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December 7, 2009

Mr Eric Olson
Chair
North Pacific Fishery Management Council
605 West 4th Ave, Ste 306
Anchorage, AK 99501

Dear Chairman Olson and Member of the Council,

Re: Agenda Item: B Reports

During the B reports of your December meeting, NMFS will provide an update on the halibut charter moratorium and a briefing on the outcome of the lawsuit filed by charter plaintiffs against the 2C conservation management measures. Members of the Halibut Coalition request that the Council take this opportunity to STRONGLY urge NMFS to implement effective management measures to limit Area 2C charter halibut harvest to the GHL in 2010. We make this recommendation for the following reasons:

- The estimated 2009 charter harvest in Area 2C, with the one halibut daily limit in place for the entire season, is 1.3 million pounds.
- The 2009 charter halibut GHL in Area 2C is .788 million pounds, hence the charter fleet exceeded its 2009 GHL by a preliminary estimate of .518 million pounds. (The 2008 preliminary harvest numbers underestimated the harvest)
- The Council, IPHC, and NMFS have repeatedly committed to managing the charter halibut fishery to the GHL until a long-term management strategy is in place.
- A federal judge has ruled that charter GHL overages constitute a conservation threat to the resource (see attached memo).
- Despite substantial setline quota reductions over the past four years, the Area 2C halibut stock continues to decline and an additional quota reduction is anticipated in 2010.

Alaska Longline Fishermen's Association • Cordova District Fishermen • Deep Sea Fishermen's Union • Fishing Vessel Owners Association • Halibut Association of North America • Kachemak Bay Fisheries Association • North Pacific Fisheries Association • Petersburg Vessel Owners Association • Sea Food Producers Cooperative • Southeast Alaska Fishermen's Alliance • United Cook Inlet Driftnetters Association • United Fishermen's Marketing Association • United Southeast Alaska Gillnetters Association

- The charter halibut moratorium is not scheduled to limit participation and in the charter fishery until 2011, hence in the absence of additional restrictions the 2010 charter harvest can be projected to equal or exceed the 2009 harvest.
- Commercial fishermen and processors, subsistence harvesters and fishery dependent communities have suffered severe economic hardship as a result of the estimated 58% halibut biomass decline in Area 2C. An additional 26% reduction is now recommended for 2C by the IPHC staff. Fishermen and processors have focused on the long-term as they grimly accepting conservation reductions. Given continued declines and poor age-class structure, the Area 2C stock cannot withstand more quota overages. NMFS has been told by a federal judge to manage the charter sector to the GHJ, and clearly the one halibut daily limit is insufficient to prevent GHJ overages.

Coalition members request that the Council direct NMFS to implement both of the following:

- 1) additional restrictions on 2C halibut charter harvest for 2010;
- 2) 2010 **effective** implementation of the halibut charter moratorium

The Council might also take note that additional regulatory controls would be triggered in Area 2C by the Catch Sharing Plan, which is scheduled for implementation in 2011 pending Secretarial approval, if it were in place in 2010. The additional regulatory action triggered would be a maximum size on the retained halibut (see table 1, pages 1-2 of Northern Economics Analysis: *Issues in selecting a maximum length limit to manage charter halibut harvest in times of low abundance*. July 6, 2009)

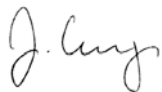
Attached is a summary of the charter lawsuit (*Van Valin v. Locke*, 2009 WL 4068028 (D.D.C., November 23, 2009) prepared by the Halibut Coalition attorney, George Mannina. To quote from Mr. Mannina's conclusion:

"The Court's decision stands for the principles that (1) the GHJ is the maximum harvest level for the charter sector and NMFS can regulate the charter fleet to limit the charter harvest to the GHJ, (2) exceeding the GHJ constitutes a conservation threat to the resource, (3) the charter sector's current harvest levels in excess of the GHJ are not properly part of the fleet's "present participation" in the fishery because rewarding overfishing above the GHJ is inappropriate, and (4) regulations implementing the GHJ are fair and equitable because limiting the charter fleet to its GHJ is a legitimate fishery management objective, provided the Administrative Record documents the relationship between the objective and the regulation selected." (G. Mannina memo, 12/5/09)

In closing, the Halibut Coalition urges NMFS to take appropriate action to limit the 2010 2C charter harvest to the GHJ. Such action is consistent with past Council, NMFS and IPHC commitments; it is consistent with the findings of the court; and it is essential to conservation of the 2C halibut resource.

Thank you for your attention,

Sincerely,



Julianne Curry, Petersburg Vessel Owners Association



Rochelle van den Broek, Groundfish Division, Cordova District Fishermen United



Jeff Stephan, United Fishermen's Marketing Association



Robert Alverson, General Manager, Fishing Vessel Owners Association



Linda Behnken, Executive Director, Alaska Longline Fishermen's Association



Roland Maw, Upper Cook Inlet Drift Association



Tim Henkel, President, Deep Sea Fishermen's Union



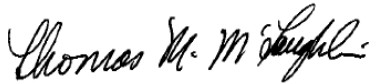
Rhonda Hubbard, Kruzof Fisheries, LLC



Chris Knight, United Southeast Alaska Gillnetters



Peggy Parker, Executive Director, Halibut Association of North America



Thomas M. McLaughlin, President/CEO Seafood Producers Cooperative



Kathy Hansen, Executive Director, Southeast Alaska Fishermen's Association

Enclosure: George Mannina, Nossaman LLP, Memo of December 5, 2009

Copy: Mr. Sean Parnell, Governor, State of Alaska
Senator Lisa Murkowski, U.S. Senate
Senator Mark Begich, U.S. Senate
Congressman Don Young, U.S. House of Representatives
Mr. Denby Lloyd, Commissioner, Alaska Department of Fish and Game
Dr. Bruce Leaman, Executive Director, International Pacific Halibut Commission
Ms Jane Lubchenco, Undersecretary of Commerce for Oceans and Atmosphere
Mr. Jim Balsiger, Regional Administrator, NMFS Alaska



TO: Linda Behnken
FROM: George J. Mannina, Jr.
DATE: December 5, 2009
RE: Analysis of the Decision in *Van Valin v. Locke*, 2009 W.L. 4068028 (D.D.C. November 23, 2009)

On November 23, 2009, Judge Collyer rejected the charter boat plaintiffs' argument that the GHL is not an enforceable limit, the regulations enforcing the GHL are not fair and equitable, and the enforcing regulations do not account for the present participation of the charter fleet in the halibut fishery.

The GHL is an Enforceable Cap on the Charter Harvest

The Court noted the Northern Pacific Halibut Act grants the Secretary broad authority to adopt necessary regulations to carry out the purposes of the Act and the International Convention. *Van Valin v. Locke*, 2009 W.L. 4068028 (D.D.C. Nov. 23, 2009) at 1. The Court found: "The GHL regulations establish the total maximum poundage for the charter vessel fishery each year according to a predetermined formula that depends on that year's CEY." *Id.* at 2, *citing* 68 Fed. Reg. 47256, 47259 (August 8, 2003). The Court went on to cite with approval the statement in preamble to the regulations setting the GHL levels that "the goal for the GHL was to provide a limit on the total amount of harvests in the guided fishery...." *Id.* The Court continued by quoting with approval the preamble to the final one halibut rule that "charter removals should be close to the GHL...." *Id.* at 8, *citing* 74 Fed. Reg. 21194 (May 6, 2009).

The Court noted that the plaintiff charter operators had argued the GHL "merely set benchmarks and did not limit the halibut harvest." 2009 W.L. 4068028 at 9. The Court responded to Plaintiffs' argument stating: "This argument is unsupported by the Administrative Record." *Id.* The Court noted the word "benchmark" is to be understood in the context that the GHL is a "benchmark" that tells the agency when it is necessary to adopt appropriate enforcement measures. *Id.* at 2, 9. Thus, the Court noted the GHL is not self-enforcing but sets the charter limit that is to be enforced "by subsequent regulation." *Id.* at 2.

Enforcing the GHL is Necessary for the Conservation of the Resource

Plaintiff charter boat operators had disputed the view that there was a conservation basis for enforcing the GHL. The Court rejected Plaintiffs' argument. The Court found that the GHL and the one halibut implementing rule were indeed rooted in conservation. The Court stated that the decline of the halibut biomass was a central fact in the North Pacific Council recommending "that the charter harvest be regulated...." *Id.* at 3. The Court found "The guided sport sector's overharvesting potentially undermines IPHC's conservation and management goals for the overall halibut stock. Thus, the final rule was based, in part, on a conservation concern...." *Id.* at 8. It is significant that the Court equated GHL exceedances with overfishing. The Court concluded by quoting with approval the preamble to the final rule that stated:

As conservation of the halibut resource is the overarching goal of the IPHC, the magnitude of charter vessel harvest over the GHL in Area 2C has raised concern that such excessive harvests by the charter sector pose a conservation risk, with the potential to undermine the IPHC's conservation and management goals for the overall halibut stock. Therefore, restraining charter sector harvests to approximately the GHL would contribute to the conservation of the halibut resource.

Id. at 8-9, *citing* 74 Fed. Reg. at 21194-95.

The Regulations to Enforce the GHL Are Fair and Equitable

The Court noted that Plaintiffs did not challenge that NMFS has the authority to adopt harvest restrictions to implement the GHL. 2009 W.L. 4068028 at 5. Rather, Plaintiffs asserted that NMFS has never explained why the GHL and its implementing regulations were fair and equitable. In response, the Court noted the Secretary promulgated the regulations, in part, "to address the imbalance caused by the de facto reallocation from the commercial fishery to the charter industry caused by the charter sector's rapidly increasing harvests in recent years." *Id.* at 8. The Court found the Halibut Act does not require that NMFS make a specific finding and declaration that the regulation is fair and equitable but only that the allocation "be fair and equitable." *Id.* at 5 (emphasis in original).

The Court went on to state:

When determining fairness and equity the focus is not on the impact of the regulation, but on its purpose. So long as the motive behind the regulation is justified in terms of the fishery management objective, advantaging one group over another is permissible under [National] Standard Four. 50 C.F.R. § 600.325(c)(3)(i)(A); *see also Alliance Against IFQs*, 84 F.3d at 350. The motive behind the Final Rule was justified in terms of fairness and equity; the Secretary considered the allocation of the halibut resource and conservation of the halibut resource in proper historical context.

Id. at 9. The Court then traced where in the Administrative Record NMFS considered the fairness and equity of the allocation and its implementing regulations, including the impact of the regulation on all user groups.

Present Participation in the Fishery was Properly Considered

Plaintiff charter operators argued that the one halibut rule was improper because it did not consider the current level of participation in the fishery by the charter operators. The Court soundly rejected this argument stating:

While present participation in the fishery is one factor that the Secretary must examine when considering fishery management measures, another factor is historic harvest participation levels. See 16 U.S.C. § 1853(b)(6) (one of the factors to be considered under the Magnuson Act is historic participation and dependence on the fishery). In *Yakutat v. Gutierrez*, 407 F.3d 1054 (9th Cir. 2005), ... [t]he court found that it was permissible for the Secretary to place a higher premium on historical participation in the fishery rather than focusing solely on present participation. *Id.* at 1073. When promulgating the Final Rule, the Secretary examined the historical participation in the Pacific halibut harvest and the charter fishery's excessive harvests in recent years.

Id. at 11.

The Court went on to state that “Where overfishing by one group in recent years is the precise concern that the regulation intends to address, it makes sense to disregard the most recent participation data.” *Id.* The Court’s reasoning was that the charter sector should not be rewarded for ignoring the GHL. The Court stated:

The Charter Operators' argument that the Secretary should have relied on recent participation data is in essence a claim that they are entitled to a greater allocation of the harvest because they have been harvesting a greater amount in recent years, *i.e.*, that they should be rewarded for exceeding the guidelines year after year. The Secretary understandably chose not to encourage such overharvesting.

Id. Again, note that the Court calls the GHL exceedences “overfishing” and “overharvesting.”

Conclusion

The Court’s decision stands for the principles that (1) the GHL is the maximum harvest level for the charter sector and NMFS can regulate the charter fleet to limit the charter harvest to the GHL, (2) exceeding the GHL constitutes a conservation threat to the resource, (3) the charter sector’s current harvest levels in excess of the GHL are not properly part of the fleet’s “present participation” in the fishery because rewarding overfishing above the GHL is inappropriate, and (4) regulations implementing the GHL are fair and equitable because limiting the charter fleet to its GHL is a legitimate fishery management objective, provided the Administrative Record documents the relationship between the objective and the regulation selected.