UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, *et al.*,

Plaintiffs,

v.

GARY LOCKE, in his Official Capacity as Secretary of the U.S. DEPARTMENT OF COMMERCE, *et al.,*

Defendants.

Civil Action No. 09-0961-RMC

INTERVENOR-DEFENDANTS' REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' AND INTERVENOR-DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Dated: August 24, 2009

George J. Mannina, Jr. (D.C. Bar No. 316943)
Paul L. Knight (D.C. Bar No. 911594)
Nossaman LLP/O'Connor & Hannan
1666 K Street, N.W., Suite 500
Washington, D.C. 20006-2803
Telephone: (202) 887-1400
Facsimile: (202) 466-3215
Counsel for Intervenor-Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

I. INTRODUCTION

Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' and Defendant-Defendants' Motion for Summary Judgment ("Pl. Op.") merely repeats Plaintiffs' basic theme that no one has explained the "why" for this Rule. The responsive briefs by the Government and Intervenors contained over 500 Administrative Record ("A.R.") citations responding directly to Plaintiffs' issues.[1] Plaintiffs' reply is simply to repeat their mantra "no one has told us why." Plaintiffs are being willfully blind.

II. THE FAIR AND EQUITABLE QUESTION

A. THE FISHERY MANAGEMENT OBJECTIVE

Plaintiffs make a variety of interesting and ever changing arguments inconsistent with governing judicial precedents and the facts. For example, Plaintiffs now ask "Assuming that charter removals create 'a *de facto* reallocation' of the resource from the commercial sector to the charter sector, why is this a concern that requires regulatory action?" Pl. Op. at 1. Although Plaintiffs previously admitted a reallocation exists, conceding the issue, now they want to question it, calling the reallocation an assumption. But Plaintiffs' opening brief admitted "the charter sector's harvest decreases the amount of halibut available to the commercial sector." Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 12. Plaintiffs explained the commercial catch limit is set after the charter catch is deducted from the overall allowable catch and, therefore, as the charter catch increases, there is a reallocation from the commercial quota. *Id.*

---

[1] Pursuant to the Administrative Procedure Act, a court reviewing an agency decision reviews "the whole record or those parts of it cited by a party." *American Wildlands v. Kempthorne,* 530 F.3d 991, 1002 (D.C. Cir. 2008). Review of the whole record "is to be based on the full administrative record that was before the [agency decision makers] at the time [they] made [their] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971).

Plaintiffs' next statement questioning whether addressing the impact of increased harvests by new fishery entrants on traditional users is really a basis for regulatory action is also stunning in its audacity. Every court faced with the issue of whether it is a legitimate fishery management objective to address the adverse socio-economic impacts to one sector caused by the expanding harvests of another sector has answered yes. *See* Intervenor-Defendants' Behnken, *et al.* Memorandum in Support of Intervenor-Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("Behnken Int.-Def. Mem.") at 6-8. Plaintiffs never respond to this unanimous precedent. Plaintiffs cite no contrary case supporting their "question."

Embedded in Plaintiffs' newly minted legal question is a factual question that has been the overall theme of their case: why has no one ever explained to us why the growing and geographically concentrated charter harvest is a problem in the first place? The Behnken Intervenors cited the voluminous record evidence about the adverse impacts of the expanding charter harvest on commercial fishermen, processors, dependent coastal communities, subsistence users, and the resource – evidence that was before the North Pacific Fishery Management Council ("Council") and the Secretary of Commerce ("Secretary") acting through the National Marine Fisheries Service ("NMFS"). *See* Behnken Int.-Def. Mem. at 11-13, 16-17, 21-27. Therein are the Council's Problem Statement and 197 A.R. citations where the adverse socio-economic and biological impacts of the growing charter harvest are discussed and/or explained, including the preambles to the proposed and final rules and the Environmental Assessment/Regulatory Impact Review ("EA/RIR"). Plaintiffs may want to be willfully blind but the evidence is in the record. NMFS reviewed and summarized the evidence, explaining its importance and the conclusions to be drawn. Behnken Int.-Def. Mem. at 12-13, 16-18, 23-27.

Plaintiffs' seek to divert attention from the record and to confuse the issue by stating the charter industry has now "reached an equilibrium." Pl. Op. at 16. Such logic ignores the fact that (1) this "equilibrium" level is completely contrary to the fishery management objective set by the Council and the Secretary; (2) this "equilibrium" is 240% above the Guideline Harvest Level ("GHL"), (3) the charter industry reached this "equilibrium" by growing 107% while the resource declined 58% and the commercial quota was cut 54% for conservation reasons caused in part by charter overfishing, and (4) this "equilibrium" poses a current conservation threat to the resource. Behnken Int.-Def. Mem. at 3, 11, 23-24.[2]

Despite Plaintiffs' "questions," the GHL was adopted for a legitimate fishery management objective.

B. THE SELECTION OF 125% OF THE 1995-1999 CHARTER HARVEST

Plaintiffs' next question is why did the Council and NMFS decide on a GHL equaling 125% of the 1995-1999 average charter harvest – a GHL that gave the charter industry 13% of the combined charter/commercial catch. Pl. Op. at 1. Again, asked and answered. *See* Behnken Int.-Def. Mem. at 15-22 wherein are collected 297 A.R. citations discussing the percentage allocation and/or the baseline years. Among those citations are the preambles to the proposed

[2] Plaintiffs attempt to further confuse the issue by saying the fishery management objective was to protect the value of Quota Shares ("QS") established pursuant to the Individual Fishing Quota ("IFQ") program which Plaintiffs say do not need protecting because they have increased in value. Pl. Op. at 17-18. Again, Plaintiffs ignore the record. The Council's Problem Statement does not talk about protecting the value of QS. It talks about localized depletion caused by geographically concentrated charter fishing and the adverse socio-economic impacts on increasing charter harvests on subsistence and commercial fishermen as well as dependent coastal communities. Behnken Int.-Def. Mem. at 11. The value of QS is certainly an issue for commercial fishermen but equally important is the loss of annual income resulting from diminished catch limits. It is like a homeowner who cannot pay the mortgage. Your house may have increased in value but that does not help you pay the monthly mortgage. Plaintiffs' attempt to rewrite and limit the Council's Problem Statement ignores the other important issues of localized depletion, subsistence, resource conservation, and the related problems charter harvests were and are causing in local communities.

and final rules where NMFS not only asked for public comment on these precise issues but explained the choices made. *Id.* at 18-21, 25-26.

As the EA/RIR for the GHL explained, the Council reviewed different baseline years and, in February 2000, selected 1995-1999 because (1) "it was the longest period under review" and (2) choosing a multiple year period avoided data concerns associated with choosing a single year. A.R. 10 at 227.[3] Allocating the charter industry 25% more than they were harvesting was a compromise fully accounting for the current size of the charter harvest, allowing some growth in that industry, and generally preserving the historic and traditional fisheries. Behnken Int.-Def. Mem. at 16. As NMFS explained, the 125% cap was chosen to "accommodate limited growth of the charter fleet while approximating historical harvest levels." A.R. 10 at 228. Why this allocation is fair and equitable was also explained. Behnken Int.-Def. Mem. at 15-20, 25-27.

Again, Plaintiffs are being willfully blind.

C. OVERALL BENEFITS

1. The Legal Standard

Moving past the previous questions, Plaintiffs next argue that furthering a legitimate fishery management objective is a necessary but insufficient condition to justify an allocation. Plaintiffs assert it is also necessary to prove there are net benefits to the Nation. Pl. Op. at 14. A review of judicial standards is in order but that review must start with the factual framework.

An allocation limits the amount of harvest. That "amount" is often fixed as a percentage or number or pounds of the total allowable catch, a seasonal restriction, a gear restriction, or an area restriction. Courts reviewing whether an allocation is fair and equitable under National

[3] Some A.R. documents have pages carrying two numbers, the document's internal pagination and the A.R. pagination in the lower right corner. Unless otherwise noted, A.R. cites will be to the A.R. pagination.

Standard 4 ("NS 4") of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") have not ruled based on the fairness of the "amount" itself. Contrary to what Plaintiffs might want, courts do not assess whether the Secretary should have approved a seasonal closure of two versus three months, or an area closure of 100 versus 500 square miles, or an award of 15% versus 20% of the allowable harvest.

Instead, many courts frame the legal standard for determining if an allocation is fair and equitable as requiring the answer to only one question, "Does the allocation in the fishery management plan ("FMP") fulfill a legitimate fishery management objective?" *See Alaska Factory Trawler Ass'n v. Baldridge,* 831 F.2d 1466, 1460 (9th Cir. 1987); *Fisherman's Finest, Inc. v. Gutierrez,* 2008 U.S. Dist. LEXIS 92936 (W.D. Wash. Nov. 12, 2008) at *13; *Sea Watch Int'l v. Mosbacher,* 762 F. Supp. 370, 378 (D.D.C 1991); *United Boatmen of N.J. v. Mosbacher,* 1992 U.S. Dist. LEXIS 664 (D. N.J. Jan. 23, 1992) at *16. Other courts hold an allocation meets the fair and equitable test if it fulfills a legitimate fishery management objective and achieves positive overall benefits. *North Carolina Fisheries Ass'n. v. Gutierrez,* 518 F.Supp.2d 62, 89-90 (D.D.C. 2007); *Nat'l Coalition for Marine Conservation v. Evans,* 231 F.Supp.2d 119, 131 (D.D.C. 2002); *Nat'l Fisheries Institute, Inc. v. Mosbacher,* 732 F. Supp. 210, 225-226 (D.D.C. 1990).

To measure national benefits, the MSA does not require a formal cost/benefit analysis. *Alaska Factory Trawl Ass'n v. Baldridge*, 831 F.2d at 1460; *Nat'l Fisheries Institute, Inc. v. Mosbacher*, 732 F. Supp. at 222, 223. The courts have also rejected the idea that the Secretary must adopt the alternative least restrictive to the fishing sector limited by the allocation. "Contrary to plaintiffs' assertion, the Secretary does not have to choose the least restrictive alternative...." *Alaska Factory Trawl Ass'n v. Baldridge*, 831 F.2d at 1466. *See also Nat'l*

Fisheries Institute, Inc. v. Mosbacher, 732 F. Supp. at 226, n.24, *citing Alaska Factory Trawl Ass'n* that NS 4 does not require selection of the least restrictive alternative.

2. The Facts

Plaintiffs search for an explanation of overall benefits takes us to the A.R. which provides a complete explanation of the benefits of the GHL. Chapter 3 of the GHL EA/RIR dedicates 66 pages to setting out the baseline data for the net benefits analysis Plaintiffs claim was not done. A.R. 10 at 62-128. The topics covered in these 66 pages include a complete portrait of the charter industry, including related angler expenditures, and of the commercial fleet. *Id.* at 3-4. Chapter 4 begins by recognizing the very issue Plaintiffs claim was ignored. Chapter 4 begins by stating its purpose is to "assess all costs and benefits of available regulatory alternatives" bearing in mind that NMFS should select those that "maximize net benefits...." *Id.* at 129. For the next 108 pages, building on the previous 66, NMFS does just that. *Id.* at 129-237. Among the evaluation tools discussed are contingent valuation modeling, participation rate modeling, angler net benefits analysis, and input-output modeling. *Id.* at 4, 131-156. NMFS explains the use of consumer surplus and producer surplus to evaluate the "net benefits" to the various fishery sectors. *Id.* at 131. NMFS then applies these economic concepts and models to examine the socio-economic impacts of the GHL and of possible harvest control measures ("HCM") to enforce the GHL, including bag limits. *Id.* at 4-5, 157-237. NMFS compares the no action alternative, *i.e.,* no GHL, with the alternatives before the Council, including the GHL.

These 174 pages, dense with data, economic equations and analysis, perform the analysis Plaintiffs claim they cannot find. The EA/RIR is fully consistent with court precedents that a formal cost benefit analysis is not required and a qualitative analysis suffices to support the conclusion that the Secretary evaluated national benefits in selecting an allocation, particularly

when the Secretary is not required to select the least restrictive alternative. As the EA/RIR notes: "The GHL alternatives essentially represent a trade-off in benefits between the charter and commercial sectors." *Id.* at 247. Plaintiffs may not like the balance struck, but they cannot claim the Secretary did not consider the benefits and burdens associated with the policy choice.

The history of the 2009 Rule is the same. The EA/RIR for the Rule contains 42 pages of analysis addressing overall national benefits. A.R. 32 at 23-65. As with the GHL EA/RIR, this analysis states NMFS should seek to select the alternative that will "maximize net benefits." *Id.* at 23. The table of contents shows the analysis describes the fishery, commercial and charter; discusses the current status of each; reviews the regional impact of each sector; and examines the economic impact of the alternatives. *Id.* at 3. Elements of the contents of these sections are described in Behnken Int.-Def. Mem. at 39-40.

The EA/RIR then summarizes the costs and benefits of the management options to (1) charter clients, (2) half-day charter operators, (3) full and multi-day charter operators, (4) commercial operators, (5) local communities, (6) seafood consumers, and (7) the general public. A.R. 32 at 63-65. The section considers whether each alternative meets the established fishery management objective, concluding that Plaintiffs' preferred position of retaining the status quo without the one fish daily bag limit does not. *Id.* at 64. NMFS states a formal quantitative cost-benefit analysis is not possible given data limitations. However, NMFS concludes that a qualitative analysis shows the status quo would not increase the net benefit to the Nation while the one fish bag limit is "expected to increase the net benefit to the Nation." *Id.* at 65. Plaintiffs may not like the conclusion but they cannot say NMFS failed to consider and explain the issue.

The preamble to the final 2009 Rule continues this analysis and explanation. The preamble devotes six pages to discussing conservation issues and the conservation benefit to the Nation. A.R. 5 at 21196-21202. Within these six pages are comments and responses specifically focused on the conservation need for the Rule. *See* Response to Comments 1-5, 7-11, 13-18, 20-24. The preamble devotes another six pages to economic issues and the relative economic impacts of the Rule. A.R. 5 at 21208-21214. There, NMFS responds to comments about the Rule's impact on (1) the charter sector (Comments 53, 54, 57, 60, 61, 63, 69, 71, 72), (2) local communities (Comments 55, 66), (3) the costs of enforcement (Comment 58), (4) the commercial sector (Comment 64, 67, 68), and (5) subsistence users (Comment 65). NMFS also responds to comments that the EA/RIR did not properly consider net benefits to the nation (Comment 70), and to comments "about which alternative will produce the greatest balance of benefits to costs" (Comment 73). In response to Comment 73, NMFS references the EA/RIR stating data limitations preclude a formal cost-benefit analysis but that "NMFS has conducted a qualitative analysis using the best information available to it." A.R. 5 at 21214.[4]

Plaintiffs' assertion that NMFS did not consider the issue of net national benefits is belied by the record. In a vain and analytically inappropriate attempt to rescue their position, Plaintiffs argue the charter harvest is worth more than the commercial harvest. Plaintiffs assert the loss to commercial vessel owners from not enacting the Rule totals only $7 million over three years. Pl.

[4] Plaintiffs suggest NMFS has an affirmative burden to find the appropriations to fund the collection of more data so that NMFS can do the quantitative analysis Plaintiffs think necessary. Pl. Op. at 19, n.7. However, as the Court said in *State of Connecticut v. Daley,* 53 F.Supp.2d 147, 165, n.20 (D. Conn. 1999), *aff'd.,* 204 F.3d 413 (2d Cir. 2000) , the MSA "does not put an affirmative burden on the Secretary to obtain the best scientific information available" *citing Washington Crab Producers, Inc. v. Mosbacher,* 924 F.2d 1438, 1444 (9th Cir. 1991); *Massachusetts v. Daley,* 10 F.Supp.2d 74, 77 (D. Mass. 1998), *aff'd.,* 170 F.3d 23 (1st Cir. 1999).

Op. at 16-17*, citing* A.R. 32 at 55. Plaintiffs then state the estimated annual loss from the Rule to the charter industry is $10.4 million. *Id.* at 16-17.

Plaintiffs' $10.4 million number is not in the A.R. for this Rule. It is in a draft document for an uncompleted rulemaking still being debated. *See* Pl. Op. at 18 *citing* Draft for Public Review Regulatory Amendment for a Catch Sharing Plan for the Pacific Halibut Charter and Commercial Longline Sectors in International Pacific Halibut Commission Regulatory Area 2C and Area 3A, August 28, 2008 at 74, Table A-42, found at www.fakr.noaa.gov/npfmc/current... /Area2C3A_CSP908.pdf ("CSP Draft"). Plaintiffs want this Court to use a draft report for a different and uncompleted rulemaking as the standard to judge whether the record in this rulemaking is adequate. It is an established principle of administrative law that a reviewing court "is not generally empowered to conduct a *de novo* inquiry into the matter" but is limited to the administrative record considered by the agency. *Oceana, Inc. v. Gutierrez,* 2009 U.S. Dist. LEXIS 44596 (D.D.C. May 28, 2009) at *5, *quoting Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744 (1985).

Even if it is proper under the Administrative Procedure Act to rely on a draft report in a different and uncompleted rulemaking as a basis to challenge the A.R. in another rulemaking, it is curious that Plaintiffs, who previously argued that the test for determining fairness and equity is overall national benefits, now confine their factual presentation to extra record evidence focused only on gross earnings by charter and halibut vessel owners. National benefits involve much more, including related consumer and business spending, associated processing wages and profits, taxes paid, etc. In fact, the CSP Draft itself states "it is inappropriate to compare projected charter revenues with projected commercial ex-vessel revenue" to determine which has the greater benefit. CSP Draft at 75. The CSP Draft lists some of the reasons for this. However,

the critical point is that the very document upon which Plaintiffs rely states the metric Plaintiffs want to use for comparing benefits is "inappropriate."[5]

Nevertheless, since Plaintiffs have now introduced this issue as a basis for this Court's decision, Behnken Intervenors will address it. We will start with the accuracy of Plaintiffs' $7 million and $10.4 million numbers and then move to the issue of overall national benefits.

Plaintiffs' logic for its lost income comparison is that under the status quo the charter industry is catching 1,914,000 pounds of halibut, but under the Rule will catch the GHL amount of 788,000 pounds, a difference of 1,126,000 pounds. A.R. 170 at 9, n. 2. Plaintiffs say the value to the charter fleet of that amount of fish is $10.4 million, a "fact" we will address in a moment. Meanwhile, for the charter industry to keep those 1,126,000 pounds means the commercial catch will be reduced because of how the commercial quota is set. If the CSP Draft is to be the relevant document, Intervenors will use it as well. Therein, the 2007 ex-vessel (dockside) commercial price of halibut to vessel owners is stated as $4.10 per pound. CSP Draft at 78. Thus, a 1,126,000 million pound deduction from the commercial quota has an annual value of $4,616,600 and a three-year value of $13,849,800, not a total of $7 million over three years. However, Plaintiffs' counsel wrote the Council on September 24, 2008 noting the commercial ex-vessel price had risen to $4.50 per pound. Using that number, the annual loss at the dock would be $5,067,000 annually, or $15,200,000 over three years. But that number understates the loss.

[5] Among the reasons cited in the CSP Draft as to why Plaintiffs' attempted comparison is inappropriate is that halibut consumers and charter clients generate a larger consumer surplus to the economy than the producer surplus generated by the charter operators and commercial harvesters. CSP Draft at 75. In other words, after arguing that the test is overall national benefits, Plaintiffs want to use a metric that fails to measure overall benefits.

The $15,200,000 number is only the lost revenue to vessel owners from fish sales. Because of the IFQ program, QS have a value like the investment value of a home.[6] The per pound value of that investment to commercial halibut fishermen in 2006 was $18.43. A.R. 336 at 41, a number cited by Plaintiffs (Pl. Op. at 17). Taking away 1,126,000 pounds of halibut from the commercial sector results in an asset loss of $20,752,180 in QS value.[7] Thus, the proper apples-to-apples one-year income comparison of Plaintiffs' $10.4 million number is $10.4 million versus $25,819,000 ($5,067,000 + $20,752,180).

However, Plaintiffs' $10.4 million lost income number is itself suspect. Plaintiffs explain that their $10.4 million lost income number comes from Table A-42 on page 74 of the CSP Draft. But this chart is plainly labeled as one showing revenue earned, not lost income. Plaintiffs assert they can compare the revenue numbers in the various columns, subtract the difference, and convert the chart from one showing revenue from all charter operations to one showing lost income related only to halibut fishing. The problem is that this case is about halibut and the chart on which Plaintiffs rely is about revenue from all species, not just halibut. Note the text beneath the Table wherein is the fine print stating the "assumptions" in the Table. Among those assumptions is that the "average charter trip" costs $225. But the "average charter trip" is not a halibut only trip and not all of the revenue can be attributed to halibut.

---

[6] Returning to the home mortgage analogy, many homeowners in today's economy find themselves "upside down" in that their mortgage exceeds the value of their home, while others see their retirement or nest egg savings diminished. So too is it for commercial halibut fishermen who have borrowed money to invest in QS. In fact, 35% of halibut QS holders in southeast Alaska (International Pacific Halibut Commission Area 2C) have purchased all of their QS and another 32% have purchased some of their QS. Thus, 67% of all Area 2C QS holders have purchased some or all of their QS, a great number borrowing money to do so and pledging their homes and/or boats as collateral. Affidavit of Linda Behnken, attached as Exhibit 1 to Intervenors' Memorandum of Points and Authorities in Support of Motion to Intervene, at ¶ 10.

[7] Even Plaintiffs acknowledge that preserving the value of QS is a key component of the fishery management objective even implying, incorrectly, that it is the principal or only objective. Pl. Op. at 16-17.

The issue is not all species, it is halibut, and Plaintiffs' own websites document that charter trip revenues come from multiple species. For example, the website of Plaintiff Dole, owner of Waterfall Lodge, has a "Fish Chart" telling customers that when they charter a boat, they can catch lingcod, red snapper, three species of salmon, 20 species of bottom fish, and halibut – a total of 26 species. *See* www.waterfallresort.com. Since 25 of these species are not at issue in this case, the $225 per trip number clearly includes revenues not attributable exclusively to halibut.

In fact, according to the Alaska Department of Fish & Game ("ADF&G") no more than 28.6% of the charter industry's harvest is from halibut. *See* "Evaluation of the 2006 ADF&G Charter Logbook" that contains a chart at 25 of the number of fish charter operators reported catching. This chart is found at http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues /LogbookEval308.pdf.[8] Thus, to get a true apples-to-apples comparison (Plaintiffs' $7 million number for the commercial fleet is a halibut only number), the $225 number reduces by at least 71.4% to reflect the proportional contribution of halibut – and so too does the $10.4 million number, making it no more than $2,227,680. Since Plaintiffs want to take us down this pathway of comparing the relative income earned by vessel owners from halibut fishing, the apples-to-

[8] The 28.6% number overstates the relative amount of the halibut harvest because the chart includes only five harvested species, excluding many others. For example, the chart lists only two salmon species and no trout. However, Plaintiff Bierman, Whale's Eye Lodge (http://www.juneaualaskafishing.com/fishing.htm), and Plaintiff Weiser, Strawberry Lodge (http://www.wildstrawberrylodge.com/about_sitka.php), advertise the harvest of five salmon species, while Plaintiff Yamada, Shelter Lodge (http://www.shelterlodge.com/gen_info.php), also advertises Dolly Varden trout, and Plaintiff Van Valin, El Capitan Lodge (http://elcapitanlodge.com/species.html), advertises three species of trout, none of which are included in the chart.

apples comparison is $2,227,680, which would be high for reasons stated above, to $5,067,000 (or $25,819,000 if the loss in QS values is included).[9]

Furthermore, Plaintiffs' $10.4 million number includes revenue for all charter boat fishermen. But NMFS has found that charter boats relying on cruise ship customers for half day trips will not likely be impacted by the Rule because their customers "do not have enough time to harvest two halibut." A.R. 5 at 21217, Response to Comment 84. The best estimate is that more than a third of the statewide recreational anglers purchase a one day sportfishing license and are, therefore, likely cruise ship passengers. *See* http://www.admin.adfg.state.ak.us/admin/license/10yr2007sold.pdf (and compare purchase of one day non-resident sport fish licenses with all non-resident sport fish licenses). Given that, Plaintiffs revenue loss number decreases further by one third down to $1,492,546 ($2,227,680-33%). However, this one third number likely understates the number of cruise ship dependent charter boats in Area 2C since Alaska's cruise ship industry (and hence the purchase of non-resident one day fishing license) is concentrated in southeast Alaska.

---

[9] In response, Plaintiffs may point to their brief where they say the price of an average charter trip is not $225 but $744 and, therefore, charter operator losses are "nearly three times" the $225 per day average. Pl. Op. at 18. Plaintiffs' statement is not correct. Plaintiffs' $744 number is lifted from page 5 of a report titled "Economic Impacts and Contributions of Sportfishing in Alaska" found at http://www.sf.adfg.state.ak.us/Static/economics/PDFs/2007 Summary.pdf. However, Plaintiffs are again comparing apples and oranges. The chart from which they take their $744 number is plainly labeled as all expenditures (including "lodging, fuel, food, travel, packages, etc.") for all guided saltwater angling for all species caught in all of Alaska. It has no relationship to the $225 average trip price paid to a southeast Alaska charter vessel owner except the $225 is included within the $744. Plaintiffs want this Court to base its decision on the fairness and equity issue, in part, on a comparison of the price paid at the dock for halibut to commercial vessel owners only in southeast Alaska (thus excluding all economic multipliers and related expenditures) with a number that includes the total amount of money spent (including airfare, souvenirs, and gifts) by all guided marine recreational anglers for all species in all areas of Alaska. If total expenditures for all species by all fishermen in all of Alaska is somehow the proper metric to measure the impact of a halibut only rule in southeast Alaska, Intervenors would be happy to provide the Court with a number for the total expenditures and economic impact of commercial fishing for all marine species in all of Alaska.

Finally, CSP Draft Table A-42 on page 74 on which Plaintiffs rely appears to be internally inconsistent. It purports to be an analysis of revenue earned under various CSP alternatives. Plaintiffs are attempting to use the Table to show the loss caused by moving from the current two fish per day bag limit to one fish per day. But the assumptions identified in the text beneath the Table state the Table's computations are based on the average charter client catching 24 pounds of halibut per trip. That is the equivalent of one fish or less.[10] The assumption in the Table that everyone is catching one fish per day, or less, would seem fundamentally inconsistent with using the Table as the source to compare the effects of a one fish versus two fish daily bag limit. If that is a purpose of the Table, one might expect the Table will undergo some revision before the draft becomes a final document.

Having now spent the time to reply to Plaintiffs' latest argument comparing dockside incomes in order to question the fairness of the GHL, it is worth recalling that the document upon which Plaintiffs rely to make this comparison calls it an "inappropriate" way to measure relative benefits.

And that takes us to the question of net national benefits because the numbers discussed above are only at the vessel owner level for both charter and commercial fishermen. These dockside numbers fail to take into account the multipliers of economic activity from these revenues; related consumer spending; processing wages, profits and economic multipliers; taxes paid; etc. Unfortunately, as everyone acknowledges, there exists no quantitative assessment of total benefits for the Rule because complete data on all of these factors do not exist. However, NMFS has found the existing data do not support the conclusion that charter operations provide

[10] Plaintiff Van Valin, owner of El Capitan Lodge, tells customers the average weight of charter caught halibut is 24-40 pounds. *See* http://elcapitanlodge.com/species.html. Plaintiff Dole, owner of Waterfall Lodge, tells customers the average weight of charter caught halibut is 25-100 pounds. *See* http://www.waterfallresort.com/fish-chart.

greater overall national economic benefits than commercial fishing. A.R. S1 341 at 47260-61, Response to Comment 2. More importantly, NMFS has found that the status quo, *i.e.,* no Rule, would not increase the net benefit to the Nation while the Rule is "expected to increase the net benefit to the Nation." A.R. 32 at 65.[11]

Plaintiffs' strained efforts to point toward alleged differences in the economic benefits of charter fishing versus commercial fishing fail for reasons stated above.

D. WHAT EVIDENCE MAY THE COURT CONSIDER?

Given the record detailed by Behnken Intervenors and the Government, Plaintiffs' principal defense is that the Court cannot consider the record. Plaintiffs contend the Secretary cannot rely on the Council record, rationale, and explanation but must create his own record, rationale, and explanation and, therefore, this Court can only look at what the Secretary said. Pl. Op. at 13, n.5. Of course, Plaintiffs never respond to the cases cited in Behnken Int.-Def. Mem. at 29-31 where the Court considered the Council and the Secretary as one and looked at the Council record as justification for the Secretary's decision.

Instead, Plaintiffs selectively cite from *Yakutat, Inc. v. Gutierrez,* 407 F.3d 1054 (9th Cir. 2005). Pl. Op. at 13, n.5. The *Yakutat* Court does talk about what the Secretary said. But the Court looked to the Council record to understand the reasons for the Secretary's actions, treating the Council and the Secretary as a unified entity. In considering the need to protect traditional

[11] At any future argument, Plaintiffs may attempt to cite the EA/RIR that does have an $85 million total benefits number for all recreational fishing. However, the $85 million number includes fishing by all fishermen (charter and non-charter) for all species (salmon, cod, trout, halibut, snapper, etc.) in southeast Alaska. A.R. 32 at 33. Unfortunately, this is not a useful number because, as the EA/RIR points out, it represents 100% of all recreational fishing by all fishermen for all species, failing to explain how much of that total would be reduced by the Rule. *Id.* at 32-33. The EA/RIR terms this a very "serious shortcoming" prohibiting the use of this number to measure the effects of the Rule. *Id.* at 33. Equally important, the study from which the $85 million number was taken was "not designed for cost benefit analysis." *Id.*

fishermen, the Court noted the Secretary's concern about protecting these traditional fishermen and immediately turned to the Council record for the explanation of why. 407 F.3d at 1067. Regarding whether present participation was properly taken into account, the Court turned first to the Council record, *id.* at 1069-1070, and then stated the Secretary "adopted the Council's recommendations." *Id.* at 1070. As to compliance with NS 4, the Court said the Secretary need only provide a reason for his actions and then immediately stated "[t]he Secretary, through the Council, drafted a Problem Statement" explaining the rationale. *Id.* at 1071. Plaintiffs' strained argument that the Council record is somehow not part of the Secretary's story is wrong.[12]

Plaintiffs' next effort to limit what evidence this Court can consider is to argue that the "allocation" of fish did not occur in 2003 but in 2009 and, therefore, everything preceding 2009 is irrelevant. Pl. Op. at 3. Plaintiffs' argument ignores the reality that an allocation has two parts, the actual allocation which is the number, in this case the GHL, and the HCM to enforce it, in this case the one fish daily bag limit. The HCM do not change the number, they enforce it. Plaintiffs' entire case is built around the contention that no one explained why the charter

[12] Plaintiffs cite cases to support the position that an agency must provide a rationale for its decision, arguing that no one has properly distinguished these cases. Pl. Op. at 9-11. There are two problems with Plaintiffs' argument and cases. First, all of the cases can be distinguished based on the simple fact that here the Secretary has fully explained the rationale for the decisions made. Second, the fact patterns in Plaintiffs' cited cases are very different. *See* Behnken Int.-Def. Mem. at 31. For example, in this case, Plaintiffs have never argued there are no standards, only that they disagree with the Secretary's application of those standards. Yet, in *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 437 F.3d 75, 81 (D.C. Cir. 2006), the Court noted the agency was restricting access to certain explosives based on burn velocities but had never established a burn velocity standard. Similarly, in *American Lung Ass'n v. Environmental Protection Agency,* 134 F.3d 388, 392-93 (D.C. Cir. 1998), *cert. denied,* 528 U.S. 818 (1999), the Court found the agency was regulating sulphur emissions but had never identified the level at which sulfur emissions became a public health problem requiring regulation. In *D&F Afonso Realty Trust v. Garvey,* 216 F.3d 1191 (D.C. Cir. 2000), the agency simply refused to use its own standards and in *Public Media Center v. FCC,* 587 F.2d 1322 (D.C. Cir. 1978), the agency announced it would use a long list of evaluation factors and did not. Cases such as these do not further Plaintiffs' cause because they are factually distinct and because here the agency had standards and explained how they were applied.

industry's harvest level should be limited to 125% of its average 1995-1999 harvest. That is the GHL number set in 2003, it is not the HCM, and the 2003 record is indeed relevant.

The entire reason for this lawsuit is that Plaintiffs do not want their harvest managed so that it is limited to the GHL number. By itself, that recognizes and admits the GHL set in 2003 is the allocation number. In that regard, Behnken Intervenors provided record citations that the GHL was, in fact, the allocation number, the upper limit, the cap, on the charter harvest. Behnken Int.-Def. Mem. at 11, 17. Plaintiffs do not challenge the accuracy of any of Intervenor-Defendants' citations. Instead, Plaintiffs want the 2003 record ignored and attempt to confuse the issue by noting that NMFS has sometimes called the GHL a "benchmark." Pl. Op. at 7. In making this argument, Plaintiffs deliberately overlook the fact that because the GHL was a fair and equitable balance, an allocation of 25% more than the charter industry was harvesting, there was no reason to establish HCM in 2003. There was nothing to enforce. The charter industry was not even close to its GHL cap. In that factual context, the GHL was both a harvest cap and a "benchmark" for when HCM would become necessary. Whether you call the GHL a cap or a benchmark, it is that number Plaintiffs are fighting and it is disingenuous to argue the 2003 record is not relevant.

Moreover, everyone, including Plaintiffs, understood in 2003 that the GHL set the allocation number. *See* Behnken Int.-Def. Mem. at 20, 24-25. Plaintiffs' only response is to selectively cite one sentence from the entire A.R. Pl. Op. at 6 *citing* A.R. 348 at 5. The single sentence Plaintiffs quote is taken out of context from an addendum to the 2003 agency decision memorandum. It says the GHL rule "does not establish an allocation." A closer look at three aspects of the decision memorandum is warranted.

First, it provides further explanation why the Council and Secretary adopted the GHL as 125% of the 1995-1999 charter harvest stating this amount will "allow for growth in the charter industry" but also cap the charter harvest at 13% of the combined charter/commercial harvest. A.R. 348 at 1. The memorandum then says the GHL is needed to address the impacts of charter fishing on localized depletion and Alaskan communities, aspects of the fishery management objective Plaintiffs consistently ignore. *Id.* at 2.

Second, the memorandum explains the GHL cap, and the HCM that might someday be needed, were a compromise "forged by representatives of the commercial halibut fisheries and guided recreational halibut fleet." *Id.* at 3.

Third, contrary to the sentence Plaintiffs lifted out of context, the memorandum recognizes the GHL was the allocation number and that HCM would come later if necessary. "[I]f the GHL were exceeded, subsequent harvest measures could be implemented...." *Id.* at 3-4. When "the GHL has been exceeded" the Council can recommend the specific HCM it thinks appropriate. *Id.* at 2. The HCM would not exist but for the GHL. If the GHL had allocated less fish than the charter industry was harvesting, the HCM would have been needed in 2003. That the GHL and HCM are separated in time because the charter industry was allocated 125% of its current harvest does not transform the HCM into the GHL number.

Contrary to Plaintiffs' position, the Court can consider the entire record.

III. THE PRESENT PARTICIPATION ISSUE

Plaintiffs' contention that the Secretary did not properly consider present participation is based on the premise that present participation is the only or principal issue. Plaintiffs fail to recognize that present participation is not the only factor to be considered. 16 U.S.C. § 1853(b)(6) enumerates six specific factors the Secretary is to "take into account" and adds a

seventh category of "any other relevant considerations." The statute does not prioritize these factors. The requirement is only to "take into account," *i.e.*, to consider, these several factors. *See* Behnken Int.-Def. Mem. at 41-42.[13]

Plaintiffs turn a blind eye to the fact that historic participation and dependence on the fishery is one of the seven 16 U.S.C. § 1853(b)(6) factors. It has equal rank with present participation. This is significant given that a key part of the fishery management objective for the GHL and its HCM is to protect the traditional, historically dependent fishermen. In setting the GHL cap, the Secretary took into account the 100 year traditional and historic dependence of commercial halibut fishermen, subsistence fishermen, halibut processors, and dependent local communities in furtherance of the fishery management objective. The Secretary also took into account the present participation of the new charter industry by awarding them 25% more fish than they were harvesting. *See* Behnken Int.-Def. Mem. at 38-39. Choosing six years later in 2009 to not reward the charter industry for ignoring the fishery management objective and overfishing the GHL is a rational decision to protect traditional fishery users and the resource.

In that regard, consider *State of Connecticut v Daley,* 53 F.Supp.2d 147 (D. Conn. 1999), *aff'd.,* 204 F.3d 413, (2d Cir. 2000). There, a central issue was whether the existing summer flounder allocation based on 1980-1989 historic fishing patterns was unfair because it failed to account for the new fishing patterns of 1990-1992. The administrative record showed the 1980-

[13] Behnken Intervenors contend, citing the statutory structure and legislative history, that the § 1853(b)(6) factors apply only to limited entry programs and not to every rule under the Halibut Act. Behnken Int.-Def. Mem. at 32-34. As the Court said in *Alliance Against IFQs v. Brown,* 84 F.3d 343, 346 (9th Cir. 1996), "The Halibut Act provides that limited access regulations 'shall be consistent with the limited entry criteria set forth in section [303(b)(6) of the [MSA]].'" Plaintiffs' only response is that the government "accepted" the position that § 1853(b)(6) applies. Pl. Op. at 20, n.8. Three points in response. First, this seems to be an admission that NMFS did consider the § 1853(b)(6) factors. Second, the fact that NMFS did the analysis does not mean it was legally required to do so. Third, the statute does not require a § 1853(b)(6) analysis for every rule.

1989 data reflected the historic fishing pattern while the 1990-1992 data "would be more characteristic of recent patterns...." *Id.* at 168. Like Plaintiffs, Connecticut charged that the changed circumstance of a new harvest pattern and the present participation factor required a new allocation. *Id.* at 154-155. The Court noted that 16 U.S.C. § 1853(b)(6) includes several factors to be considered, of which present participation and historical fishing practices in (and dependence on) the fishery are but two. The Court concluded it is not arbitrary and capricious to choose an allocation "that considers historical landing patterns. Rather, that is one of the criteria that Congress said should be considered when establishing a limited access system. 16 U.S.C. § 1853(b)(6)(B)." *State of Connecticut v. Daley,* 53 F.Supp.2d at 169, n.24. As the Court said in *Yakutat, Inc. v. Gutierrez,* 407 F.3d at 1067, also involving the § 1853(b)(6) factors, a legitimate objective in balancing these factors is protecting the long term investments and long term catch histories of traditional fishermen.

Plaintiffs also refuse to recognize that regardless of whether NMFS did or did not have to apply the § 1853(b)(6) factors, NMFS did so. Both the preamble to the 2009 Rule and its EA/RIR contain an extensive review and discussion of the present state of the fishery, charter and commercial. *See* Behnken Int.-Def. Mem. at 39-40.

Plaintiffs' response begins with an admission that the A.R. does in fact contain the present participation data. "As Plaintiffs have pointed out ..., the more recent and relevant data about recent participation in the halibut fishery in Area 2C was available to NMFS in the administrative record." Pl. Op. at 21. The document Plaintiffs point to is the EA/RIR prepared by NMFS. Plaintiffs' argument is that although NMFS put the data in the record, NMFS never considered it. *Id.* Plaintiffs are, once again, being willfully blind.

The A.R. is replete with references to the current harvest levels of both the charter and commercial sectors and the fact that it is the current charter harvest level, its present participation, that necessitates action. NMFS has also made it clear that the principal way it chose to measure present participation was via current harvest levels. As the Court in *Alliance Against IFQs v. Brown* noted, the statute gives the Secretary discretion to determine what measure of present participation to use (number of fishermen, harvest capacity, actual harvest, etc.). 84 F.3d at 347. Furthermore, NMFS goes on to assess how the action it proposes will affect the charter industry, *i.e.,* how present participants will be affected. In fact, the 2009 rulemaking record even returns to the question of whether there need be a GHL and, if so, the proper level. *See* Behnken Int.-Def. Mem. at 21-23.[14]

The facts are that the Secretary discussed the current problem of the reallocation of fish from commercial fishermen to the charter industry, the current socio-economic and conservation problems caused by GHL exceedances, the proper GHL amount, the effects of the Rule on each

[14] Every citation in Behnken Int.-Def. Mem. and in this Reply to the weighing of net benefits and the impact of charter fishing on the commercial fleet, and every record citation in Plaintiffs' briefs, both on preliminary injunction and summary judgment, about the alleged adverse impact of the GHL and its implementing regulations on the current charter industry is a reflection of the debate before the Secretary about present participation, the impacts of regulatory actions, and the merits of regulatory action as to present participants.

fishing sector, and that the GHL and its implementing regulations considered the historic usage of the resource, one of the § 1853(b)(6) factors Plaintiffs ignore. *Id.* at 23-27.[15]

Plaintiffs next present a disjointed argument that they are not asking for a new charter allocation but only arguing the GHL is incorrect because it relies on "decade-old data." Pl. Op. at 22. Of course Plaintiffs are asking for a new allocation, otherwise we would not be here. But Plaintiffs make no effort to respond to the judicial precedents that "present participation" is considered when the allocation number is established, not when implementing regulations are issued. *See* Behnken Int.-Def. Mem. at 34-36. Nor do Plaintiffs respond to the fact that when the GHL was established, the Council and the Secretary made a decision for the present and for the future about the proper participation level for the charter industry and set a cap on charter participation. *See id.* at 38-39. Nor do Plaintiffs respond to the fact that they are asking to be rewarded with a new allocation because they have ignored and violated the policy set by the Council and Secretary when the GHL was established. Nor do Plaintiffs make any response to the fact that requiring an allocation number to be redone based on "present participation" every time an implementing regulation is issued leads to completely dysfunctional resource management. *See id.* at 36-38. Nor do Plaintiffs respond to the fact that the Secretary is also required to consider the present and historic participation of commercial fishermen. The present participation coin has two sides. *See id.* at 37.

[15] Plaintiffs' assertion that the decline in the number of IFQ holders and the rise in the number of charter operators is a significant factor weighing for a reallocation based on present participation (Pl. Op. at 21) overlooks at least two salient facts. First, because many commercial fishermen have IFQs that are small, the reduction in the commercial quota related to the charter industry overfishing its GHL has made it uneconomic to fish these small quotas and they are being sold to others with shares that are economic to fish, thus shrinking the number of IFQ holders. In short, Plaintiffs are causing the decline in numbers they point toward. Second, some IFQ recipients further down the allocation ladder received such small shares, sometimes the equivalent of one or two fish, that they would have sold out regardless of what resulted from GHL exceedances. This was a natural and expected element of the IFQ program. A.R. 336 at 24, 116.

Plaintiffs' views on present participation are without merit.

IV. LACHES

The Behnken Intervenors argued laches bar Plaintiffs' suit. Behnken Int.-Def. Mem. at 42-44. Plaintiffs' response does not challenge that Intervenors and others relied on the GHL and changed positions to their detriment. Instead, Plaintiffs say the 2003 GHL did not establish an allocation and Plaintiffs would not have had standing to challenge it. Pl. Op. at 7, n.3.

As discussed above, the 2003 GHL did establish the allocation. The charter industry, including Plaintiffs, fully participated in that process. It was understood and anticipated by all, including Plaintiffs, that enforcing HCM would follow if the GHL cap was exceeded – and the regulations so stated. As the Supreme Court has said, "It is a familiar rule of administrative law that an agency must abide by its own regulations." *Fort Stewart Schools v. Fed'l Labor Relations Authority,* 495 U.S. 641, 654 (1990). *See also Drumheller v. Dept. of the Army,* 49 F.3d 1566, 1573-74 (Fed. Cir. 1995). Plaintiffs not only knew in 2003 that a GHL had been established, but they knew it would be implemented by HCM because NMFS was bound to follow its own regulations. Plaintiffs' action is barred by laches.

V. CONCLUSION

Sixteen years ago, the Council and the Secretary began considering how to protect the resource and the traditional commercial and subsistence users, as well as dependent processors and coastal communities, from the ill effects of a new, rapidly growing, and unlimited charter industry. Plaintiffs are not raising before this Court any argument they have not presented repeatedly to the Council and NMFS over the last 16 years. In *C&W Fish Co. v. Fox,* 745 F. Supp. 6, 8 (D.D.C. 1990), *aff'd.,* 931 F.2d 1556 (D.C. Cir. 1991), the Court found it instructive that the preamble to the rule "contains a discussion of the same issues that are raised in this

case." Similarly, in *Nat'l Fisheries Institute, Inc. v. Mosbacher,* 732 F. Supp. at 227, the Court found:

> Most, if not all, of the arguments that the plaintiffs have mounted in this forum against the Secretary's decision to implement the billfish FMP were raised repeatedly by them (as well as other individuals and entities) throughout the lengthy administrative process that preceded the Secretary's approval and implementation of the FMP. The Councils, and through them the Secretary, carefully considered but ultimately rejected these policy arguments.

That is the precise circumstance in the instant case.

The Supreme Court has held an agency action may be found arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983). Here, NMFS did not rely on factors ruled out by Congress, considered the multitude of issues raised in the last 16 years, and presented an explanation and rationale for its decision. The differences with Plaintiffs are a difference in view, not a legal deficiency.

Dated: August 24, 2009

Respectfully submitted,

/s/George J. Mannina, Jr.
George J. Mannina, Jr. (D.C. Bar No. 316943)
Paul L. Knight (D.C. Bar No. 911594)
Nossaman LLP/O'Connor & Hannan
1666 K Street, N.W., Suite 500
Washington, D.C. 20006-2803
Telephone: (202) 887-1400
Facsimile: (202) 466-3215

Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2009, a true copy of the foregoing *Intervenor-Defendants' Reply to Plaintiffs' Consolidated Opposition to Defendants' and Intervenor-Defendants' Motions for Summary Judgment* was served via email upon the following:

Christopher Lundberg, Esq.
Haglund Kelley Horngren Jones & Wilder LLP
101 SW Main Street, Suite 1800
Portland, Oregon 97204
E-mail: clundberg@hk-law.com

Notice shall be electronically mailed to all other counsel of record via CM/ECF.

/s/George J. Mannina, Jr.
George J. Mannina, Jr.