

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, *et al.*,

Plaintiffs,

v.

Civil Action No. 08-0941 (RMC)
Category D

THE HONORABLE CARLOS M.
GUTIERREZ, in his official capacity as
Secretary of Commerce, *et al.*,

Defendants.

MOTION TO INTERVENE AS DEFENDANTS

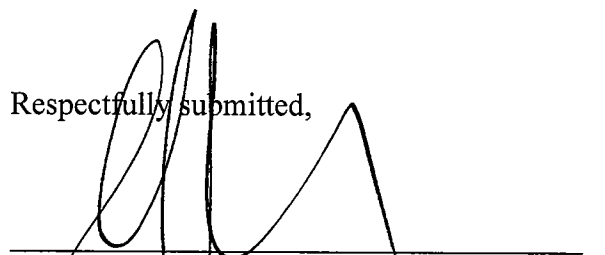
Pursuant to Fed. R. Civ. P. 24 and for the reasons set forth in their accompanying Memorandum of Points and Authorities attached hereto, Linda Behnken, David Gibson, Sherri Wohlhueter and Kurt Wohlhueter, North Pacific Seafoods, Inc., Sandy Craig, Luke Wiedel, Carolyn Heuer, Seafood Producers Cooperative, the City of Pelican, the City of Port Alexander, and the Halibut Association of North America respectfully move to intervene as defendants in the case as of right pursuant to Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissively under Fed. R. Civ. P. 24(b). The Proposed Answer is attached hereto as Exhibit 1.

Counsel for Proposed Intervenor-Defendants has conferred with counsel for Plaintiffs and Defendants in this action. Defendants have represented that they have no position regarding the Motion to Intervene. Plaintiffs have represented that they have no opposition to this Motion as it relates to the merits of the case but oppose the Motion to Intervene to the extent it would give proposed Intervenor-Defendants the right to appeal the Preliminary Injunction. Proposed Intervenor-Defendants submit they meet the standards for intervention and should be permitted

to intervene for all purposes. Given the immediacy of the issues in this case, proposed Intervenor-Defendants respectfully request expedited consideration of this Motion to Intervene. Proposed Intervenor-Defendants have attached a proposed Order for the consideration of this Court.

Dated: June 23, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2008, a copy of the foregoing *Motion to Intervene*, *Memorandum of Points and Authorities* in support thereof, and *Proposed Order* were served via email and first class mail, postage prepaid, upon the following counsel of record:

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Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
INTERVENE AS DEFENDANTS SUBMITTED BY LINDA BEHNKEN, DAVID
GIBSON, SHERRI WOHLHUETER AND KURT WOHLHUETER, NORTH PACIFIC
SEAFOODS, INC., SANDY CRAIG, LUKE WIEDEL, CAROLYN HEUER, SEAFOOD
PRODUCERS COOPERATIVE, THE CITY OF PELICAN, THE CITY OF PORT
ALEXANDER, AND THE HALIBUT ASSOCIATION OF NORTH AMERICA

I. INTRODUCTION

Plaintiffs, the charter halibut fishing industry operating in International Pacific Halibut Commission (“IPHC”) Area 2C, seek to overturn a final rule issued under the Northern Pacific Halibut Act (“Halibut Act”) – a rule specifically designed to prevent continued overfishing by Plaintiffs in Area 2C. The proposed Intervenor-Defendants (“Intervenor” or “Intervenors”), described in more detail below, will be substantially affected should this final rule be struck down by the Court.

Intervenors have three specific interests. First, they have a strong interest in the conservation of the halibut stocks. Allowing charter fishermen to continue to overfish their quota in Area 2C, as they have every year since 2003, will significantly affect halibut fishing in future years. Second, Intervenors have an interest in proper regulation of the industry. Lastly,

Intervenors wish to correct factual inaccuracies and omissions presented to the Court by the charter industry. The Court should make its final decision on accurate and complete facts.

It is significant that the charter industry has never claimed that its allotment of halibut in Area 2C is unfair or incorrect. They do not deny that the harvest amount they are allocated, called the Guideline Harvest Level (“GHL”), is a conservation-based determination. What Plaintiffs are seeking in this action is to prevent the National Marine Fisheries Service (“NMFS”) from implementing the conservation-based harvest levels set for the charter industry. Exceeding the GHL is first and foremost a conservation issue. It is not a simple allocation issue as Plaintiffs repeatedly claim. Plaintiffs have been allocated 931,000 pounds of halibut, but they do not want to be held to that level.

The Intervenors fall into five categories: (i) commercial setline halibut fishermen, (ii) halibut processors, (iii) halibut subsistence users, (iv) charter boat operators, and (v) local communities. Below is a factual description of each of the Intervenors by category. The application of the facts to the legal standards for standing can be found in Section III of this Memorandum.

A. Intervenors Who Are Commercial Setline Halibut Fishermen

1. Intervenor Linda Behnken is a commercial halibut setline fisherman fishing in International Pacific Halibut Coalition (“IPHC”) Area 2C. Affidavit of Linda Behnken (“Behnken Aff.”), ¶¶ 1, 2, attached as Exhibit 2 of Memorandum of Points and Authorities in support of Motion to Intervene as Defendants, (“Intervenors’ Memorandum”).

Ms. Behnken purchased all of the halibut quota share (“QS”) she holds. In 2008, she will be allowed to fish approximately 5,000 pounds. *Id.*, ¶ 4. Ms. Behnken depends on the halibut resource. *Id.*, ¶ 1. Approximately 50% of her family’s income is earned from halibut fishing. *Id.*, ¶ 5. The 43% reduction in the setline commercial quota over the past two years “has caused

substantial economic harm to our family” and deductions from her quota caused by the guided sport industry exceeding its guideline harvest level (“GHL”) imposes a “harmful burden....” *Id.*, ¶¶ 4, 5. If the guided sport industry fishes pursuant to the same regulatory regime as allowed in 2007, they will be harvesting approximately twice as much fish as provided for in the 2008 GHL. That will mean a further 15% reduction in Ms. Behnken’s halibut allocation since overharvests by the guided sport industry have been, and will be, deducted from the setline quota. *Id.*, ¶¶ 6, 7, 18. Thus, each day the 2008 regulations are suspended and charter boat fishermen operate under the 2007 rules results in a reallocation of commercial halibut QS from Ms. Behnken and other setline fishermen because each pound of fish harvested in 2008 by the guided sport industry above the 931,000 pound GHL will be a direct deduction from the 2009 commercial setline fisheries. *Id.*, ¶¶ 6, 7, 18. Ms. Behnken served as a member of the North Pacific Fishery Management Council (“Council”) at the time the Council helped to frame and develop the GHL program. *Id.*, ¶¶ 9, 12, 16.

2. Intervenor David Gibson owns a 40-foot commercial halibut setline fishing vessel in Area 2C. Affidavit of David Gibson (“Gibson Aff.”), ¶ 1, attached as Exhibit 3 to Intervenor’s Memorandum. Mr. Gibson borrowed money to purchase his vessel and halibut QS. *Id.*, ¶¶ 3, 4. To purchase QS, Mr. Gibson pledged his fishing vessel as collateral. *Id.*, ¶ 4. In 2006, Mr. Gibson grossed \$18,321. Subtracting his QS loan payments and expenses, Mr. Gibson netted about \$2,000. *Id.*, ¶ 4. Due to reductions in the amount of fish Mr. Gibson was allowed to harvest in 2008, his gross income of almost \$14,000 is insufficient to pay expenses and debt service on his QS loan payment. *Id.*, ¶ 5. Mr. Gibson is “entirely dependent on commercial fishing for my livelihood.... If the halibut quota is cut any further, *i.e.*, due to charter overages, I

may lose my quota share, boat, salmon permit; in other words, I would lose my whole commercial fishing business.” *Id.*, ¶ 6.

3. Intervenor Sherri Wohlhueter and Kurt Wohlhueter “are a fishing family.” Affidavit of Sherri Wohlhueter and Kurt Wohlhueter (“Wohlhueter Aff.”), ¶ 1, attached as Exhibit 4 of Intervenor’s Memorandum. The Wohlhueters received an initial halibut QS when the individual fishermen’s quota (“IFQ”) program was implemented in 1995. They have purchased additional QS. *Id.*, ¶ 3. Their halibut QS are in Area 2C and they cannot fish halibut in any other area. *Id.*, ¶ 5. Mr. and Mrs. Wohlhueter will not be able to pay their crew “if quota share reductions continue.” *Id.* Charter harvests exceeding the GHL impact the resource and reduce the amount of halibut Mr. and Mrs. Wohlhueter can harvest, economically impacting them. *Id.*, ¶ 7.

B. Intervenor Who Are Halibut Processors

1. Intervenor North Pacific Seafoods, Inc. processes halibut in Area 2C. Affidavit of North Pacific Seafoods, Inc. (“North Pacific Seafoods Aff.”), ¶ 1, attached as Exhibit 5 to Intervenor’s Memorandum. In Area 2C, North Pacific Seafoods has experienced a reduction in business due to the reduced commercial setline harvest caused in part by the charter sector exceeding its GHL. *Id.*, ¶ 3. Since 2004 when the guided sport industry began exceeding their GHL, halibut production in North Pacific Seafoods’ Area 2C processing plant has dropped 25%. *Id.*, ¶ 5. If the 2008 conservation measures are not enforced, North Pacific Seafoods expects “a further drop in processing volume, likely to be 30% of what we processed in 2004.” *Id.* If the 2008 NMFS rule is overturned, North Pacific Seafoods “will experience about a 25% loss of revenue” and will reduce its 800 employees by 10%. *Id.*, ¶¶ 1, 6.

2. Seafood Producers Cooperative founded in 1944 is the largest fishermen owned cooperative in the United States. It has a halibut processing facility in Sitka, Alaska in IPHC

Area 2C. Affidavit of Seafood Producers Cooperative (“Seafood Producers Cooperative Aff.”), ¶ 1, attached as Exhibit 6 to Intervenors’ Memorandum. Twenty-five percent of the Cooperative’s revenue is derived from halibut. The commercial halibut quota has been reduced by 43% in the past two years and the latest reduction will reduce the Cooperative’s revenue by \$2 million, also reducing incomes for 140 plant employees. *Id.*, ¶ 2. Allowing the charter GHL overages to continue will have “the immediate effect” of reducing setline fishing success, thereby impacting the Cooperative’s operations and members. *Id.*, ¶ 3. The Cooperative has participated in the Council’s deliberations on halibut management for 15 years and has representatives on both of the IPHC advisory boards. *Id.*, ¶ 5.

3. Intervenors Halibut Association of North America (“HANA”) represents 70% of the Pacific halibut processed annually, 46% of which operate processing plants in Area 2C. Affidavit of the Halibut Association of North America (“HANA Aff.”), ¶ 1, attached as Exhibit 7 to Intervenor’s Memorandum. Since 2006, halibut deliveries to HANA members Area 2C plants have dropped 10-30% depending on the plant. *Id.*, ¶ 7. Lay-offs have resulted. If the 2008 regulations are not enforced, HANA members anticipate a 25-30% drop in product availability, a 20-25% drop in revenue, and total losses of \$5-10 million. *Id.*, ¶ 8. HANA’s charter provides for representation of its members on economic and regulatory issues of concern. *Id.*, ¶ 2. HANA has been involved with efforts by the Council to manage the halibut fishery for 15 years and has actively participated in IPHC matters for nearly 50 years, including currently serving on advisory committees established by the IPHC. *Id.*, ¶¶ 2-5.

C. Intervenors Who Are Subsistence Users

1. Intervenor Carolyn Heuer is a subsistence fisherman in Area 2C. Her family depends solely on wild fish and game for the family’s protein. Affidavit of Carolyn Heuer (“Heuer Aff.”), ¶ 1, attached as Exhibit 8 to Intervenors’ Memorandum. According to Ms.

Heuer: “We can not afford to feed our family without depending on subsistence harvest. In a given year, we eat approximately 50-75 lbs of halibut. Over the past 4 years, we have noticed a significant decline in the availability of halibut due to the depletion of halibut stocks in the waters around Sitka.... We are dependent on halibut and my ability to feed my family is threatened.” *Id.*, ¶ 1. The charter fishing industry continues to concentrate its fishing efforts in and around Sitka and “our usual locations for subsistence fishing are no longer reliable....” *Id.*, ¶¶ 1, 2.

D. Intervenors Who Are Local Communities

1. Intervenor City of Pelican is a community of 106 residents, 30% of whom are Alaskan natives or American Indian in Area 2C. Affidavit of Patricia Phillips on behalf of the City of Pelican (“City of Pelican Aff.”), ¶¶ 1, 2, attached as Exhibit 9 to Intervenors’ Memorandum. Pelican has no road connections with any other town and the commercial halibut fishery is the mainstay of Pelican’s economy. *Id.*, ¶ 2. “Pelican depends heavily” on commercial fisheries’ taxes to provide essential revenue for community services and infrastructure. *Id.*, ¶ 4. Without that tax revenue, Pelican would experience a significant loss of revenue and be forced to reduce its budget by 20%. *Id.* Reductions in the setline halibut fishery reduce taxes available to Pelican. *Id.*, ¶ 6. The GHL exceedances by the charter boat sector which has contributed to the commercial setline quota reduction “has caused significant economic harm” to Pelican. *Id.*, ¶¶ 8, 9.

2. Intervenor City of Port Alexander in Area 2C is a community that “depends on viable access to healthy and abundant marine fish stocks.” Affidavit of William Luedke on behalf of the City of Port Alexander (“City of Port Alexander Aff.”), ¶¶ 1, 2, attached as Exhibit 10 to Intervenors’ Memorandum. The reallocation of halibut from the commercial setline sector to the charter sector “impact Port Alexander fishermen and our community, since the economic

survival of the community depends on the commercial halibut and salmon fleet.” *Id.*, ¶ 5. The Port also receives taxes from the fisheries’ tax on setline halibut landings. If the 2008 NMFS rule is not implemented in June, the halibut charter fleet will once again exceed its GHIL and the impact on Port Alexander will be serious. *Id.*, ¶ 5. Port Alexander participated in Council deliberations for the past 15 years regarding halibut management. *Id.*, ¶ 6. “Our community depends on the halibut resource for sustenance and livelihood. The one halibut daily limit is necessary to ensure charter harvest is restricted to the sector’s GHIL, the resource is not over harvested, and fishery dependent communities such as Port Alexander survive.” *Id.*, ¶ 7.

E. Intervenors Who Are Charter Boat Operators

1. Intervenor Sandy Craig is the owner and operator of a small charter fishing business. Affidavit of Sandy Craig (“Craig Aff.”), ¶ 1, attached as Exhibit 11 to Intervenors’ Memorandum. Her clients target halibut and salmon. *Id.*, ¶ 2. Ms. Craig’s business depends on a healthy halibut resource. *Id.*, ¶ 4. The number of Area 2C charter boats is increasing with mounting pressure on the resource and that is having a “negative effect on my small business...” *Id.*, ¶ 6. Ms. Craig and her family have also invested in halibut QS and, therefore, are also commercial setline fishermen. *Id.*, ¶¶ 8-9. Because of the reduction in her halibut quota amounting to 43% over the past two years, her family has suffered significant financial harm given that commercial halibut fishing accounts for approximately 25% of her family’s income. *Id.*, ¶ 9.

2. Intervenor Luke Wiedel is a charter boat captain in Area 2C. Charter fishing is his primary source of income and his clients target halibut and salmon. Affidavit of Luke Wiedel (“Wiedel Aff.”), ¶ 1, attached as Exhibit 12 to Intervenors’ Memorandum. “My business, and the business of all charter and setline fishermen, depends on a healthy resource.” *Id.*, ¶ 2. The southeast charter sector’s halibut harvest has exceeded its GHIL for the past four

years and it is important to have regulations enforcing the GHL in order to protect the resource on which Mr. Wiedel depends. *Id.*, ¶¶ 2, 3.

Intervenors are entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, Intervenors respectfully request that they be permitted to intervene pursuant to Fed. R. Civ. P. 24(b).

II. STATEMENT OF FACTS

Plaintiffs challenge a rule issued pursuant to authority granted under the Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773-773k. *See* 73 Fed. Reg. 30504, 30523 (May 28, 2008) (the “Rule”) (“The authority citation for 50 C.F.R. Part 300, Subpart E continues to read as follows: Authority: 16 U.S.C. 773-773k.”) The Rule limits the 2008 commercial guided sport halibut harvest to the 931,000 pound conservation limit set forth at 50 C.F.R. 300.65(c).

Part II of this Memorandum overviews the facts relevant to the interests of Intervenors and the harm to them that will occur if Plaintiffs prevail. Before doing so, it may be helpful to place the Rule in its regulatory context.

The existing regulations specifying the appropriate GHL for the halibut guided sport industry are found at 50 C.F.R. 300.65. The regulations provide that if the IPHC determines the biologically acceptable harvest of halibut is “x” then the allowable harvest by the guided sport industry, the GHL, will be “y.” There are five different GHLs based on five different halibut population sizes. 50 C.F.R. 300.65(c). No one, including Plaintiffs, has ever argued the GHL limits are not the correct harvest levels based on the health of the halibut resource. The regulations also provide a procedure for dealing with circumstances in which the guided sport industry exceeds the appropriate GHL in a given year. *Id.*

Plaintiffs argue that even though the halibut population has declined such that the appropriate GHL is now set at 931,000 pounds in accordance with 50 C.F.R. 300.65(c), NMFS

cannot require the guided sport industry to adhere to that GHIL, even though there is no dispute that this is the correct, conservation-based GHIL. Allowing the resource to be overfished by allowing the guided sport industry to exceed the conservation-based GHIL harms the resource and causes direct, immediate, and irreparable harm to Intervenor.

A. Conservation Issues

1. The Halibut Resource Is Declining

The Pacific halibut fishery is cyclical and is currently experiencing a decline in abundance. Indeed, the exploitable biomass in IPHC Area 2C has declined 55%. IPHC Eighty-fourth Annual Meeting Handout, Jan. 2008 at 83-84, which can be found at <http://www.iphc.washington.edu/HALCOM/pubs/annmeet/2008/bluebook/bluebook08.pdf>; Ex. 6, Seafood Producers Aff., ¶ 7 (“In written materials provided at the annual meeting, IPHC staff stated the halibut resource is at the lowest level in a decade”); Ex. 2, Behnken Aff., Ex., ¶ 13. When a resource is in decline, it is especially important to prevent overfishing. Commercial setline halibut fishermen such as Intervenor who have permitted halibut harvesting rights¹ have a direct and tangible interest in conserving the resource and preventing its overharvest, as do halibut processors. Individuals such as Intervenor who depend on the resource for their subsistence

¹ In 1995, an Individual Fishermen’s Quota (“IFQ”) permit program was initiated for the commercial setline halibut fleet. Fishermen were allocated Quota Shares (“QS”) based on their past level of fishing. QS is translated annually into pounds of halibut, the amount fluctuating directly with the total setline catch limit for a management area. Without a QS setline, halibut fishing is prohibited. QS were issued for IPHC management areas. Thus, commercial fishermen with QS for management Area 2C (southeast Alaska) cannot fish in management Area 3A (central Gulf of Alaska) without a QS for that area. Pursuant to the IFQ Program, there is an excessive share cap such that the amount of QS any person may own or control is 1% of the total quota, or 599,799 QS units. Those QS units are translated into pounds of halibut based on the allowable harvest limit. Thus, if the allowable harvest based on biomass increases, the amount of pounds represented by QS units increases. If the allowable harvest number decreases, then the allocation from each unit of QS also decreases. In 2008, the maximum QS units of 599,799 translated into fixed cap of 62,100 pounds. Fishermen can buy and sell QS. Ex. 2, Behnken Aff., ¶ 3.

needs have the same interest. Similarly, local governments that depend on revenue generated from the commercial setline halibut fishery have a significant interest in preserving and protecting the halibut resource.

2. Allowable Catch Limits Are Being Exceeded

The IPHC sets fishing conservation targets to protect the resource from overfishing. These targets are based on an assessment of the biological status of the halibut resource called the Constant Exploitation Yield (“CEY”). A separate CEY is established for each IPHC management area. There are ten IPHC areas, including Area 2C in southeast Alaska. 72 Fed. Reg. 74257, 74258 (Dec. 31, 2007). Since 1995, when the IFQ Program was established, commercial setline fishermen have never exceeded their allocation and conservation targets. Ex. 6, Seafood Cooperative Aff., ¶ 10; Federal Defendants’ Opposition to Motion for Temporary Restraining Order, Exhibit 1, Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis dated April 20, 2008, at p. 18, Table 19; IPHC Eighty-third Annual Meeting Handout, at 93, found at <http://www.iphc.washington.edu/halcom/pubs/annmeet/2007/bluebook/iphcbb07.pdf>.

In contrast, the commercial guided sport industry in Area 2C has exceeded its allocation and conservation target, the GHL, every year since the GHL was established. The commercial guided sport industry exceeded its GHL by 22% in 2004, 36% in 2005, and 26.5% in 2006. 72 Fed. Reg. 74257, 74259 (Dec. 31, 2007). In 2007, the GHL was overharvested by 20%. IPHC Eighty-fourth Annual Meeting Handout, Jan. 2008, at 11, found at <http://www.iphc.washington.edu/HALCOM/pubs/annmeet/2008/bluebook/bluebook08.pdf>.

Intervenors whose commercial fishing, subsistence, and other interests depend on the continued viability of the halibut resource have a significant interest in preventing that resource from being overfished.

3. The Exceedance Of Allowable Catch Limits Is Causing Overfishing Of Allowable Harvest Levels And Is A Threat To The Resource

Common sense tells you that there is a conservation problem when fishing limits are set and then regularly exceeded. More importantly, the IPHC, the entity charged with managing and conserving the halibut resource, has stated that fishing above assigned conservation targets by any sector poses serious conservation problems. As NMFS stated in the preamble to the proposed Rule:

The IPHC annually determines the amount of halibut that may be removed from the resource without causing biological conservation problems on an area-by-area basis....

72 Fed. Reg. 74257, 74258 (Dec. 31, 2007). Thus, these conservation targets represent the harvest level that can occur in an IPHC management area “without causing conservation problems.” Fishing beyond these allocations presents conservation problems.

The IPHC has expressed continuing concerns about the conservation threat posed by the commercial guided sport industry exceeding its conservation allocation, particularly in Area 2C. As early as December 1, 2006, the IPHC wrote the Council, the entity established pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801, to manage domestic fisheries, stating:

The recent publication of the recreational harvests of halibut in IPHC Regulatory Areas 2C and 3A in 2006 by the Alaska Department of Fish and Game has, with other removals, indicated that the [CEY] established by the Commission for these areas has been exceeded... The achievement of the Commission’s conservation mandate is dependent on adherence to catch limits and total yield.

See Ex. 2, Behnken Aff., Appendix B, Letter from Bruce Leaman, Executive Director, IPHC, to Stephanie Madsen, Chair, North Pacific Fishery Management Council, December 1, 2006. As noted above, only the guided sport sector is exceeding its harvest allocation.

On January 23, 2007, the IPHC wrote the U.S. Secretary of Commerce again protesting the conservation threat caused by overfishing by the commercial guided sport industry. That letter stated:

The Commission noted that the [GHL] approved by the [Council] for the charter/guided recreational halibut fishery in Areas 2C (southeast Alaska) and 3A (central Gulf of Alaska) were exceeded in recent years, substantially so in Area 2C (over 40% higher than the GHL in 2006).... The Commission, with the support of its advisory bodies, therefore recommends establishment of more restrictive daily bag limits for the charter/guided halibut fishery in Areas 2C and 3A during 2007, in order to constrain catch within the [Council's] GHL levels.... The Commission ... believes the action to be necessary given the magnitude by which the charter/guided catches exceeded the GHL limits and the belief that such overharvesting puts at risk the achievement of IPHC management goals for the halibut stock.

See Ex. 2, Behnken Aff., Appendix B, Letter from Jim Balsiger, Chairman, IPHC, to Secretary Gutierrez, January 23, 2007.

On January 30, 2008, the IPHC wrote NMFS, again expressing its concerns about the conservation threat caused by overfishing by the commercial guided sport industry.

The Council has previously stated its intent to manage the sport charter fishery to the GHL, and has proposed management options if the GHL was reduced for 2008. The Commission took this into account when setting the 2008 commercial fishery catch limit. Achievement of the Commission's harvest goals and management objectives is thus dependent on the proposed action.

See Ex. 2, Behnken Aff., Appendix B, Letter from Bruce Leaman, Executive Director, IPHC, to Sue Salveson, January 30, 2008.

In sum, the agency charged with responsibility for conserving the halibut resource and protecting it for present and future generations identifies overfishing by the commercial guided sport industry as a threat to the conservation of the resource. As NMFS stated in the preamble to the proposed Rule, "conservation of the halibut resource is the overarching goal of the IPHC...."

72 Fed. Reg. 74257, 74258 (Dec. 31, 2007). NMFS has acknowledged this concern about the effects of charter boat overfishing stating:

The IPHC recommended [limits on the guided sport halibut catch] because it believed its management goals were at risk by the magnitude of the charter halibut harvest in excess of the GHLL, especially in Area 2C.

72 Fed. Reg. 74257, 74259 (Dec. 31, 2007).

In other words, and as confirmed by the January 30, 2008 IPHC letter cited in this section, statements that there is no conservation issue are based on the assumption that all sectors live within their allocation. The facts are that the IPHC establishes its halibut conservation program area by area and the IPHC is concerned about the conservation of halibut in Area 2C, the area governed by the regulations at issue. In fact, the IPHC stated in their 2008 annual report that “it has become paramount that harvest rates be brought down to the target harvest rate in Area 2.” IPHC, Eighty-fourth Annual Meeting Handout, Jan. 2008, at 84, found at <http://www.iphc.washington.edu/HALCOM/pubs/annmeet/2008/bluebook/bluebook08.pdf>.

Intervenors whose subsistence needs, livelihood, and other interests depend on a healthy halibut resource, have a direct and substantial interest in the conservation of that resource.

4. Overfishing By The Commercial Guided Sport Industry Is Causing Localized Depletion

Alaska Department of Fish and Game (“ADFG”) data shows that the charter halibut catch per rod hour has declined in many areas and by more than 50% around Sitka, Alaska, where approximately 40% of the Area 2C charter halibut harvest occurs. Ex. 2, Behnken Aff., ¶¶ 20, 21; Ex. 6, Seafood Cooperative Aff., ¶ 3. Declines in catch per unit of effort are a classic sign of diminished resource abundance and localized depletion. Ex. 2, Behnken Aff., ¶ 20. The fact that the charter fleet now travels farther to catch the same fish also indicates localized depletion. *Id.* at ¶ 21.

As NMFS has stated:

The Council has discussed the expansion of the halibut guided recreational fleet since 1993, when the rapid increase in guided recreational vessel effort in some small Alaskan communities, such as Sitka, gave rise to concerns about localized depletion of the halibut resource....

67 Fed. Reg. 3867 (Jan. 28, 2002).

Indeed, as early as 1995, the Council recognized this issue finding:

Pressure by charter operations may be contributing to localized depletion in several areas.

Id.

Subsistence fishermen are inshore fishermen and Intervenor who depend on the halibut resource for their subsistence needs are immediately impacted by localized depletion.

B. Allocation Impact On Intervenor Caused By Overfishing By The Commercial Guided Sport Industry

1. Overfishing By The Commercial Guided Sport Industry Results In A Direct Reduction Of The Allocation To The Commercial Setline Sector

In addition to the impact on Intervenor caused by conservation threats to the resource, overfishing by the guided sport industry has a second direct adverse impact on Intervenor. Each year, the IPHC determines “the amount of halibut that may be removed from the resource without causing biological conservation problems on an area-by-area basis....” 72 Fed. Reg. 74257, 74258 (Dec. 31, 2007). The IPHC then estimates the catch by the guided sport sector and other users, not including commercial setline fishermen. That total is subtracted from the CEY based conservation target for each area and the remaining amount of fish is the catch quota for the commercial setline fleet for that area. 68 Fed. Reg. 47256, 47257 (Aug. 8, 2003). As the guided sport fishery increases its catch, the setline harvest is reduced. As NMFS has stated:

This represents an open-ended allocation to the guided recreational fishery from the quota available to the commercial halibut fishery.

Hence, as the guided recreational fishery expands, its harvests reduce the pounds available to be fished in the commercial halibut fishery and, subsequently, the value of quota shares (QS) in the IFQ Program.

Id.

Exacerbating the impact of this system on the setline fleet is the fact that the IPHC has deducted from the setline quota the amount of over harvest by the commercial guided sport fishery in the previous year. 72 Fed. Reg. 74257, 74258 (Dec. 31, 2008); 73 Fed. Reg. 30504, 30505 (May 28, 2008).

This open-ended reallocation of fish from commercial setline fishermen to the commercial guided sport sector causes severe economic harm to individual setline fishermen, forcing many to consider leaving the halibut fishery and forcing many to confront the loss of their homes and vessels pledged as collateral for loans to purchase QS. This is a direct, immediate, and irreparable injury to Intervenors.

2. It Is Neither Fair Nor Equitable For Setline Fishermen To Bear All Of The Quota Reduction Needed For Conservation

Because GHL exceedances are deducted from the setline quota, and because of overfishing by the commercial guided sport industry, the setline quota was reduced by 20% in 2007 and another 27% in 2008. 73 Fed. Reg. 30504, 30507 (Response to comment 6)(May 28, 2008). The GHL for the guided sport sector was never reduced until this year. 72 Fed. Reg. 74257, 74259 (Dec. 31, 2007). The purpose of the Rule is to implement a regulatory program that will keep the guided sport harvest in Area 2C within its GHL established at 50 C.F.R. 300.65(c). 72 Fed. Reg. 74257 (Dec. 31, 2007). This will prevent overfishing of the resource by this sector. Plaintiffs filed this action to overturn the Rule so they will not be compelled to stay within their GHL and may continue overfishing.

It is neither fair nor equitable for one group of fishermen to have their quota reduced for conservation purposes and for another group to say they should not have their quota reduced, particularly when the second group is overfishing and creating a conservation problem. Intervenor will be directly, immediately, and irreparably harmed if Plaintiffs prevail in overturning the Rule because Intervenor will bear all of the conservation and allocation burdens.

3. Overharvests By The Guided Sport Industry Threatens Subsistence Fishermen And Local Communities

Halibut is one of Alaska's most important subsistence fish species. Environmental Assessment and Regulatory Impact Review for a Regulatory Amendment to Define a Halibut Subsistence Fishery Category in Convention Waters, NMFS, 2003, at 100, found at <http://www.fakr.noaa.gov/analyses/subsistence/halibut0403.pdf>. Subsistence fishing occurs in near shore areas which are readily accessible to subsistence users. *Id.* at 99-100. The commercial guided sport fishery operates in near shore areas, competing with local anglers and subsistence users. Localized depletion caused by the guided sport industry poses an immediate, direct, and irreparable threat to subsistence fishermen, and coastal communities. Ex. 2, Behnken Aff., ¶¶ 20, 21.

Indeed, the Alaska Department of Fish and Game has found that subsistence harvests have declined in Area 2C and in other areas where the guided sport industry operates inshore in waters on which subsistence fishermen depend. Hall, J.A., Koster, D., and Turek, M., Subsistence Harvests of Pacific Halibut in Alaska, 2006, Alaska Dept. of Fish and Game, Division of Subsistence, Dec. 2007, at 17-18, found at <http://www.subsistence.adfg.state.ak.us/TechPap/TP333.pdf>.

Charter boat harvests in near shore areas have also caused localized depletion of other important subsistence resources such as rockfish. Ex. 2, Behnken Aff., ¶ 22.

C. The Legal and Regulatory Regime

1. The GHL Is A Defined And Fixed Allocation

The GHL is the halibut quota established for the commercial guided sport fishery. As NMFS has stated: “The GHLS are established as a total maximum poundage.” 68 Fed. Reg. 47257, 47258 (Aug. 8, 2003). “[T]he GHL was to provide a limit on the total amount of harvests in the guided fishery....” 68 Fed. Reg. 47259. The preamble to the Rule recognizes “it is the Council’s policy that the charter vessel fishery should not exceed the GHL.” 73 Fed. Reg. 30504, 30505 (May 28, 2008). This was clearly the intent of the Council members who debated and voted for this policy. Ex. 2, Behnken Aff., ¶¶ 24, 25, 27.

Intervenors have a direct and immediate interest in assuring that this policy is followed, an interest directly opposed and prevented by the relief sought by Plaintiffs.

2. The Area 2C GHL Was Reduced In 2008 In Accordance With 50 C.F.R. 300.65(c)

When the GHLS were established, they were linked to the overall CEY for each IPHC management area. Thus, 50 C.F.R. 300.65(c) provides that if the Area 2C CEY is more than 9,027,000 pounds, the GHL will be 1,432,000 pounds. The regulations then provide four more GHL categories or levels, each expressed such that if the CEY is reduced to “X” pounds, then the GHL shall be “Y” pounds. The Category (iv) level is that if the Area 2C CEY is 5,841,000 pounds or more, then the GHL shall be 931,000 pounds. 50 C.F.R. 300.65(c).

Since the GHLS were first established, the CEY has been reduced. However, it has never been reduced in an amount sufficient to trigger a step down reduction in GHL from the highest GHL level of 1,432,000 pounds, identified as Category (i) in the regulations. 2008 is the first year the Area 2C CEY has been decreased sufficiently to trigger a GHL reduction from Category (i). The 2008 Area 2C CEY reduction was of such a magnitude that the Area 2C GHL was

dropped from the maximum Category (i) level to the fourth of the five possible levels. As the preamble to the Rule states:

Since 2003, when the GHGs became effective, they have never been reduced below their maximum level because declines in the total CEY have not been sufficient to trigger the first step reduction in GHGs.

72 Fed. Reg. 74257, 74259 (Dec. 31, 2007).

No one has ever challenged as improper the regulation providing a step down decrease in Area 2C GHGs based on Area 2C CEY levels. There is also no dispute that the Area 2C CEY has now been reduced such that the 2008 Area 2C GHG is 931,000 pounds. For both conservation and allocation reasons, Intervenor has a direct interest in effectuating the existing regulation and implementing the GHG appropriate to the CEY for the resource, an interest opposed by Plaintiffs.

D. The Purpose Of The Rule

In describing the purpose of the Rule, NMFS stated:

NMFS proposes regulations that would limit the harvest of Pacific halibut by guided sport charter vessel anglers in [IPHC] Area 2C of Southeast Alaska to the [GHL] for that area....

72 Fed. Reg. 74257 (Dec. 31, 2007). NMFS continued:

This proposed regulatory change is necessary to reduce the halibut harvest in the charter vessel sector to the GHL for Area 2C.

Id.

The final Rule reflects that intent. The preamble to the Rule states its purpose is to restrict the guided sport halibut fishery in Area 2C “to the [GHL] of 931,000 lb (422.3 mt).” 73 Fed. Reg. 30504, 30505 (May 28, 2008). *See also id.* at 30506 (Response to Comment 2) (the Rule is “intended to reduce the Area 2C charter halibut harvest amount to the 2008 GHL.”); and at 30509 (Response to Comment 23).

Thus, the Rule is not intended to retrospectively deal with an overage in a prior year's GHL. Its purpose is to implement 50 C.F.R. 300.65(c) which provides for a lower GHL when the CEY is reduced. The issue is not addressing a GHL exceedance in the circumstance when the base GHL remained unchanged. The issue is implementing a conservation program based on the fact that the CEY and, therefore, the GHL has changed. This dichotomy, regulation to address GHL exceedances versus regulations to address a lower GHL based on a lower CEY, was reflected in the Council debate. As NMFS explained in the preamble to the proposed Rule:

The Council also was considering management alternatives for the charter vessel halibut fishery in Area 2C during the first half of 2007.... Not knowing in June 2007 how the GHL may be affected by IPHC action in January 2008, the Council recommended a suite of charter vessel fishing restrictions if the GHL remains the same in 2008 (Option A) and a different, more restrictive, suite of restrictions if the GHL decreases in 2008 (Option B).

72 Fed. Reg. 74257, 74260 (Dec. 31, 2007). The Council was dealing with two possible circumstances: (1) a lower GHL based on reduced halibut abundance, or (2) an overage of the 2007 GHL, assuming no change in the CEY and, therefore, the base GHL. Once the IPHC determined in January 2008 that the Area 2C CEY needed to be reduced for conservation reasons, the issue became how to manage to the GHL required by the lower CEY. As NMFS noted:

This Council recommendation is the basis for this proposed regulatory action.

Id.

In short, there are two stages of GHL management: management to achieve the GHL based on the CEY based conservation targets and then management of any exceedances of that GHL. Ample quotations can be found to show that for GHL exceedances, the existing policy is to not disrupt charter fishing by making in-season adjustments, a policy reflected in the

procedure for dealing with GHL exceedances retrospectively. However, in 2008, because of the reduced CEY, the issue was implementing 50 C.F.R. 300.65(c) which pegs the Area 2C GHL to changes in the Area 2C CEY. As noted above, Plaintiffs do not challenge that this is the correct conservation-based GHL. The Rule implements this GHL under the Halibut Act.

In sum, the Rule was adopted under the Halibut Act, *infra.* at p. 8, to achieve the conservation goals of the IPHC when the Area 2C CEY was reduced, this triggering the lower GHL already established in regulation – a regulation and GHL never challenged by Plaintiffs. Intervenor has a direct and immediate interest in NMFS implementing the regulations setting lower GHLs when CEY is reduced. Plaintiffs seek to prevent the lower, conservation based GHLs from being implemented.

It should be noted that NMFS estimates that even with implementation of the Rule, the guided sport fishery could exceed the 2008 GHL by up to 58,000 pounds. 72 Fed. Reg. 74257, 74263 (Dec. 31, 2007). If that occurs, then the regulatory processes set forth in 50 C.F.R. 300.65(c) for addressing GHL exceedances will be triggered.

E. Conclusion

As discussed in more detail below, there can be no question that (1) the interests of Intervenor are directly and immediately implicated by the subject of this action, *i.e.*, the Rule and its halibut management program, (2) those interests could be seriously and adversely affected by the disposition of this action, and (3) the interests and perspectives of the Intervenor are different from those of the government.

III. INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Qualification for intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2), depends on the following four factors:

(1) the timeliness of the motion; (2) whether the applicant “claims an interest relating to the property or transaction which is the subject of the action”; (3) whether “the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest”; and (4) whether “the applicant’s interest is adequately represented by existing parties.”

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003); *Nuesse v. Camp*, 385 F.2d 694, 699 (D.C. Cir. 1967). These standards must be interpreted flexibly. *Nuesse*, 385 F.2d at 700. The requirements of Rule 24(a) are to be broadly construed in favor of applicants for intervention. 7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, §§ 1904 (2d ed. 1986); *See also Nuesse v. Camp*, 385 F.2d at 700; *States Marine Intern., Inc. v. Peterson*, 518 F.2d 1070, 1080 n.25 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976); *South Dakota ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783 (8th Cir. 2003); *Lipsett v. United States*, 37 F.R.D. 549 (S.D.N.Y. 1965), *appeal dismissed*, 359 F.2d 956 (2d Cir. 1966); *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *cert. dismissed*, 478 U.S. 1030 (1986); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

In addition to the qualifications for intervention under Rule 24(a)(2), a party seeking to intervene as of right in this Circuit must demonstrate that it has standing under Article III of the Constitution. *Fund for Animals*, 322 F.3d at 731. Intervenors satisfy all of the requirements for intervention as a matter of right. In light of the opposition filed by Plaintiffs to the initial Motion to Intervene based on timeliness and interest in the subject matter, and in light of the Court’s concern regarding standing, this Memorandum will expand on these points.

