western Gulf to 20% of the catch, and phased out pot fishing altogether in favor of allocating 95% of the sablefish in the Eastern area and 80% in both the Central and Western areas to longline fishermen. 831 F.2d at 1463. Plaintiffs claimed that Amendment 14 violated National Standard 4 because it discriminated in favor of longline fishermen, who were predominantly Alaskan, at the expense of trawlers and pot fishermen, who were predominantly non-Alaskan. The Court rejected this challenge, stating:

> This Court must review the Secretary's determination that Amendment 14 does not violate National Standard 4 under an abuse of discretion standard. The administrative record constantly refers to the ground preemption and gear conflict problems which result from pot fishing and trawl fishing in the same area as longline fishing. In addition, the record indicates that all longliners will benefit from this regulation, not just the Alaska longliners. In light of this information the Secretary could reasonably conclude that even though there may be some discriminatory impact from Amendment 14, the regulations satisfy the requirements of National Standard 4 in that they are tailored to solve the gear conflict problem and to promote the conservation of sablefish.

Id. at 1464.

In *North Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 85 (D.D.C. 2007), a court in this District rejected a claim brought by commercial fishermen who argued that Amendment 13C to the South Atlantic Snapper-Grouper Fishery Management Plan unfairly prejudiced them vis a vis recreational fishermen. The plaintiffs argued that Amendment 13C was not fair and equitable because it, among other measures, imposed a "hard" quota on commercial fishermen that required the fishery to be closed once the quota was reached, whereas the recreational sector was subject to a "soft" quota, notwithstanding the fact that recreational fishermen were allowed to sell their catch. *Id*. at 90. In addition, the plaintiffs complained that

Amendment 13C imposed a trip limit that placed 62% of the burden on 21 commercial vessels, while over 50% of the vessels would suffer no loss at all. *Id*. In rejecting the plaintiffs' National Standard Four claim, the court noted that, like in this case, both the recreational and the commercial sector were having their catches reduced, and both sectors were expected to be impacted economically by Amendment 13C. *Id*. at 90-91. As the court concluded, "[t]he lines drawn by the Secretary do not cease to be "fair and equitable," *id*. § 600.325(a)(1), simply because plaintiffs view them as unfair and inequitable." *Id*. at 91. The court in *North Carolina Fisheries Ass'n* noted that the plaintiffs had made "no real effort to distinguish" the body of cases in which courts have National Standard Four claims, several of which are cited below, and that the plaintiffs had offered "no case support for their reading of National Standard 4." *Id*. The same is true in this case.

In *Nat'l Coal. for Marine Conservation*, a court in this District found that, notwithstanding the plaintiffs' claim that a challenged area closure would "essentially shut down the Florida East Coast fishing industry" because fishermen in Florida who owned smaller vessels could not travel beyond the closure area, the closure did not violate National Standard Four because NMFS had "evaluated the benefits and costs imposed by the Florida Closure, and compared its consequences with those of alternative allocation schemes, including the 'status quo.'" 231 F. Supp. 2d at 129, 131-32. Similarly, in *Sea Watch Int'l v. Mosbacher*, 762 F. Supp. 370, 376-78 (D.D.C. 1991), a court in this District held that a quota scheme alleged to discriminate against smaller fishing fleets, and ultimately drive them out of business, did not violate National Standard Four because "'[i]nherent in an allocation is the advantaging of one group to the detriment of another,'" and "nothing prevent[ed] coalitions of small owners from pooling their allocations to obtain efficiencies."

Additionally, in *Nat'l Fisheries Inst.*, the court found that regulations that "significantly reduc[ed] the domestic commercial harvest of Atlantic Ocean billfish while also limiting the recreational harvest to a lesser degree" did not violate National Standard Four. 732 F. Supp. at 211. The Court found that "the Secretary could properly conclude that, on the whole, the nation would benefit most from an effort to reduce billfish mortality caused by commercial fishing and maximize billfish availability for recreational fishing." *Id*. at 223. Finally, in *Alliance Against IFQs*, 84 F.3d 343, the Ninth Circuit held that quotas that effectively shut non-owning crewmen out of the fishery in favor of those who owned or leased fishing boats, did not violate National Standard Four. The Ninth Circuit noted that, "[d]espite the harshness to the fishermen who were left out," and the fact that "[a]lternative schemes can easily be imagined," the Secretary's decision implementing the regulations was not arbitrary or capricious because "[t]he Secretary considered their interests, 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *Id*. at 350, 352 (citations omitted).

In this case, the May 2009 rule is "fair and equitable" because "[t]he Council and NMFS . . . articulated a legitimate objective for this action, i.e., to limit the use of halibut by one sector that has grown significantly in proportion to the other sectors that harvest halibut." 74 Fed. Reg. at 21214; *see also* 50 C.F.R. § 600.325(c)(3)(i)(A). In particular, the charter sector has exceeded the GHL by significant margins in each year since 2004 to the present, which creates a conservation concern and causes instability in the fishery, in addition to aggravating an ongoing allocation issue between the commercial and sport fisheries. 73 Fed. Reg. at 78278. As noted above, in determining compliance with National Standard Four's "fairness and equity" standard, courts focus not on the impact of the regulation, but on its purpose. As long as the motive for a particular allocation is justified in terms of the fishery management plan, advantaging one group

to the detriment of another is permissible under National Standard Four. 50 C.F.R. §600.325(c)(3)(i)(A). Plaintiffs have not identified any discriminatory motive or intent on the part of the Council or NMFS. *See North Carolina Fisheries Ass'n*, 518 F.Supp.2d at 91 (noting that "Plaintiffs have not identified anything 'intentionally invidious or inherently unfair in the plan adopted by the Council and the Secretary' . . . and their challenge under National Standard 4 therefore fails") (citation omitted). Rather, those bodies were motivated by the legitimate objective of "limit[ing] the growth of one sector and the resulting reallocation from other sectors that use the same finite resource." 74 Fed. Reg. at 21214-215.

It is important to understand that "a fair and equitable allocation does not mean that all U.S. fishermen should be able to harvest equal amounts of the halibut resource." 74 Fed. Reg. at 21215. The Halibut Act requires that allocations be "consistent" with a number of factors set forth in the Magnuson-Stevens Act, including present participation in the fishery and historical fishing practices in, and dependence on, the fishery. 16 U.S.C. § 773c(c) (referencing elements of 16 U.S.C. § 1853(b)(6)). The Pacific halibut fishery historically has been a commercial fishery. For instance, between 1997 and 2007, commercial fishing accounted for approximately 76% of the average annual harvest, with sport fishing (guided charter vessels and unguided angling combined) accounting for approximately 20%, and subsistence fishing, bycatch, and wastage accounting for the remainder. 73 Fed. Reg. at 78277. Thus, the fact that plaintiffs may view the lines drawn by NMFS as unfair and inequitable does not make it so. *North Carolina Fisheries Ass'n*, 518 F. Supp. 2d at 91.

Plaintiffs contend that, when the 2003 GHL rule was implemented, no attempt was made to make it "fair and equitable" because it was merely intended to be a "'benchmark for monitoring the charter vessel fishery's harvests of Pacific halibut.'" Pls' Mem. at 25-26 (quoting

74 Fed. Reg. at 21194). That is untrue. When the Council and NMFS determined the GHL in 2003, they allowed for a 25% increase above the 1995 to 1999 average charter vessel harvest level, which was a period of historically high levels of halibut abundance. 72 Fed. Reg. at 74259. Thus, the GHL struck a rational balance between historic and present participation in the fishery, in accordance with Section 773c(c) of the Halibut Act. Although the GHL provided for limited growth in the charter sector, charter vessel fishery harvests have grown significantly in recent years, increasing by 107% between 1999 and 2005 (74 Fed. Reg. at 21203), and they continue to remain high during a time when the halibut biomass has been decreasing, to the point where, in 2008, the charter sector exceeded the GHL by more than double and likely will significantly exceed the GHL in 2009 unless changes are made to the existing regulatory structure. 73 Fed. Reg. at 78277. While the charter sector has experienced uncontrolled growth and repeatedly exceeded the GHL, the commercial sector has shouldered the burden of conservation cutbacks, having its annual catch limits reduced by 54% between 2005 and 2009. 74 Fed. Reg. at 21207. In fact, the halibut catch limit for Area 2C commercial fishermen was reduced by approximately 19% from 2008 to 2009. *Id*. at 21215.

Plaintiffs argue that allowing for a 25% expansion is not enough to make the GHL "fair and equitable" to the charter sector because that sector has grown far beyond 25%. Pls' Mem. at 29-33. Plaintiffs contend that, by using average charter vessel harvests from 1995 to 1999, the GHL is based on "old" and "stale" data[7] and fails to reflect the charter sector's present

[7] The Halibut Act contains no substantive standard with respect to what type of underlying data must be used in rulemakings. National Standard Two of the Magnuson-Stevens Act, however, is instructive. National Standard Two requires NMFS to base conservation and management measures on "the best scientific information available." 16 U.S.C. § 1851(a)(2). As a court in this District has noted, "[l]egal challenges to the Secretary's compliance with National Standard 2 are frequent and frequently unsuccessful." *North Carolina Fisheries Ass'n*, 518 F. Supp. 2d at 85. "Time and time again courts have upheld agency action based on the 'best *available*' science, recognizing that some degree of speculation and uncertainty is inherent in agency decisionmaking." *Id*. at 85 (citation omitted). As the D.C. Circuit has explained in interpreting statutory language analogous to that of National Standard 2, the agency "must utilize the 'best scientific ... data available,' not the best scientific data *possible*." *Id*. at 85 (quoting

participation in the fishery, which as noted above has grown by 107% between 1999 and 2005. *Id*. at 30. However, the charter sector's rapid and uncontrolled growth is the very problem that has prompted all three bodies responsible for Pacific halibut management (the Council, NMFS, and the IPHC) to take action in the first instance. The Council's 1995 problem statement (as revised in the 2001 GHL analysis) demonstrates that the Council was concerned about the expansion of the halibut charter industry and how that expansion may affect "'the Council's 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.'" 74 Fed. Reg. at 21214. The Council indicated six issues of particular concern, including the "absence of limits on the annual harvest of halibut by the guided sector and the rapid growth in that sector, which amounted to an 'open-ended reallocation from the commercial fishery to the charter industry.'" *Id*. Plaintiffs essentially argue that the very concern that their sector has created, and that the May 2009 rule is intended to address, is now a reason to prevent NMFS from taking action. A clever argument indeed, but one that clearly lacks merit. If, as Plaintiffs argue, each sector in the fishery should simply be allowed to harvest as many fish as it is capable of harvesting, it would not be long before no fish were left to harvest. Thus, as noted above, the GHL struck a difficult balance between historical participation in the fishery while allowing for limited growth in the charter sector.

Building Industry Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1246 (D.C. Cir. 2001)). Thus, "[a]bsent some indication that superior or contrary data was available and that the agency ignored such information, a challenge to the agency's collection of and reliance on scientific information will fail"). *North Carolina Fisheries Ass'n* at 85. As explained herein, NMFS did not ignore any superior available data, and thus Plaintiffs' complaint that NMFS relied on "stale" data fails. *See Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 47 (D.D.C. 2008) (finding that the plaintiff's claim that NMFS "failed to explain its conclusion" regarding its use of its model did not "come close" to making the requisite showing under National Standard Two).

In addition to the 2003 GHL, which considered equities involved, as Plaintiffs themselves point out, NMFS' March 209 EA includes "recent data about the historical catch and recent participation in the halibut fishery in Area 2C." Pls' Mem. at 32 (referring to Table 4 at p. 21 of the EA/RIR/FRFA). Thus, NMFS cannot be said to have ignored this factor. To the contrary, NMFS explained in its response to comments in the May 2009 rule that data relating to "past and present participation levels" has been considered beginning with the 2003 GHL rule and continuing through to the May 2009 rule. 74 Fed. Reg. at 21204. While Plaintiffs may have weighed the data differently than did NMFS, the fact of the matter is that NMFS considered this factor and made a rational decision after having done so in full compliance with the Halibut Act and the APA. *Cactus Corner*, 450 F.3d at 435 (courts are to "'defer to the evaluations of agencies when the evidence presents conflicting views'").

In addition to considering recent data about the historical catch and recent participation in the halibut fishery, as noted previously the March 2009 EA considered the potential impacts to various sectors of the fishery as part of NMFS' consideration of the equities involved in the proposed action. The analysis recognized that a one-fish bag limit likely would reduce the demand for guided halibut charters, but that, if no action was taken, the status quo "may result in reduced gross revenues and lower quota share prices" in the commercial fishery. EA/RIR/FRFA at 48-49. NMFS did not perform a qualitative analysis to determine the costs or benefits to either sector because to do so would have required a level of rigor that was not present in the data used to produce the examples. The 2009 EA does, however, include an "illustrative table" estimating potential losses to the commercial longline sector over the next three years (2009 to 2011) if the status quo is maintained. *See also id*. at 39. The 2009 EA explains that a similar table was not prepared for the guided sport fishery because guided charter gross revenue estimates were

precluded under the information currently available. *Id.*[8] In particular, because "output in the guided sector is not halibut, but days of angler fishing time," to "estimate gross revenue changes in the guided charter fleets, NMFS would have to have demand models based on survey research, which would allow the determination of changes in angler participation in the lodge-based and cruise ship-based industry segments in response to changes in the bag limit. Moreover, NMFS would need better information than it has on the possible guided charter operation supply responses." 74 Fed. Reg. at 21212-13.

Notwithstanding the inherent limitations on accurately predicting economic impacts of a one-fish bag limit on the charter sector, Plaintiffs contend that NMFS could not have rationally determined the one-fish bag limit was "fair and equitable" because an analysis prepared regarding the forthcoming Catch Sharing Plan showed that the charter sector could lose $10.4 million per year under the one-fish bag limit. Pls' Mem. at 35-36. As an initial matter, as explained above, case law interpreting the virtually identical National Standard Four of the Magnuson-Stevens Act makes clear that "[m]erely because . . . [fishery management regulations] have a greater impact upon one type of gear user or group of fishermen does not necessarily mean that they violate National Standard 4." *Nat'l Fisheries Inst.*, 732 F. Supp. at 225. Thus, even if the one-fish bag limit has a greater impact on the charter sector, that does not make the May 2009 rule unfair and inequitable. In any event, NMFS explained in its response to comment

[8] As NMFS explained:

> Different assumptions and models will generate different approaches to a problem and different results. NMFS has worked with a conceptual model in which retained halibut catches are one input into the demand for guided charter fishing days. A change in the number of halibut retained will shift the demand curve; guided charter businesses may respond by altering their business models or prices. The impacts will be different in the half-day and full- and multi-day segments of the guided charter business. NMFS does not have the data necessary to better specify or estimate the parameters of this model.

74 Fed. Reg. at 21213.

71 that the Catch Sharing Plan analysis was not prepared by NMFS, but rather was prepared for the North Pacific Council. Thus, while NMFS was aware of the report, it is important to note that the report had not been formally submitted by the Council for Secretarial review. 74 Fed. Reg. at 21213.[9] Moreover, as NMFS explained, attempting to predict economic impacts to the charter sector is inherently speculative and the Catch Sharing Plan analysis used certain assumptions that render its conclusions unreliable:

> The model used for the Catch Sharing Plan implicitly assumes that fishermen come to catch a certain weight of halibut, that the demand in terms of the number of angler-days is fixed for any given GHL, and that demand is not responsive to price or any other factor. The model assumes anglers come to Alaska to harvest 24 lbs of halibut (an estimate based on average harvests by charter vessel anglers in Area 2C) and the model equilibrates so as to set the number of angler-days demanded equal to the GHL divided by 24. The quantity of halibut harvested is central to the Catch Sharing Plan model, while the fishing experience in Southeast is central to the model used in this analysis. As the Catch Sharing Plan analysis notes, *the analysis was provided at the request of Council members, despite the impossibility of providing rigorous estimates of charter sector revenue with the information available.*

Id. (emphasis added). Thus, even if the Catch Sharing Plan model had been formally submitted by the Council to NMFS for Secretarial review, NMFS rationally could have given the report no weight due to its speculative and unreliable nature and rationally determined that the May 2009 rule is fair and equitable. *Marsh*, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive").

[9] Plaintiffs accuse NMFS of "refusing to address the significant facts in the adoption of its final rule" because its December 2008 proposed rule states that NMFS had considered, among many other factors, "the impacts of potential future actions, such as the Catch Sharing Plan for Areas 2C and 3A." Pls' Mem. at 36 (quoting 73 Fed. Reg. at 78282). Plaintiffs' argument is without merit. The quotation cited by Plaintiffs merely explains that NMFS had considered the potential effects of the Catch Sharing Plan on a broad, general level. NMFS did not purport to have reviewed any particular document such as the Catch Sharing Plan EA Report. Indeed, as noted above, that document has not been formally submitted for Secretarial review. Thus, NMFS has not refused to address any significant facts in its adoption of the May 2009 rule as Plaintiffs allege.

Finally, Plaintiffs contend that the May 2009 rule is not fair and equitable because it applies only to the charter sector, and not the unguided sport and subsistence sectors. Pls' Mem. at 37-38. As NMFS rationally explained in its response to comments, the harvest levels of the unguided sport and subsistence sectors are not as great a concern as that of the guided sport sector because they have remained relatively stable over the past several years. *See* 74 Fed. Reg. at 21216. Plaintiffs dispute that the unguided sport and subsistence sector harvests have remained stable, citing to an increase of 400,000 pounds in that sector between 2006 and 2007 as compared to a 100,000 pound increase in the guided sector during that same time period. Pls' Mem. at 38. However, Plaintiffs selectively cite the data. The fact is that non-guided sport fishery harvest levels have fluctuated between 700,000 pounds and 1.2 million pounds over the past decade and have remained relatively low as compared to the fishery as a whole, accounting for 9.3% of the total removals from Area 2C in 2007. 74 Fed. Reg. at 21203. Moreover, the non-guided sector has experienced much smaller growth between 2002 and 2007 than the guided sector, increasing its harvest level by some 300,000 pounds as compared to approximately 640,000 pounds by the guided sport sector. 74 Fed. Reg. at 21195. Thus, while Plaintiffs may evaluate the evidence differently than NMFS, the fact of the matter is that NMFS clearly had a rational basis for focusing the May 2009 rule on managing the uncontrolled growth of the guided sport sector. NMFS' rational determination is entitled to deference. *Cactus Corner*, 450 F.3d at 435 (courts are to "'defer to the evaluations of agencies when the evidence presents conflicting views'").

In sum, NMFS has done more than "parrot" the language of the Halibut Act (Pls' Mem. at 25), it has considered the equities involved in imposing a one-fish bag limit throughout the rulemaking process, and "the agency's path may reasonably be discerned." *Nat'l Ass'n of*

Homebuilders, 127 S.Ct. at 2530 (citations omitted). Plaintiffs may disagree with the agency's ultimate decision, but the fact of the matter is that Plaintiffs have not shown that NMFS failed to consider any relevant factors or lacked a rational basis for promulgating the May 2009 rule.[10] Plaintiffs therefore have failed to demonstrate that they are likely to overcome the presumption in favor of upholding NMFS' rational decision.

B. Plaintiffs Have Not Demonstrated That They Are Likely To Suffer Irreparable Harm Unless the May 2009 Rule Is Temporarily Enjoined.

The D.C. Circuit has "set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). First, the moving party must establish that the injury is "both certain and great; it must be actual and not theoretical." *Id.* (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Indeed, in *Winter*, the Supreme Court recently elucidated the "irreparable harm" standard, explaining that a plaintiff must do more than merely demonstrate that he faces the "possibility" of irreparable harm before a decision on the merits can be rendered; rather a plaintiff must demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 129 S. Ct. at 375. The moving party further must show that "[t]he injury complained of is of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy*, 454 F.3d at 297 (citations, brackets, and internal quotation marks omitted). Second, the moving party must establish that the injury is "beyond remediation." *Id.* The D.C. Circuit has held that "economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas*, 758 F.2d at 674. As

[10] Even if the Court did find NMFS' explanation inadequate, that fact would not justify the "drastic" remedy of a preliminary injunction. Rather, the appropriate remedy would be to remand the issue to the agency for further explanation while leaving the rule in place. *See North Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) (noting that, "[a]s we have said, "[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards"); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (leaving invalid rule in place for 90 days where vacatur "would prove disruptive").

a court in this District recently noted, "it is well-settled that monetary loss constitutes irreparable harm "'only where the loss threatens the very existence of the movant's business.'" *Bill Barrett Corp. v. U.S. Dep't of Interior*, 601 F. Supp. 2d 331, 335 (D.D.C. 2009) (quoting *Wisconsin Gas*, 758 F.2d at 674); *accord United Farm Workers v. Chao*, 593 F. Supp. 2d 166, 168 (D.D.C. 2009) (noting that "[i]t is well-settled that economic loss alone will rarely constitute irreparable harm" unless "the potential harm could threaten the very existence of the business").

In this case, Plaintiffs' alleged irreparable harm is entirely economic. In their motion for preliminary injunction, Plaintiffs assert that "if the final rule is not enjoined before or soon after the start of [the 2009] fishing season on June 1, the very existence of Plaintiffs' businesses *could* be in jeopardy by the end of the fishing season in August." Pls' Mem. at 8 (emphasis added). Plaintiffs' assertion suffers from two fatal defects. First, the assertion fails to reflect the correct "irreparable harm" standard as articulated by the Supreme Court in *Winter*, and thus even if the assertion were true, it would not demonstrate irreparable harm. Under *Winter*, Plaintiffs must do more than show that they "could" suffer irreparable harm before a decision on the merits can be rendered; they must show that they are "likely" to suffer irreparable harm in the absence of an injunction. *Winter*, 129 S. Ct. at 375. Plaintiffs have failed to show irreparable harm for this reason alone. Second, Plaintiffs' assertion is not supported by the evidence. As purported evidence of irreparable harm, Plaintiffs have proffered affidavits from each of the six named Plaintiffs (Scott Van Valin, Ken Dole, Rick Bierman, Theresa Weiser, Donald Westlund, and Richard Yamata). None of the affiants assert that his or her business is likely to be lost as a result of the May 2009 rule. Nor, for that matter, do any of the affiants state that any business is likely to be lost imminently, before a decision on the merits is rendered in this case. Plaintiffs

have failed to demonstrate irreparable harm for this reason as well. *Wisconsin Gas*, 758 F.2d at 674; *Chaplaincy*, 454 F.3d at 297.

The affiants offer only vague and uncertain assertions. *See* Van Valin Aff. ¶ 4 (alleging to have lost clients that "represent a significant portion of my usual annual business"); Dole Aff. ¶ 5 (alleging to have lost clients representing "a significant portion of my annual business"); Yamada Aff. ¶ 3 (alleging that his bookings are currently 10% lower than 2008 but that he has retained monies for trips paid in full that have been cancelled); Weiser Aff. ¶ 7 (alleging a loss of clients representing "a significant portion of my annual business"); Bierman Aff. ¶ 6 (complaining of economic losses caused by the 2006, 2007, and 2008 bag limits -- which are not at issue in this case -- and alleging that he "could" be forced to sell his boat at season end); Westlund Aff. ¶ 4 (not specifying any economic loss and alleging that an unknown number of "former regular clients have declined to book trips").[11] In fact, two of the affiants – Messrs. Yamada and Bierman -- concede that a number of factors likely are contributing to reduced demand for guided sport fishing trips in 2009, including "the current recession and financial crisis," a point made by NMFS in the May 2009 rule. *Compare* 74 Fed. Reg. at 21209 *with* Yamada Aff. ¶ 3 (asserting that he does not "know for sure how much [his downturn in business] is due to the slowing economy" or to the May 2009 rule); Bierman Aff. ¶ 9 (asserting that, "[e]ven without bag limit reductions the lodge industry in Southeast Alaska is facing hard times in 2009 with the economy falling into recession"). Thus, Plaintiffs have failed to make the definite and particularized showing of imminent harm necessary to justify the drastic remedy of a preliminary injunction. *See United Farm Workers*, 593 F. Supp. 2d at 170 (finding that uncertain

[11] Plaintiffs assert that "lost bookings *might* prevent" Mr. Westlund from making enough trips to qualify for the charter vessel limited entry program (Pls' Mem. at 10-11), however a final decision to implement a limited entry program has not yet been made. Thus, Plaintiffs' claim is entirely speculative and Plaintiffs have failed to "substantiate the claim that irreparable injury is 'likely' to occur" or that "the alleged harm will directly result from the action which [it] seeks to enjoin." *Wisconsin Gas*, 758 F.2d at 674; *Winter*, 129 S. Ct. at 375.

and indefinite assertions of economic harm in proffered declarations failed to demonstrate irreparable harm and thus failed to justify entrance of injunction against forthcoming Department of Labor rule); *Wisconsin Gas*, 758 F.2d at 674 ("Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time'") (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).[12]

Plaintiffs correctly note that, "even if they are not forced out of business [by the May 2009 rule], Plaintiffs will have no legal remedy through which they may recover lost revenues" that result from the May 2009 rule. Pls' Mem. at 9. Plaintiffs argue that, for that reason, they need not demonstrate that their businesses are likely to be lost, but rather they only must show that the May 2009 rule will "significantly damage [their] business[es] above and beyond a simple diminution in profits." Pls' Mem. at 12 (citing *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 67 (D.D.C. 2000). Although they are not binding D.C. Circuit authority, it is true that *World Duty Free Americas* and the primary case upon which it relies, *Mylan Pharm. v. Shalala*, 81 F. Supp. 2d. 30, 43 (D.D.C. 2000), stand for the proposition that "a strong showing that the economic loss would significantly damage [a movant's] business above and beyond a simple diminution in profits" can demonstrate irreparable harm. Plaintiffs, however, have failed to make a "strong showing" of "significant damage" in this case. In *World Duty Free Americas*, the plaintiffs demonstrated a loss of at least "one-third of [their] total business." 94 F. Supp. 2d at 67. Here, by contrast, aside from Mr. Yamada, who asserts a 10% drop in bookings from 2008 that he concedes could be due at least in part to the declining economy, none of the affiants

[12] Plaintiffs assert that "sport anglers booked for the 2009 year with the expectation of being able to retain two fish daily" (Pls' Mem. at 9), however that is simply not supported by the facts. Sport fishermen and guided businesses have had nearly two years to become informed and prepare for the potential of this action, as the Council first expressed a desire to implement a one-halibut daily bag limit for charter vessel anglers in June 2007. 74 Fed. Reg. at 21217. The proposed rule that preceded the May 2009 rule was published in December 2008 (*see* 73 Fed. Reg. 78276-01), and the May 6, 2009 rule has a 30-day delayed effectiveness period, such that it does not take effect until June 5, 2009 (*see* 74 Fed. Reg. 21194). Plaintiffs simply cannot credibly claim that there was any unfair surprise with respect to the May 2009 rule.

provide their total annual revenue figures. As such, there is no way for the Court to determine whether Plaintiffs are likely to suffer "significant damage" or a "simple diminution in profits." Indeed, in *Mylan Pharmaceuticals*, although the movant had demonstrated a non-recoverable loss of $3 million in revenue as a result of a challenged Food and Drug Administration regulation, the court found that the movant had not demonstrated irreparable harm because the movant's annual sales totaled one billion dollars, and as such the loss of $3 million amounted to a mere .4% of the movant's annual sales. 81 F. Supp. 2d. at 43. Thus, by failing to provide their annual sales in this case, Plaintiffs cannot show irreparable harm is likely to occur in the absence of a preliminary injunction. Moreover, the affidavits proffered by Plaintiffs testify as to losses already incurred, in the form of past cancellations. The affidavits do not speak to what future losses are likely to occur in the future unless a preliminary injunction issued, nor do the affiants explain how a preliminary injunction would remedy those losses that already have been incurred. Plaintiffs therefore have failed to show a "'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy*, 454 F.3d at 297.

It is worth noting that none of the affiants claim that their businesses are solely dependent on the halibut fishery. Thus, there is nothing to indicate that, in addition to being able to continue to fish for, and harvest halibut every day under the May 2009 rule, Plaintiffs do not have the ability to fish for additional species such as salmon and/or rockfish. In fact, Rick Bierman's affidavit states that his clients come firstly to "enjoy the Alaskan marine environment" and secondly "for the opportunity to catch Salmon *and halibut*." Bierman Aff. ¶ 3. The ability to substitute other species is recognized in NMFS' response to comments in the May 2009 rule as well as its analysis underlying the rule. *See* 74 Fed. Reg. at 21220 (noting that the one-fish bag limit "may cause some charter vessel businesses to modify their operations to

supplement fishing experiences for their anglers" by targeting other species like lingcod and red snapper); EA/RIR/FRFA at 13 (noting that "[a] portion of the marine sport fishing effort [in Southeast Alaska] is directed toward State-managed groundfish species, including rockfishes, lingcod, and sharks"); *see also id.* at 22, 33.

Also, even if Plaintiffs' businesses were solely dependent on halibut, characterizing the decrease of a bag limit (*i.e.*, the number of fish that can be caught and retained per day) as significant deterrent to their entire client base is disingenuous. Sport fishing is not primarily managed, and should not be marketed, as method to obtain sustenance. Rather, as the name implies, guided sport fishing has more components than just retaining fish for sustenance, including the fishing experience and opportunities to catch and release. Other methods of fishing, such as personal use and subsistence fishing, which use different gears and have different bag limits, are managed more consistently with fishing for sustenance. In addition, Plaintiffs fail to acknowledge that other management measures were considered and not chosen by NMFS, such as annual limits. With no annual limits, even if Plaintiffs' clients were primarily concerned with sustenance and desired to catch and retain more fish than is allowed under the current bag limit, those clients are free to extend their stay, which would increase the income stream to Plaintiffs.

Plaintiffs assert in their motion for preliminary injunction that NMFS has "conceded" the issue of irreparable harm because it agreed in its response to comments that the May 2009 rule "is likely to have adverse impacts on charter business profitability in 2009 and that some charter operators may fail or leave the business." Pls' Mem. at 12-13 (quoting 74 Fed. Reg. at 21210). Plaintiffs, however, fail to provide the full quotation. The quotation continues, stating that " . . . NMFS does not agree [with the comment] that all but a few guided operations will go bankrupt."

74 Fed. Reg. at 21210. In any event, the issue here is not whether the "charter industry" (Pls' Mem. at 12) as a whole, will be impacted economically, or whether any member of the charter sector may leave the fishery in 2009. The only issue currently before the Court is whether or not the six individual Plaintiffs in this lawsuit have made a "clear showing" that they are "likely" to suffer irreparable harm before this case can be decided on the merits. *Mazurek*, 520 U.S. at 972; *Winter*, 129 S. Ct. at 375. NMFS has conceded nothing with respect to the named Plaintiffs in this case. *See* Pls' Mem. at 12. To the contrary, Federal Defendants submit that Plaintiffs have failed to make the requisite "clear showing."[13]

In sum, it is important to understand that, because halibut is a fully utilized fishery, any management measure that NMFS imposes to reduce allowable harvest is expected to have an economic impact on one sector or another, and the May 2009 rule is no exception. While Plaintiffs in this case may experience some economic impacts as a result of the new one-fish bag limit, the fact of the matter is that Plaintiffs bear a heavy burden of demonstrating that they are likely to suffer a harm that is so imminent and so severe that it justifies the drastic and extraordinary remedy of enjoining the May 2009 rule until the case can be decided on the merits. Plaintiffs have failed to carry this heavy burden, and their motion for a preliminary injunction should be denied for this reason alone.

C. Preliminarily Enjoining the May 2009 Rule Would Cause Substantial Injury to Other Interests.

As noted above, to obtain a preliminary injunction, Plaintiffs must demonstrate that the balance of equities tips in their favor, *Winter*, 129 S. Ct. 365, or in other words, that issuance of a preliminary injunction would not "substantially injure" other interested parties. *Serono Labs.*,

[13] Plaintiffs' motion for preliminary injunction asserts that "the harm is not limited" to what is described in the affidavits (Pls' Mem. at 11), however the discussion provided at pages 11-12 of Plaintiffs' brief is merely the unsupported assertions of Plaintiffs' counsel, which clearly fail to make a "clear showing" that irreparable harm is "likely" in the absence of a preliminary injunction. *Mazurek*, 520 U.S. at 972; *Winter*, 129 S. Ct. at 375.

Inc. v. Shalala, 158 F.3d 1313, 1317 (D.C. Cir. 1998). Plaintiffs have failed to make this required showing. Contrary to Plaintiffs' assertions, granting a preliminary injunction against the May 2009 rule would injure NMFS, the Council, the commercial halibut fishery, and the halibut resource itself.

1. Granting a Preliminary Injunction Would Injure NMFS and the Council.

Plaintiffs assert that NMFS "certainly will not suffer any substantial injury if the final rule is preliminarily enjoined." Pls' Mem. at 13. Plaintiffs assert this is so because NMFS "cannot be said to be 'burdened' by a requirement that it comply with the law" and that "[t]he immediate relief that Plaintiffs seek will require nothing more of the Secretary than what the law already requires." *Id*. Plaintiffs' arguments are far wide of the target. The issue is whether or not the immediate relief that Plaintiffs seek -- an injunction preventing the May 2009 rule from taking effect -- would substantially injure NMFS. Plaintiffs must demonstrate that this is not the case. Plaintiffs' unsupported assertions noted above fail to make the necessary showings.

First, Plaintiffs may not simply assume that the May 2009 rule is unlawful. To the contrary, the applicable standard of review in this case is highly deferential and presumes the May 2009 rule to be lawful. As explained above, Plaintiffs are not likely to overcome this presumption. Furthermore, enjoining the May 2009 rule would prejudice NMFS and the Council, and undermine the IPHC's overall harvest strategy. NMFS has explained that the charter sector's uncontrolled growth (107% between 1999 and 2005) in the face of declining halibut biomass has caused the charter sector to exceed the GHL by significant margins in each year between 2004 and 2008, which undermines the IPHC's overall harvest strategy. 74 Fed. Reg. at 21203; 73 Fed. Reg. at 78277-78; 73 Fed. Reg. at 78277. As the domestic entities charged with maintaining the health and stability of the Pacific halibut fishery, NMFS and the

North Pacific Council determined that action in the form of the May 2009 rule was needed to control the heretofore uncontrolled growth of the charter sector. 16 U.S.C. § 773c(a)-(c). Given the short duration of the halibut season in which the most significant portion of halibut is caught (June to August), if the May 2009 rule is preliminarily enjoined, the harm to NMFS and the Council would be much greater than a mere "temporary delay in its effectiveness" as Plaintiffs assert (Pls' Mem. at 14), rather the rule would essentially be defeated for the 2009 fishing season and the Council and NMFS' intent to limit the charter sector to the GHL would be thwarted entirely, leaving the charter sector free again to exceed the GHL by a significant margin. Because enjoining NMFS' May 2009 rule would jeopardize the agency's ability to carry out its statutory mandate to manage the halibut resource, Federal Defendants submit that Plaintiffs cannot demonstrate that their requested relief would not substantially injure NMFS.

2. Granting a Preliminary Injunction Would Injure Commercial Halibut Fishermen and IPHC Harvest Objectives.

Plaintiffs assert that preliminarily enjoining the May 2009 rule would not "harm any person involved in the commercial halibut fisheries" because "[t]he total allowable catch for the commercial sector has already been fixed by the IPHC and the Secretary for the 2009 commercial season." Pls' Mem. at 14. While Plaintiffs correctly note that the total allowable catch for the 2009 commercial season has been fixed, Plaintiffs are wrong to assert that this fact means that enjoining the May 2009 rule will not substantially injure commercial fishing interests. As explained above, because the commercial sector's catch limit is determined only after estimated non-commercial harvests are deducted from the CEY, the charter sector's overharvesting decreases the amount of halibut available to the commercial sector in subsequent years when the IPHC accounts for the overages, thereby creating a *de facto* reallocation of the resource from the commercial sector to the charter sector in future years. 73 Fed. Reg. at 78277.

Thus, while enjoining the May 2009 rule and allowing the charter sector to surpass the GHL in this fishing season may not immediately harm commercial fishing interests, it will harm those interests in years to come.

Indeed, as NMFS explained in the May 2009 final rule's response to comments, the charter sector's past GHL overages are partly responsible for the 54% reduction in the commercial sector annual catch limits between 2005 and 2009. 74 Fed. Reg. at 21207, 21212. NMFS' 2009 EA estimates that, if the status quo were maintained for the next three years (2009 to 2011), it could result in a significant loss to the commercial longline halibut fishery. EA/RIR/FRFA at 39. Plaintiffs' motion for a preliminary injunction entirely fails to address the issue of future allocations, and for that reason Federal Defendants submit that Plaintiffs have failed to carry their burden of demonstrating that enjoining the May 2009 rule will not substantially injure commercial halibut fishing interests. *See Serono Labs.*, 158 F.3d at 1326 (finding that the balance of harms resulted "roughly in a draw" where the movant's claimed lost sales in the absence of an injunction equaled those that would be lost to the non-movant in the presence of an injunction).

D. Granting a Preliminary Injunction Would Be Contrary to the Public Interest.

Plaintiffs spend a significant portion of their brief attempting to paint the May 2009 rule as a pure allocation measure that holds no conservation benefits and does not implicate the health of the halibut stock. *See generally* Pls' Mem. at 15-20. Plaintiffs assert that the "key point" is that the May 2009 rule "will not change the size of the halibut harvest in Area 2C" (Pls' Mem. at 16, quoting from the EA/RIR/FRFA at 75), and as such "there are no environmental impacts that factor into the public interest prong of the preliminary injunction test." Pls' Mem. at 16.

Plaintiffs are incorrect and seriously misconstrue the cited material from NMFS' 2009 EA. As an initial matter, Plaintiffs selectively quote from the document. The full question and answer from the 2009 EA is as follows:

> Can the proposed action be reasonably expected to jeopardize the sustainability of any target species that may be affected by the action? No. No significant adverse impacts were identified for the preferred alternative. The action is expected to reduce charter vessel harvest of halibut. Total removals from the halibut resource are set by the IPHC at a level determined to be sustainable. No changes will be made to the total amount of halibut harvest (EA Section 4.3.1).

EA/RIR/FRFA at 75.

Thus, the "key point" identified by Plaintiffs on page 75 of the EA/RIR/FRFA was made in the context of explaining that *implementation of the May 2009 rule would not cause any adverse environmental impacts* because the rule was intended to limit the harvest to the amount determined by the IPHC to be sustainable (*i.e.*, the CEY). By holding the charter sector to the GHL, the May 2009 rule does not change the size of the halibut harvest that the IPHC has found to be sustainable, and thus the rule does not adversely affect the environment. Plaintiffs misconstrue this citation (as well as quoted passages from pages 64 and xv of the 2009 EA)[14] in suggesting that, because implementation of the May 2009 rule will not have any adverse

[14] Plaintiffs' brief (at 16) also selectively quotes from page 64 of the 2009 EA. Immediately after the material quoted by Plaintiffs, the EA states:

> While realized IPHC target harvest rates have exceeded their target harvest rates since about 2000, the IPHC has also reduced the total CEY and the fishery catch limit substantially since 2005. Under the status quo, in the short run, it is likely that large guided charter harvests could contribute to exceedence of the exploitation rates on which the IPHC Total CEY for the year were based and exceed the desired exploitation rate contained in IPHC's harvest policy. However, this could be ameliorated by reductions to catch limits in subsequent years. Compared to the status quo [*i.e.*, the two-fish bag limit], the preferred action [*i.e.* the one-fish bag limit] reduces the potential for exceeding the CEY.

EA/RIR/FRFA at 64.

Thus, if the May 2009 rule is enjoined and the charter sector is allowed to exceed the GHL in 2009, causing more halibut to be harvested than the IPHC has deemed sustainable, it would harm the resource and undermine the IPHC's management strategy, causing it to reduce the CEY in future years to account for this year's overage.

environmental impacts, enjoining the rule would have no conservation implications. The opposite is true. As explained above, the CEY represents the amount of halibut that the IPHC has determined may be removed by all sources of fishing mortality without causing biological conservation problems. When the IPHC establishes the CEY, it assumes that the charter sector will not exceed the GHL. 73 Fed. Reg. at 78277. Thus, when the charter sector exceeds the GHL, it causes more halibut to be removed from the fishery as a whole in that year than the IPHC has determined may be removed without causing biological conservation problems. As NMFS has explained, "leaving fish unharvested contributes to biomass and Total CEY in subsequent years." 74 Fed. Reg. at 21212. Thus, the charter sector's overharvesting undermines the IPHC's overall harvest strategy and creates a conservation concern. 73 Fed. Reg. at 78277. Plaintiffs' assertion that "[t]he only thing that is subject to change is which sector catches the fish, not whether the fish will be caught at all" (Pls' Mem. at 17) is incorrect.

For the reasons explained above, enjoining the May 2009 rule would adversely affect the resource because it would allow the charter sector to exceed the GHL in the 2009 fishing season, and thus remove more halibut than the amount the IPHC, NMFS, and the Council have deemed are appropriate and necessary to maintain the health and stability of the halibut fishery. Indeed, NMFS' 2009 EA determined that, because the proposed rule would "meet distributional objectives and re-establish stability in the 2C halibut fishery," it was "expected to increase the net benefit to the Nation, over that of the status quo." EA/RIR/FRFA at 49. Conversely, enjoining the May 2009 rule (*i.e.*, maintaining the status quo), "would not be expected to increase the net benefit to the Nation" because it would not meet distributional objectives and would not re-establish stability in the 2C halibut fishery. *Id.*

Plaintiffs argue that the GHL is not a "fair and equitable" allocation between the charter and commercial sectors and that this fact "undermines the entire conservation argument." Pls' Mem. at 19. Again, Plaintiffs are far wide of the target.[15] Whether or not the GHL results in a fair and equitable allocation is an entirely separate question from whether or not enjoining the May 2009 rule and allowing the charter sector to exceed the GHL would harm the halibut resource. As explained above, NMFS never determined that allowing the charter sector to exceed the GHL would not harm the halibut resource, and thus enjoining the May 2009 rule is not in the public interest. In fact, NMFS' 2009 EA explained that, because the charter sector's GHL overages reduce the amount of halibut available to the commercial sector in future years, "the reduction in the allocation of halibut to the commercial longline sector will reduce the amount available to people buying halibut in stores and restaurants." EA/RIR/FRFA at 44. The analysis further explained that holding the charter sector to the GHL eventually would "result in smaller deductions from the Total CEY for halibut, a larger halibut Fishery CEY, and larger production from the commercial longline fleet," which "would reduce the price of halibut in the marketplace." *Id*. at 45. For the reasons set forth above, Plaintiffs have failed to carry their burden of demonstrating that enjoining the May 2009 rule is in the public interest.

VI. CONCLUSION

In sum, Pacific halibut, like all fishery resources, is a finite resource. As users of this resource increase, regulatory regimes governing all users necessarily become more restrictive and complex to meet conservation and allocation policy goals. In recent years, the halibut biomass has been decreasing and the commercial quotas have been reduced accordingly. While

[15] Plaintiffs also offer the wholly conclusory argument that "it is in the public interest that an agency be enjoined from acting unlawfully." Pls' Mem. at 21. As noted previously, Plaintiffs cannot simply assume that the May 2009 rule is unlawful and ignore the fact that they bear the burden to not only demonstrate that they are likely to overcome the presumption in favor of upholding the May 2009 but also to show that enjoining the May 2009 rule is in the public interest.

other user groups' use of the resource has remained relatively stable during this time, the charter sector has experienced uncontrolled growth, making it necessary for NMFS to impose management measures to control this growth for the health and stability of the fishery. Plaintiffs, as charter boat owners and operators, clearly would benefit economically from continued uncontrolled growth, however the fact of the matter is that NMFS made a rational policy decision, as the expert agency charged with choosing appropriate management measures based on its evaluation of the relevant quantitative and qualitative factors. Plaintiffs have failed to show that they are likely to overcome the presumption in favor of upholding NMFS' rational decision, that they are likely to suffer irreparable harm if NMFS' rule is not enjoined before the case can be decided on the merits, or that enjoining the 2009 rule would not harm other parties or the public interest. Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted: June 1, 2009

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