



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

May 28, 2009

AGENDA B-2
Supplemental
JUNE 2009

Mr. Eric Olson, Chairman
North Pacific Fishery Management Council
605 W. 4th Avenue
Anchorage, AK 99501-2252

Dear Mr. Olson:

For the upcoming June Council meeting, the National Marine Fisheries Service (NMFS) recommends that the Council carefully evaluates its priorities for analysis and rulemaking in light of limited available staff resources from NMFS and NOAA General Counsel. To the extent practicable, we want to allocate available resources in a manner consistent with the Council's priorities. We urge the Council to carefully consider its priorities and provide guidance on those projects that can be tabled or delayed to accommodate completion of higher priority tasks.

For purposes of discussion with the Council, we currently consider the following projects as the highest priority fishery management actions for NMFS and NOAA General Counsel:

- Response to litigation, including current lawsuits on charter halibut and salmon management;
- Completion of the final EIS and rulemaking necessary to implement the Council's proposed Bering Sea Chinook salmon bycatch measures;
- Development of an implementation plan and analysis for restructuring of the North Pacific groundfish observer program;
- Completion of rulemaking and updating the analysis for the proposed limited entry program for the charter halibut fishery;
- Completion of the analysis and proposed rulemaking for the catch share plan for the commercial and charter halibut fisheries;
- Completion of analyses and rulemaking supporting the Council's proposed changes to the groundfish license limitation program;
- Completion of analyses and rulemaking supporting the Council's proposed changes to the existing Crab Rationalization Program (e.g., crew shares, changes to the arbitration system, adjustments to Gulf of Alaska sideboards);
- Completion of analyses supporting fishery management plan amendments necessary for compliance with the new National Standard 1 guidelines; and
- Pending its approval, the final rule to implement the proposed Arctic Fishery Management Plan.



Several new analytical initiatives the Council may undertake would require NMFS staff input that may not be available until late this year or early next year. These include:

- Development of a new LAPP for the Gulf of Alaska Rockfish Fishery (the current LAPP expires at the end of 2011);
- Potential modification of the Crab Rationalization Program (e.g., five-year review);
- New non-Chinook salmon bycatch measures for the Bering Sea pollock fishery;
- New salmon and crab bycatch measures for the Gulf of Alaska groundfish fisheries; and
- Potential changes to Steller sea lion protection measures.

The Council's ability to pursue some or all of these projects at this time will be impacted by the availability of NMFS and NOAA General Counsel staff to contribute to or review analyses, even if analyses are completed primarily by Council staff or contractors. We urge the Council to dedicate time during its June meeting to assess analytical priorities so that we collectively address the highest conservation and management needs first, and set reasonable expectations for completion of other projects on the Council's agenda.

Sincerely,



Robert D. Mecum
Acting Administrator, Alaska Region

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN,
P.O. Box 1174
Craig, Alaska 99921

KEN DOLE,
320 Dock Street
Ketchikan, Alaska 99901

RICK BIERMAN,
P.O. Box 21066
Auke Bay, Alaska 99821

THERESA WEISER
P.O. Box 2300, 724 Siginaka Way
Sitka, Alaska 99835

DONALD WESTLUND
15065 Lizzie Lane
Ketchikan, Alaska

and

RICHARD YAMADA
P.O. Box 210064
Auke Bay, Alaska 99821

Plaintiffs,

v.

Gary Locke, in his Official
Capacity as Secretary of the U.S.
DEPARTMENT OF COMMERCE,
Office of the Secretary, Room 5852
14th Street and Constitution Ave., NW
Washington, DC 20230

Dr. Jane Lubchenco,
in her Official Capacity as
Administrator of the U.S.
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,
Department of Commerce, Room 5128
14th Street and Constitution Ave., NW
Washington, DC 20230

COMPLAINT FOR REVIEW
OF AGENCY ACTION AND
FOR DECLARATORY
AND INJUNCTIVE RELIEF

PRELIMINARY
INJUNCTION SOUGHT

Civil Action No. _____

**Dr. James W. Balsiger, in his Official
Capacity as Acting
Administrator of the U.S.
NATIONAL MARINE FISHERIES
SERVICE
Department of Commerce, Room 14636
1315 East-West Highway
Silver Spring, MD 20910**

Defendants.

JURISDICTION AND VENUE

1. This action arises under the Northern Pacific Halibut Act of 1982 (the "Halibut Act"), 16 U.S.C. §§ 773-773k, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.
2. This Court has jurisdiction over this action by virtue of the Halibut Act, which provides, "[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under this Act. Any such court may, at any time—(1) enter restraining orders or prohibitions; (2) issue warrants, process *in rem* or other process; (3) prescribe and accept satisfactory bonds or other security; and (4) take such other actions as are in the interest of justice." 16 U.S.C. § 773i(d).
3. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, which grants the district courts "original jurisdiction of all civil actions arising under the...laws...of the United States," and 28 U.S.C. § 1361, which grants the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."
4. Jurisdiction is also found under the APA, 5 U.S.C. § 706, which authorizes a court to "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and 5 U.S.C. § 704, which provides a right to judicial review of all "final agency action for which there is no other adequate remedy in a court."

5. Venue is proper in this district court pursuant to 28 U.S.C. § 1391(e)(1), which provides: “[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which...a defendant in the action resides.”

NATURE OF THE CASE

6. This is an action for review of a final rule issued by the Secretary of Commerce through the National Marine Fisheries Service (“NMFS”), a division of the National Oceanic and Atmospheric Administration, Department of Commerce, published in the Federal Register on May 6, 2009. *See* 74 Fed. Reg. 21194 (attached hereto as Exhibit A). The final rule limits the harvest of Pacific halibut to one halibut per calendar day by guided sport charter vessel anglers in Area 2C (Southeast Alaska).
7. This is NMFS’ second attempt in two years to impose a one-fish daily bag limit on the guided charter sector in Area 2C. A one-fish daily limit was first implemented by NMFS by final rule on May 28, 2008. *See* 73 Fed. Reg. 30504. Plaintiffs challenged that action in this Court on the grounds that the May 28, 2008, final rule was a violation of the Halibut Act and the APA. *See Van Valin, et al. v. Guitierrez*, Civil Action No. 1:08-cv-941 (RMC). On June 10, 2008, this Court issued a temporary restraining order enjoining the May 28, 2008, final rule. The Court issued a preliminary injunction on June 20, 2008, finding that the Plaintiffs had demonstrated that the May 28, 2008, final rule would cause the

guided charter sector in Area 2C irreparable harm and that Plaintiffs had shown a likelihood of success on the merits on their claim that the Secretary violated his own regulations through the imposition of a one-fish daily bag limit.

8. After the May 28, 2008, final rule was enjoined by this Court, NMFS withdrew the rule on September 11, 2008, *see* 73 Fed. Reg. 52795, and the *Van Valin* lawsuit was thereafter dismissed without prejudice by the Court as moot on November 18, 2008. *See Van Valin v. Gutierrez*, 587 F.Supp.2d 118 (D.D.C. 2008). The Court dismissed the case as moot upon the government's assertion that it would re-issue a new rule imposing a one-fish daily limit on the guided charter sector that would be based upon a new administrative record and accompanied by a new rationale. The one-fish daily bag limit at issue in the final rule here is identical in all relevant respects to the rule that was invalidated by the Court in *Van Valin*.
9. In order to reduce the harvest of halibut by the charter vessel fishery in Southeast Alaska, NMFS published a proposed rule on December 22, 2008. *See* 73 Fed. Reg. 78276 (attached hereto as Exhibit B). The proposed rule was published by NMFS at the request of the North Pacific Fishery Management Council (the "Council"), a body with statutory authority under the Halibut Act to recommend, but not to adopt, regulations. The proposed rule was based on a draft Regulatory Impact Review, Initial Regulatory Flexibility Analysis, and Environmental Assessment dated November 2008, and available at http://www.fakr.noaa.gov/analyses/halibut/halibut2c_earirifa1108.pdf. That

draft EA Report was reissued as a final report in March 2009 (the "EA Report"), and is attached hereto as Exhibit C.

10. Despite the fact that the proposed rule makes reference to general conservation objectives, it did not in any way implicate specific resource conservation concerns with respect to the health of the halibut stock in Area 2C. Instead, the proposed rule dealt only with the issue of allocating the total allowable halibut harvest between the commercial sector and the guided sport charter sector. *See* 73 Fed. Reg. at 78276 ("The intended effect of this action is to manage the harvest of halibut consistent with an allocation strategy recommended by the North Pacific [Fishery] Management Council for the guided sport charter fishery and the commercial fishery.").
11. Under the proposed rule, NMFS proposed the following rules: (1) a limit of one halibut per calendar day to be caught and retained by each charter vessel angler in Area 2C, (2) a prohibition against charter vessel guides, charter vessel operators, and crews of a charter vessel from catching and retaining halibut during a charter fishing trip, (3) a limit on the number of lines used to fish for halibut to not exceed six, or the number of charter vessel anglers onboard the charter vessel, whichever is less. 73 Fed. Reg. at 78278-79.
12. On January 21, 2009, Plaintiffs filed comments in response to the proposed rule (attached hereto as Exhibit D, along with the Feb. 2, 2009, letter from Dr. James W. Balsiger indicating that certain comments of Plaintiffs would be addressed in the final rule). In those comments, Plaintiffs stated that they owned and/or operated halibut guided charter operations in Area 2C, and that they opposed the

one-fish daily bag limit, which would have substantial and lasting negative effects on Plaintiffs' businesses, the guided charter fishing industry, and the communities in Southeast Alaska where Plaintiffs' businesses are located. *See* Exhibit D at 1, 9.

13. As charter operators whose business models are built primarily around non-local, multi-day anglers who come to Southeast Alaska for the sole or primary purpose of recreational fishing, Plaintiffs explained that they would suffer the greatest negative impact of any sector of the charter fishery if the Secretary were to adopt the one-fish daily bag limit. Plaintiffs will be substantially and irreparably harmed both because lost customers may never return and also because there is no available remedy at law against the Secretary through which to recover lost revenues. *See* Exhibit D at 1, 9.
14. Plaintiffs further stated that the proposed rule was identical to the one-fish rule that was invalidated by the Court in *Van Valin*, and that it suffered from similar procedural and substantive legal flaws under the Halibut Act and the APA. *See* Exhibit D at 1-2.
15. On May 6, 2009, the Secretary of Commerce, through NMFS, published its final rule in the Federal Register, formally adopting the one-halibut daily limit. The final rule is effective on June 5, 2009.
16. Section 5(c) the Halibut Act requires that all allocations or assignments of halibut fishing privileges be "fair and equitable to all such fisherman, based on the rights and obligations in existing Federal law [and be] carried out in such manner that no

particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges.” 16 U.S.C. § 773c(c).

17. The final rule violates Section 5(c) of the Halibut Act and the APA because the Secretary never performed a meaningful analysis to determine whether the one-fish rule is “fair and equitable.”
18. In addition, the rule is unlawful under the Halibut Act because the data upon which the one-fish rule is based is more than a decade old, and therefore the Secretary cannot rely on it to support the final rule.
19. Finally, applying the standard in section 5(c) of the Halibut Act to the one-fish daily limit imposed on the charter sector, the Secretary could not have reasonably found on the record here that the final rule is “fair and equitable.”
20. Plaintiffs seek in this action an order declaring the one fish daily bag limit in the final rule adopted by NMFS to be invalid, vacating it, and preliminarily and permanently enjoining NMFS from acting in further reliance on it.

THE PARTIES

21. Plaintiffs each own and/or operate either a combined lodge and charter boat operation or a charter boat operation that provides guided charter services to anglers fishing for halibut in Area 2C (Southeast Alaska). Their businesses are built primarily around multi-day clients who come to Southeast Alaska for the sole or primary purpose of recreational fishing. Plaintiffs, as well as the communities in which they conduct their guided charter businesses, have suffered and will continue to suffer substantial economic harm and other negative effects due to the final rule adopted by Defendant NMFS.

22. Plaintiff Scott Van Valin is the owner and operator of El Capitan Lodge, which is located on Prince of Wales Island.
23. Plaintiff Ken Dole is a partner in Waterfall Resort, located on the west coast of Prince of Wales Island.
24. Plaintiff Rick Bierman is the owner and operator of The Whale's Eye Lodge, which is located on Shelter Island near Juneau, Alaska.
25. Plaintiff Theresa Weiser is owner and operator of Alaska Premier Charters and Wild Strawberry Lodge, which is located on Baranof Island near Sitka, Alaska.
26. Plaintiff Donald Westlund is the owner and operator of Silver King Charters, which is located in Ketchikan, Alaska.
27. Plaintiff Richard Yamada is the General Partner of Alaska Connections, d/b/a Shelter Lodge, a fishing lodge located on Shelter Island near Juneau, Alaska.
28. Defendant Gary Locke is Secretary of the United States Department of Commerce. He is sued in his official capacity as the chief officer of the Department charged with managing United States marine fisheries.
29. Defendant the U.S. Department of Commerce is a federal agency organized and existing pursuant to the Department of Commerce and Labor Act, 15 U.S.C. §§ 1501 *et seq.*, and is responsible for, among other things, managing United States marine fisheries.
30. Defendant Dr. Jane Lubchenco is the Under Secretary of Commerce for Oceans and Atmosphere, and the Administrator of the National Oceanic and Atmospheric Administration ("NOAA"). She is sued in her official capacity as chief officer of NOAA charged with managing United States marine fisheries.

31. Defendant NOAA is an agency of the U.S. Department of Commerce with supervisory responsibility for the National Marine Fisheries Service ("NMFS"). The Secretary of Commerce has delegated responsibility to manage fisheries and ensure compliance with the Halibut Act and the APA to NOAA, which in turn has sub-delegated those responsibilities to NMFS.
32. Defendant Dr. James W. Balsiger is the Acting Assistant Administrator for Fisheries for NOAA and Acting Administrator of NMFS. He is sued in his official capacity as chief officer of NMFS charged with managing United States marine fisheries.
33. Defendant NMFS is an agency of the United States Department of Commerce that has been delegated the responsibility to manage United States marine fisheries. NMFS is the United States government agency with primary responsibility to manage marine fisheries and enforce the Halibut Act.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

34. The Secretary of Commerce and the International Pacific Halibut Commission ("IPHC") manage fishing for Pacific halibut through regulations established under the authority of the Northern Pacific Halibut Act of 1982 (the "Halibut Act"), 16 U.S.C. §§ 773-773k; 50 C.F.R. §§ 300.60-300.66.
35. The IPHC recommends regulations governing the conservation of halibut stocks under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (the "Convention"). The IPHC's regulations are subject to approval by the Secretary of State with concurrence from the Secretary of Commerce. *See* 16 U.S.C. §

773b. After approval by the Secretaries of State and Commerce, the IPHC regulations are published in the Federal Register as annual management measures. See 50 C.F.R. § 300.62.

36. The Secretary has stated that one of the primary goals of the Convention, for which the Halibut Act is the U.S. implementing legislation, is “to provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities.” 73 Fed. Reg. at 78281.
37. The Halibut Act’s general rulemaking authority provides the Secretary of Commerce with broad authority and discretion to “adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and Act...” 16 U.S.C. §773c(b)(1). The Halibut Act also provides the North Pacific Fishery Management Council (the “Council”) with the authority to recommend regulations to the Secretary of Commerce to allocate harvesting privileges among U.S. fisherman. See 16 U.S.C. § 773c(c). Any such regulations recommended by the Council “shall be consistent with the limited entry criteria set forth in section 303(b)(6) of the Magnuson Fishery Conservation and Management Act [16 U.S.C. 1853(b)(6)].” The Secretary has full authority to adopt any regulation or no regulation in his discretion, irrespective of any Council recommendation. Thus, the Secretary is not required by statute to adopt any Council recommendation, and the Secretary may act whether or not the Council makes any recommendation. *Id.*
38. If the Secretary makes an allocation decision, section 5(c) of the Halibut Act provides in relevant part: “[i]f it becomes necessary to allocate or assign halibut

fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges.” 16 U.S.C. §773c(c).

FACTS

39. As stated in the proposed rule, the harvest of halibut off Alaska generally occurs in three basic fisheries—commercial, sport (recreational), and subsistence fisheries. *See* 73 Fed. Reg. at 78277. The sport sector is further divided into the guided sport (“charter”) and unguided sport sectors. The final rule adopted by NMFS seeks to reduce the harvest of halibut by only the guided sport charter fishery in order to allocate a larger harvest to the commercial fishery.
40. The IPHC annually determines the amount of halibut that may be removed from the resource without causing any conservation problems on an area-by-area basis in all areas of the Convention waters. *See* 73 Fed. Reg. at 78277. The target amount of allowable harvest is called the total constant exploitation yield (“CEY”), which represents the target level for total removals in net pounds for that area in the coming year. The IPHC subtracts estimates of all non-commercial removals from the total CEY to determine the target level for commercial fishing, then applies an economic “buffering” algorithm called “slow-up, fast-down” to determine the commercial fishery’s catch limit. According to NMFS, the continued growth of the charter fishery in Area 2C has resulted in the charter

fishery harvesting a larger amount of halibut, which ultimately reduces the amount of halibut available to the commercial fishery. *See* 74 Fed. Reg. at 21194.

41. On August 8, 2003, the Secretary published a final rule establishing non-binding benchmarks for monitoring harvests in the charter fisheries in Areas 2C and 3A off Alaska. Those benchmarks are called "guideline harvest levels," or "GHLs." *See* 68 Fed. Reg. 47256 (Aug. 8, 2003); 50 C.F.R. §300.65(c). The GHLs do not limit the harvest in the charter fishery, but instead serve as a basis for measuring the charter harvest relative to the commercial harvest. *See* 74 Fed. Reg. at 21194.
42. At its meeting in June 2007, the Council adopted a motion to recommend reducing the daily bag limit for anglers on charter vessels in Area 2C from two halibut to one halibut under certain conditions. The Council recommended this bag limit reduction to reduce the charter harvest to the GHL. 73 Fed. Reg. at 78282.
43. Following the Council's recommendation in June 2007, the Secretary first attempted to implement a one-fish daily limit by final rule on May 28, 2008. *See* 73 Fed. Reg. 30504. Plaintiffs challenged that action in this Court on the grounds that the May 28, 2008, final rule was a violation of the Halibut Act and the APA. This Court issued a temporary restraining order on June 10, 2008, and then a preliminary injunction on June 20, 2008, enjoining the May 28, 2008, final rule.
44. After the May 28, 2008, final rule was enjoined, NMFS withdrew the rule on September 11, 2008. *See* 73 Fed. Reg. 52795. The case was then dismissed as moot without prejudice on November 18, 2008. *See Van Valin v. Gutierrez*, 587 F.Supp.2d 118, 121 (D.D.C. 2008).

45. On December 22, 2008, NMFS once again published a proposed rule, as recommended by the Council in June 2007, proposing a one-halibut daily bag limit on the guided sport charter sector to “reduce the charter vessel fishery harvest of halibut in Area 2C to approximately the GHL of 931,000 lb.” 73 Fed. Reg. at 78278.
46. After a public comment period that closed on January 21, 2009, the Secretary of Commerce published the final rule in the Federal Register on May 6, 2009, formally adopting the one-halibut daily limit. 74 Fed. Reg. 21194. NMFS reaffirmed that the purpose of the challenged one-fish rule is to “control the charter vessel fishery’s harvests to the GHL.” *Id.*

FIRST CAUSE OF ACTION

47. Plaintiffs hereby repeat and reallege and incorporate paragraphs 1 through 46 above.
48. Like the May 28, 2008, rule that was enjoined by this Court last year, the stated purpose of the challenged final rule is “to control the charter vessel fishery’s harvests to the GHL.” 74 Fed. Reg. at 21194 (emphasis added). However, neither in the final rule at issue, nor in the GHL regulations adopted in 2003 upon which the final rule is based, did the Secretary ever analyze whether managing to the GHL benchmark would result in an allocation that is “fair and equitable” as is required by section 5(c) of the Halibut Act. The Secretary thereby failed to consider the only statutory standard that Congress directed the agency to apply in the Halibut Act. 16 U.S.C. § 773c(c). The Secretary’s failure to perform this

essential analysis also renders its decision arbitrary and capricious, an abuse of discretion, and contrary to law under the APA. 5 U.S.C. § 704.

SECOND CAUSE OF ACTION

49. Plaintiffs hereby repeat and reallege and incorporate paragraphs 1 through 48 above.
50. Even if the GHL arguably represented a “fair and equitable” allocation when it was adopted in 2003 (which the Secretary never determined it did), the data upon which the GHL was based in 2003 is from 1995 to 1999. That data, which is now more than a decade old, fails to consider changed circumstances since the GHL was adopted, such as the present level of participation in the various fishing sectors in Area 2C as well as recent catch levels of each sector relative to the current distribution of the halibut stock. The Secretary’s reliance on old data and failure to analyze more recent and readily available information renders the final rule unlawful under the Halibut Act and the APA. 16 U.S.C. § 773c(c); 16 U.S.C. § 1853(b)(6); 5 U.S.C. § 704.

THIRD CAUSE OF ACTION

51. Plaintiffs hereby repeat and reallege and incorporate paragraphs 1 through 50 above.
52. The final rule adopted by the Secretary is contrary to the clear and unambiguous language of the Halibut Act, which provides that all allocations or assignments of halibut fishing privileges must be “fair and equitable,” 16 U.S.C. §§ 773c(c). The final rule violates this requirement because it imposes substantial harm on guided charter sector operators without providing a reasonably proportionate benefit to

commercial sector fisherman, and also because it ignores recent and substantial growth in the unguided and subsistence fisheries.

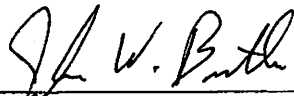
RELIEF REQUESTED

WHEREFORE Plaintiffs Pray:

53. That the Court declare the one fish daily bag limit in the final rule adopted by the Secretary to be in excess of his authority, arbitrary, capricious, an abuse of discretion, in violation of law, and vacated.
54. That the Court issue a preliminary injunction to prevent the Secretary from acting upon the one fish daily bag limit in the final rule until such time as the Court may rule on the merits.
55. That the Court issue a permanent injunction following its ruling on the merits.
56. That the Court grant such other relief as is proper and just.
57. A separate motion for a preliminary injunction is filed contemporaneously herewith.

Respectfully submitted this 22nd day of May, 2009.

By:



John W. Butler (D.C. Bar No. 437370)
Robert K. Magovern (D.C. Bar No. 497862)
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500 (Main)
(202) 463-2510 (Direct)
(202) 365-0059 (Cell)

Earl W. Comstock (Admitted in Alaska)
COMSTOCK CONSULTING LLC
6225 30th Street, N.W.
Washington, DC 20015
(202) 255-0273

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, et al.

Plaintiffs,

v.

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Defendants.

MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION

Civil Action No. _____

TABLE OF CONTENTS

	Page
INTRODUCTION	2
SUMMARY OF ARGUMENT	4
THE COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF	5
APPLICABLE LEGAL STANDARDS OF REVIEW	6
PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION	7
A. Plaintiffs Will Be Irreparably Injured in the Absence of Injunctive Relief.....	8
B. If Injunctive Relief is Granted, Others’ Interests Will Not Be Substantially Burdened.....	13
C. The Public Interest Favors Injunctive Relief.....	20
D. Plaintiffs are Likely to Succeed on the Merits.	22
1. The Secretary Has Never Explained Why the GHJ or the GHJ-Based Allocation Set Forth in the Final Rule is Fair and Equitable.	22
2. The Secretary Cannot Rely on Historical Catch Data From 1995-1999 to Support the Final Rule.....	29
3. The Final Rule is Not a “Fair and Equitable” Allocation as Required by the Halibut Act.....	33
CONCLUSION	38

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
A PRELIMINARY INJUNCTION**

Plaintiffs Scott Van Valin, Ken Dole, Rick Bierman, Theresa Weiser, Donald Westlund,
and Richard Yamada, through counsel, respectfully submit this memorandum of points and
authorities in support of their Motion for a Preliminary Injunction.

INTRODUCTION

This is an action for review of a final rule issued by the Secretary of Commerce through the National Marine Fisheries Service ("NMFS"), a division of the National Oceanic and Atmospheric Administration ("NOAA"), Department of Commerce ("Commerce"), published in the Federal Register on May 6, 2009, and effective on June 5, 2009. *See* 74 Fed. Reg. 21194. The final rule limits the harvest of Pacific halibut to one halibut per calendar day by guided sport charter vessel anglers in Area 2C (Southeast Alaska).

The Secretary of Commerce issued the final rule under the Northern Pacific Halibut Act of 1982 ("Halibut Act"), 16 U.S.C. §§ 773-773k. The halibut fishery is regulated by the International Pacific Halibut Commission ("IPHC"), a body established under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (the "Convention"), which is responsible for the overall conservation of halibut stocks in the Pacific Ocean and Bering Sea off the U.S. and Canada, and by the Secretary of Commerce, who is responsible under the Halibut Act for allocation and management decisions affecting U.S. halibut fishermen. The Halibut Act is the U.S. domestic implementing legislation for the Convention. In addition to the authority granted to the Secretary, the Halibut Act also provides that the North Pacific Fishery Management Council (the "Council") may recommend allocation and management regulations for consideration by the Secretary of Commerce, but the Secretary is not required to pursue such recommendations, and any regulations recommended by the Council may be adopted only after approval by the Secretary. The final rule under review here was recommended by the Council.

This is NMFS' second attempt in two years to impose a one-fish daily bag limit on the guided charter sector in Area 2C. A one-fish daily limit was first implemented by NMFS by

final rule on May 28, 2008. *See* 73 Fed. Reg. 30504. Plaintiffs challenged that action in this Court on the grounds that the May 28, 2008, final rule was a violation of the Halibut Act and the Administrative Procedure Act (“APA”). *See Van Valin, et al. v. Gutierrez, et al.*, Civil Action No. 1:08-cv-941 (RMC). This Court issued a temporary restraining order on June 10, 2008, and then a preliminary injunction on June 20, 2008, enjoining the May 28, 2008, final rule. In both instances, the Court found that the May 28, 2008, final rule would cause substantial and irreparable harm to the guided charter sector in Area 2C, and that Plaintiffs demonstrated a likelihood of success on the merits on their claim that the Secretary violated his own regulations in adopting that one-fish daily bag limit.

After the May 28, 2008, final rule was enjoined, NMFS withdrew the rule on September 11, 2008. *See* 73 Fed. Reg. 52795. Following the withdrawal of the May 28, 2008, rule, the government moved to dismiss that case as moot. This Court granted the government’s motion and dismissed the case without prejudice on November 18, 2008, relying upon the government’s assertion in its motion that it would re-issue a new rule imposing a one-fish daily limit on the guided charter sector that would be based upon a new administrative record and accompanied by a different rationale. *See Van Valin v. Gutierrez*, 587 F.Supp.2d 118, 121 (D.D.C. 2008).

Like the May 28, 2008, rule that was enjoined by this Court last year, the stated purpose of the challenged final rule here is “to control the charter vessel fishery’s harvests to the GHL.” 74 Fed. Reg. at 21194. The “GHL” referenced in the final rule is the Guideline Harvest Level, a benchmark that was first adopted in 2003. *See* 68 Fed. Reg. 47256 (Aug. 8, 2003); 50 C.F.R. § 300.65(c). The GHL is not a limitation on the amount of halibut the charter sector may harvest. The preamble to the 2003 GHL final rule stated, for example, that “[t]his final rule imposes no restrictions on the guided recreational fishery. . . .” 68 Fed. Reg. at 47259. Instead, the GHL was

adopted as a historical benchmark against which the charter sector harvest could be monitored. *See* 74 Fed. Reg. at 21202 (Comment 28) (“The Area 2C GHL was established in 2003 as a benchmark for a level of guided harvest. By itself, the GHL does not restrict or limit charter vessel anglers....”).

The 2003 GHL regulations did not make any finding that the GHL represents a “fair and equitable” allocation of the resource under section 5(c) of the Halibut Act, 16 U.S.C. § 773c(c). The GHL regulations only included a mechanism by which the GHL level may be adjusted downward if the IPHC reduces the total constant exploitation yield (“CEY”), which is the IPHC’s target for the total amount of halibut that may be harvested by all sectors of the fishery (commercial, charter, unguided sport, and subsistence) in a given regulatory area in a given year. Even if the GHL level is changed in a given year, the GHL regulations do not provide for the automatic implementation of management measures. Any management measures that are tied to the GHL, such as the one-fish rule challenged here, must be adopted by the Secretary in a separate rulemaking proceeding. *See* 68 Fed. Reg. at 47258 (“[I]f the GHL were exceeded, subsequent harvest restrictions could be implemented as needed under normal APA rulemaking with the accompanying analyses.”).

SUMMARY OF ARGUMENT

The final rule is unlawful for three independent reasons, which are discussed in more detail in the merits section below. First, all parties agree that the Secretary is managing to the GHL in the final rule. *See, e.g.*, 74 Fed. Reg. at 21195 (“As indicated in the proposed rule for this action, NMFS is implementing a one-halibut daily bag limit in Area 2C to give effect to the Council’s intent to keep the harvest of charter vessel anglers to approximately the GHL.”). Yet neither in the final rule at issue, nor in the GHL regulations adopted in 2003 upon which the final

rule is based, did the Secretary ever analyze whether managing to the GHL benchmark would result in an allocation that is “fair and equitable” as is required by section 5(c) of the Halibut Act. Second, even if the GHL arguably represented a fair and equitable allocation when it was adopted in 2003, the harvest data upon which the GHL was based in 2003 are now more than a decade old. Use of that stale data violates the requirement incorporated in the Halibut Act that the Secretary consider “present participation” in the fishery when making allocation decisions. Finally, applying the substantive standard in the Halibut Act to the one-fish daily limit imposed on the charter sector, the Secretary could not have reasonably found on the record here that the final rule is “fair and equitable,” because the rule imposes harm on the charter sector that is disproportionate to any benefit to the commercial sector, and the rule ignores growth in the subsistence and unguided recreational sectors.

THE COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF

This Court has jurisdiction over this action under section 11 of the Halibut Act, which provides that “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under this Act. Any such court may, at any time—(1) enter restraining orders or prohibitions; (2) issue warrants, process *in rem* or other process; (3) prescribe and accept satisfactory bonds or other security; and (4) take such other actions as are in the interest of justice.” 16 U.S.C. § 773i(d). The final rule was published in the Federal Register on May 6, 2009, with an effective date of June 5, 2009. Plaintiffs’ request for a preliminary injunction is therefore ripe for judicial review.

APPLICABLE LEGAL STANDARDS OF REVIEW

There are two standards of review that are relevant to the Court's consideration of Plaintiffs' motion. First, in determining whether to grant a preliminary injunction, the Court must assess (1) the likelihood of success on the merits; (2) any irreparable injury to the plaintiff if preliminary relief is not granted; (3) any burden on others' interests from an injunction; and (4) the public interest in granting or denying relief. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 35–36 (D.D.C. 2006) (citing *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)). Under a traditional equitable analysis, these factors interrelate on a sliding scale, and relief may be afforded “where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.” *City Fed. Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *see also Cuomo v. U.S. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (justifying injunction with “either a high probability of success and some injury, or *vice versa*.”).

Second, with respect to the Court's consideration of the merits of Plaintiffs' arguments, under the APA a court may set aside an administrative action if it is “arbitrary, capricious, or otherwise contrary to law.” 5 U.S.C. §706(a). In reviewing agency actions in general, and specifically NMFS decisions with respect to the management of U.S. marine fisheries, this and other courts have held that “the APA standard accords great deference to agency decisionmaking, and the Secretary's action enjoys an initial presumption of validity.” *Nat'l Coalition for Marine Conservation v. Evans*, 231 F.Supp.2d 119, 127 (D.D.C. 2002). However, “while this is a highly deferential standard of review, it is not a rubber stamp.” *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 203 (1st Cir. 1999). The Court must still undertake a “narrow yet careful and searching review of the administrative record to determine whether the

Secretary's actions are adequately supported by the available facts." *Connecticut v. Daley*, 53 F.Supp.2d 147, 158 (D.D.Conn. 1999). The question is not "whether the Court agrees with the decision of the agency; but rather whether the decision of the agency finds support in the administrative record." *C&W Fish Co., Inc. v. Fox*, 745 F.Supp. 6, 8 (D.D.C. 1990). If an agency action is to be upheld, it must be upheld on the grounds offered and the administrative record relied upon by the agency. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

In order for the Court to find that an agency's decision is reasonable, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Conclusory statements are insufficient to meet this requirement." *Ind. Reference Servs. Corp. v. FTC*, 145 F. Supp.2d 6, 25 (D.D.C. 2001). Courts have found agency decisions to be unreasonable where "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." *State Farm*, 463 U.S. at 43. Likewise, the Secretary must "exercise his authority rationally and consistently within the parameters set by Congress." *Connecticut v. Daley*, 53 F.Supp.2d at 158.

PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

Because the irreparable harm, burden on the interests of others, and public interest factors are closely related, Plaintiffs address them first, followed by an analysis of the merits. Each of these factors weighs in Plaintiffs' favor.

A. Plaintiffs Will Be Irreparably Injured in the Absence of Injunctive Relief.

As mentioned above, the one-fish daily bag limit imposed on the guided charter sector in the final rule is the same as the rule that was enjoined by the Court last year. *See Van Valin, et al. v. Guitierrez*, Civil Action No. 1:08-cv-941 (RMC). In that case, the Court found that there was “irreparable harm to the plaintiffs” because the imposition of a one-fish daily limit could very likely force charter “businesses to be lost or severely injured.” *See* June 10, 2008, Hearing Transcript at 33 (Excerpts of the June 10, 2008, transcript are attached hereto as Exhibit 1.). Indeed, even the commercial sector interveners in that case conceded this was true. *See* June 20, 2008, Hearing Transcript at 29 (Excerpts attached as Exhibit 2) (“There are several groups of fisherman involved here. There are the charter boat operators. And they are clearly harmed, there’s no question about that.”). The final rule adopted by the Secretary here threatens to impose the same severe and irreparable harm to the charter sector in Area 2C as was imposed by the rule that the Court enjoined last June.

Courts have recognized that the requisite injury is present, and preliminary injunctive relief is appropriate, in cases where “time is of the essence.” *See, e.g., United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir. 1988); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). Such is the case here. The Secretary published the final rule in the Federal Register on May 6, 2009, and the rule goes into effect on June 5, 2009. The 2009 summer fishing season starts on June 1, 2009 and lasts, in any commercially meaningful sense, for only three months. As charter operators whose businesses are built almost entirely around out-of-state anglers who travel to Southeast Alaska primarily in the summer fishing season, if the final rule is not enjoined before or soon after the start of that fishing season on June 1, the very existence of Plaintiffs’ businesses could be in jeopardy by the end of the fishing season in August. Thus,

Plaintiffs will be irreparably harmed unless the Court acts now, "when it [is] still possible to grant effective relief," and before "all opportunity to grant the requested relief [is] foreclosed." *Local Lodge No. 1266, Int'l Ass'n of Machinists and Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981). In addition, even if they are not forced out of business, Plaintiffs will have no legal remedy through which they may recover lost revenues if the rule is ultimately found unlawful.

Plaintiffs all own and/or operate charter operations in Area 2C. All of the Plaintiffs rely on repeat customers who come to Southeast Alaska for the sole or primary purpose of fishing. Plaintiffs have already suffered, and will continue to suffer, negative impacts now that the Secretary has adopted its one-fish daily limit for halibut in the final rule. The reality of Plaintiffs' business is that sport anglers have booked for the 2009 year with the expectation of being able to retain two fish daily. As the affidavits attached as Exhibits 3-8 to this memorandum demonstrate, customers are already cancelling 2009 halibut bookings in Area 2C and moving their 2009 and 2010 plans elsewhere because the rule restricts their daily catch of halibut to one fish. Those anglers are instead choosing to fish in other regulatory areas (which retain a two-fish daily limit for halibut), especially the adjacent Area 3A (Southcentral Alaska). *See Exhibits 9-12.*

The evidence of serious and ongoing harm to Area 2C charter operators is irrefutable. Scott Van Valin, an Area 2C lodge operator, states in his affidavit that 12 regular clients have already cancelled existing reservations for the 2009 season since the one-fish final rule was released. He has refunded \$44,340.00 to those clients. In total, Mr. Van Valin has had 42 regular clients cancel their 2009 reservations because of the one-fish rule, representing a loss of \$151,200 in gross revenues. *See Exhibit 3.* Mr. Van Valin states in his affidavit that these repeat

clients represent a significant portion of his business that he has built over the last 21 years. *Id.* Ken Dole, who operates a charter fishing resort in Area 2C, has already lost even more. Mr. Dole has received cancellations from repeat customers citing new daily fishing limits totaling over \$600,000. *See Exhibit 4.*

Richard Yamada, an Area 2C lodge owner, states in his affidavit that bookings for 2009 are already 10% lower than bookings for 2008, and he has had twelve guests cancel reservations for next summer based on the publication of the one-fish rule. *See Exhibit 5.* Theresa Weiser owns and operates a charter fishing lodge in Area 2C, and has already had 4 regular clients cancel charter-fishing trips this year because of the one-fish rule. She had to refund \$4,000 in deposits to these clients. *See Exhibit 6.* In addition, since January of this year, 24 repeat clients of Ms. Weiser have waited to see if the Secretary would impose a one-fish daily limit before completing their reservations. Since the publication of the final rule, all of them have cancelled. The 28 total clients lost because of the one-fish rule represents a loss of \$57,316 to her business. *Id.* For Rick Bierman, who owns a small fishing lodge in Area 2C, his 2009 bookings are already less than half of his 2006 bookings, with his clients citing the one-fish daily bag limit as the reason for not returning to his lodge this year. *See Exhibit 7.* He estimates that these cancellations will prevent him from meeting his fixed costs this year, and thus his business will be operating at a net loss. If the one-fish rule is not enjoined, he states that he could be forced to sell his boat at the end of the fishing season, which could drive his business out of operation by September. *Id.*

The experience of Donald Westlund, who operates a charter boat in Area 2C, has been similar. Mr. Westlund has had six groups of regular clients decline to book fishing trips this year due to the imposition of the one-fish rule. Mr. Westlund states that these lost bookings might

prevent him from making enough fishing trips this year to qualify for the charter fishing vessel limited entry program. Thus, the one-fish daily limit has caused Mr. Westlund more than just immediate economic harm, it has also threatened the very existence of his business. See Exhibit 8.

The losses already suffered by Plaintiffs, described above and in their respective affidavits, are more than adequate to demonstrate substantial and irreparable harm. It is nevertheless important to note that the harm is not limited to what is described above. In addition to the high likelihood of more cancellations as a result of the final rule, the losses to date have a greater ultimate impact than their (already high) dollar values would suggest. Specifically, despite the relatively high cost to the angler (and thus the large monetary contribution to the local economies supporting charter fishing), charter fishing operations are relatively low margin businesses. In addition to having low margins, these businesses tend to have high percentages of fixed overhead. That is, many of the operators' costs, such as boat loans, lodge mortgages, lodge fuel for heating and lighting, and vessel fuel costs, do not vary directly with the number of anglers served. That means that when revenues go down, costs remain high. In addition, because many operators have outstanding loans on their boats and, where applicable, lodges, it is not possible to "ride-out" a bad year or two and then return to the fishery. Loss of adequate revenue means foreclosure on vessel and lodge loans and therefore loss of the means to continue in or return to the business. Even if operators are not immediately driven out of business, these charter lodges and charter boat operators rely heavily on repeat customers. Clients lost to operations in other halibut regulatory areas are not likely to be easily recovered. Under this combination of factors, a loss, for example, of 20 or 30 percent of annual revenues does not translate merely into a 20 or 30 percent loss of annual profit. Instead, that

percentage change in revenue can mean the difference between staying in business (and contributing directly and indirectly to the local and regional economy) and going out of business.

This Court has held that “economic loss may constitute irreparable harm where the loss threatens the very existence of the movant’s business,” *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 67 (D.D.C. 2000), or “where plaintiff has made a showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits.” *Id.* This Court has also recognized that “admittedly economic” injury to a plaintiff amounts to irreparable harm if “no adequate compensatory or other corrective relief” could be provided at a later date. *Bracco Diagnostics v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997). *See also Hoffman Laroche Inc. v. Califano*, 453 F. Supp. 900, 903 (D.D.C. 1978) (where no other corrective relief is available, “it is not one of the ‘mere’ economic injuries which...are insufficient to warrant a stay.”). Here, Plaintiffs do not have a viable action at law against the Secretary for damages, because fishing privileges are not property protected by the Fifth Amendment to the U.S. Constitution. Analyzing the same one-halibut-per-day limit imposed by NMFS last year, this Court found the harm to the charter industry was “irrevocable in the sense that there is no way that those money losses could ever be paid by the Secretary or the businesses that might be lost or severely injured could be recovered.” June 10, 2008, Transcript at 33. In this Court’s view, “that the harm is not compensable...is what makes it a significant harm.” June 20, 2008, Transcript at 38. The harm imposed by the challenged one-fish rule here is the same today as the Court determined it was last year.

Indeed, throughout the final rule, the Secretary has conceded the immediate and substantial harm that Plaintiffs will suffer, including the possibility that some charter operators will go out of business. For example, in response to a comment that the “[g]uided charter

operations will be badly hurt by the demand decrease associated with this action,” and that “[h]alibut charter business will be devastated and many forced out of business,” the Secretary agreed that the rule “is likely to have adverse impacts on charter business profitability in 2009 and that some charter operators may fail or leave the business.” 74 Fed. Reg. at 21208 (Comment 54). The final rule also states that “this action is likely to reduce the demand for guided sport fishing in Southeast Alaska.” 74 Fed. Reg. at 21210 (Comment 63). The Secretary also “acknowledges that independent or repeat tourists who take multi-day vacations at lodges within Area 2C may consider the reduced halibut bag limit in their decision to book a vacation, along with considerations for alternative fishing or tourist opportunities.” 74 Fed. Reg. at 21217 (Comment 84). Nevertheless, the Secretary concedes, “[o]ther than acknowledging the potential for lost business, NMFS cannot forecast the probability or extent to which this might occur.” *Id.* As the attached affidavits describe in detail, there is no question that this harm has already occurred, and unless the Court enjoins the final rule, Plaintiffs’ harm will only get worse. If the Plaintiffs are to receive any meaningful relief in this action, the final rule must be enjoined now.

B. If Injunctive Relief is Granted, Others’ Interests Will Not Be Substantially Burdened.

Injunctive Relief Will Not Burden the Secretary

In contrast to the serious, immediate, and irreparable harm to Plaintiffs’ interests that will result if the final rule is not enjoined, the Secretary of Commerce certainly will not suffer any substantial injury if the final rule is preliminarily enjoined. The Secretary cannot be said to be “burdened” by a requirement that it comply with the law. The immediate relief that Plaintiffs seek will require nothing more of the Secretary than what the law already requires. There is no harm, other than delay, that Defendants will suffer if the final rule is enjoined, and the Secretary

is in no position to complain of delay. The proposed rule was released on December 22, 2008, and the public comment period closed on January 21, 2009. The Secretary did not release the final rule until three months later, on May 6, 2009, with an effective date after the 2009 summer fishing season begins. In any event, the one-fish rule challenged here is the same rule the Secretary attempted to implement before last year's fishing season, and the Secretary himself admits in the final rule that the issue has been percolating since at least 1995. *See* 74 Fed. Reg. at 21214 ("The 1995 problem statement...demonstrates that the Council was concerned about the expansion of the halibut charter industry."); *see also* 68 Fed. Reg. 47257. A temporary delay to give the Court sufficient time to review the merits of this case will not harm the Defendants. Case law in this Court has held that issuing an injunction is appropriate where the only injury to the defendant federal agency is delay. *See, e.g., International Long Term Care v. Shalala*, 947 F. Supp. 15, 20 (D.D.C. 1996) (delay in administrative process was inadequate basis for denying preliminary injunction); *DSE, Inc. v. United States*, 3 F. Supp. 2d 1464, 1472 (D.D.C. 1998); *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993). Thus, as the Court found last year, "the Secretary's interests are not so severely harmed that they counterbalance the harms to the plaintiffs." June 20, 2008, Hearing Transcript at 39.

Injunctive Relief Will Not Burden the Commercial Sector

Nor will the entry of preliminary injunctive relief harm any person involved in the commercial halibut fisheries. The total allowable catch for the commercial sector has already been fixed by the IPHC and the Secretary for the 2009 commercial season. *See* 74 Fed. Reg. 11681 (Mar. 19, 2009). This allocation went into effect March 4, 2009, and will remain effective until "superseded by the 2010 management measures." 74 Fed. Reg. at 11681. Thus, any change to this rule (and certainly only a temporary delay in its effectiveness) would have

absolutely no affect on the allowable harvest for the commercial sector in 2009. In addition, for 2009, the IPHC assumed that guided anglers would be held to the GHIL when it calculated the commercial catch limit for Area 2C. Based on this assumption, the IPHC added an additional 570,000 pounds of halibut to the commercial quota for 2009. This additional allocation to the commercial sector is set regardless of whether the Court temporarily enjoins the one-fish rule.

The Court addressed whether the commercial sector would be harmed by the issuance of a preliminary injunction when it invalidated last year's one-fish rule. The issue arose in the context of the commercial sector's motion to intervene. The Court chose to allow permissive intervention under Fed. R. Civ. P. 24(b), and not intervention as of right, thus denying intervention "for the purpose of challenging the preliminary injunction." *See Van Valin v. Gutierrez*, Civil Action No. 08-941, Memorandum Opinion and Order at 3 (Aug. 19, 2008). In addition to finding the commercial sector's intervention motion untimely, the Court also held that "Intervenors have not shown that they would be negatively impacted by the preliminary injunction," because "[t]emporary injunctive relief in this case will not affect the quota of halibut allocated to commercial fisherman in 2008." *Id.* at 3-4. As the Court found, "[t]he total allowable catch for the commercial sector was set by the [IPHC] and the Secretary for the 2008 season, and a delay in the effectiveness of the final rule will have no impact on the allowable harvest for the commercial sector in 2008." *Id.* at 4. The same is true this year.

Injunctive Relief Will Not Burden the General Public

Finally, injunctive relief would not burden or harm any members of the general public. The potential interest of the public is an interest in making sure that the halibut resource – which remains a public resource notwithstanding the grant of individual fishing quota ("IFQ") shares to commercial sector fishermen – remains healthy. NMFS has made it clear that there is no threat

to the health of the resource from charter fishing, and that the final rule here deals with how the total allowable catch is divided, not with how much halibut can be caught. As the March 2009 Regulatory Impact Review/Final Regulatory Flexibility Analysis/Environment Assessment Report ("EA Report," Complaint Exhibit C) states in the summary of the "Environmental Assessment" section: "The action is expected to reduce charter vessel harvest of halibut. Total removals from the halibut resource are set by the IPHC at a level to be sustainable. No changes will be made to the total amount of halibut harvest (EA Section 4.3.1)." EA Report at 75 (internal citation in original). The final sentence of that passage captures the key point here: this action will not change the size of the halibut harvest in Area 2C. Therefore, there are no environmental impacts that factor into the public interest prong of the preliminary injunction test.

The EA Report upon which the final rule is based confirms that the one-fish rule deals with allocation, not conservation:

The preferred alternative addresses the resource allocation issues. The actions within the preferred alternative would affect harvest levels and fishing practices of individuals participating in the charter halibut fishery, but not the health of the halibut stock. Regardless of the amount of halibut biomass taken by a sector, no adverse impacts on the halibut resource would be expected because the IPHC accounts for all significant resource removals in the halibut stock assessment when estimating the biomass and setting annual catch limits.

EA Report at 64. The point was deemed central enough to be included in the summary of the EA Report:

The proposed alternatives are not expected to have a significant impact on the halibut stocks. *This action will not affect the overall harvest levels determined by the IPHC or the ability of the IPHC, NMFS, and the Council to constrain overall harvests within those limits, over time.* It is designed to affect the allocation of given halibut yields between two user groups.

EA at xv (emphasis added). The final rule says the same thing: "By reducing the amount of fish available to the commercial sector, the charter harvests create an allocation concern." 74 Fed.

Reg. 21194.

As the Secretary has explained in both the EA Report and the final rule, the regulatory scheme already in place precludes any threat to the long-term health of the resource in Area 2C (and indeed in any area covered by the Convention). As the Secretary said in the final rule:

Each year, the IPHC establishes an annual total Constant Exploitation Yield (Total CEY) for Pacific Halibut based on the most recent estimates of the overall halibut biomass. The IPHC then subtracts estimates of all noncommercial removals (sport, subsistence, bycatch, and wastage) from the Total CEY. The remainder, after the noncommercial removals are subtracted, is the Fishery CEY for an area's directed commercial fishery. Any increases in non-commercial removals of halibut will necessarily decrease the portion of the Total CEY available as Fishery CEY for use by the commercial sector.

74 Fed. Reg. at 21194.

As it does every year, the IPHC has already set a cap on the total harvest of halibut by the commercial sector for 2009. The IPHC calculates the "Fishery CEY," which is the basis for the amount of fish the commercial sector is allowed to take, by subtracting all "other removals" by other sectors from the "Total CEY," which is the target level of removals from all sources combined. *See* 73 Fed. Reg. at 78277. Thus, the allocation made in the final rule here is a "zero-sum" game. However much halibut the guided charter sector (or any other non-commercial sector) is allowed to catch is simply taken out of the allotted portion that the commercial sector is allowed to catch. The only thing that is subject to change is which sector catches the fish, not whether the fish will be caught at all. That issue of who catches the fish raises the question of how the catch should be allocated (the subject of the merits discussion that begins below on page 24), but it does not implicate the health of the resource.

At the temporary restraining order and preliminary injunction hearings last year, the Court addressed the same issue of the relationship of fishery conservation goals to the public interest prong of the preliminary injunction test. In the TRO hearing, the Court stated that "the

Secretary has serious responsibilities here to protect the halibut over the long term. I certainly would be very concerned if this rule were a total environmental protection rule; that is to preserve the species, luckily it's not that." June 10, 2008, Hearing Transcript at 33. Similarly, in the preliminary injunction hearing, the Court determined that the charter sector's private interests outweighed any public interests because "the Secretary is allocating, is not engaging in anything but long term conservation, not short-term conservation. This is not a regulation...that is required by depletion of the species." June 20, 2008, Hearing Transcript at 39. Essential to the Court's decision on this point was the fact that, notwithstanding the Secretary's "longer term conservation angle," "critically the fish themselves are not in dangerous decline and so the necessity to consider conservation isn't there." *Id.* As the EA Report and the final rule confirm, the same is true today. Therefore, preliminary injunctive relief will not result in any environmental or conservation harms.

Notwithstanding the agency's own statements in the final rule and the EA Report, and the Court's careful treatment of this subject last year, it appears that the Secretary may argue in opposition to Plaintiffs' motion for preliminary injunction that in fact there is a public interest conservation factor that weighs against granting the injunction. Plaintiffs believe that this may be the case because of the manner in which Secretary in the final rule responded to comments about whether the rule implicated conservation concerns (*see* agency responses to Comments 1-27, 74 Fed. Reg. at 21196-21202), and also because the Secretary suggested a potential conservation concern in the preamble to the final rule:

Charter vessel harvests in excess of the GHJ also create a conservation concern by compromising the overall harvest strategy developed by the IPHC to conserve the halibut resource. The Total CEY and Fishery CEY have decreased each year since 2004 reflecting declines in the estimated halibut biomass. As the Total CEY decreases, harvests of halibut should decrease to help conserve the

resource. Hence, the GHL is linked to the Total CEY so that the GHL decreases in a stepwise fashion as the Total CEY decreases. Despite a decrease in Total CEY and the GHL in recent years, charter vessel harvests have remained high and in excess of the GHL. As conservation of the halibut resource is the overarching goal of the IPHC, the magnitude of charter vessel harvests over the GHL in Area 2C has raised concern that such overharvesting by the charter sector poses a conservation risk, with the potential to undermine the IPHC's conservation and management goals for the overall halibut stock. Therefore, restraining charter sector harvests to approximately the GHL would contribute to the conservation of the halibut resource.

74 Fed. Reg. at 21194-95.

Plaintiffs discuss in the merits section below the fact that, as reflected in the quote above, the Secretary has simply *assumed* that the GHL is the proper allocation number, rather than *explaining why* that number is "fair and equitable" as is required by the Halibut Act, a fact that undermines the entire conservation argument. For present purposes, however, the issue is whether granting the requested preliminary injunction will threaten the resource while the merits of this case are decided. Even in stating that there is a conservation concern, the Secretary seems to concede that any harm is speculative, stating as he does that the charter harvest level "poses a conservation *risk*, with the *potential* to undermine the IPHC's conservation and management goals for the halibut stock." *Id.* (emphasis added). There is no such tentative tone in the EA Report, which states that "[t]he action itself would not entail changes in stock levels, and any environmental effects, such as the removal of the halibut biomass from the ecosystem, are so minor as to make it difficult to reasonably predict further indirect effects of those changes." EA Report at 74.

In addition to the fact that the Secretary's stated conservation concern is exceedingly vague, the language quoted above from 74 Fed. Reg. 21194-95 completely ignores what the Secretary said two paragraphs before, which is that the IPHC takes into account *all* removals, and then allocates what is left to the commercial sector. To the extent that the charter removals

in a single year – which the Secretary described in the EA Report as being “so minor as to make it difficult to predict” their effect – are the basis of the stated conservation concern (which appears to be the case), the EA Report also makes it clear that year-to-year overages and underages are simply part of managing a resource that cannot be measured precisely:

While realized IPHC target harvest rates have exceeded their target harvest rates since about 2000, the IPHC has also reduced the total CEY and the fishery catch limit substantially since 2005. Under the status quo, in the short run, it is likely that large guided charter harvests could contribute to exceedence of the exploitation rates on which the IPHC Total CEY for the year were based and exceed the desired exploitation rate contained in IPHC’s harvest policy. However, this could be ameliorated by reductions to catch limits in subsequent years.

EA Report at 64.

In sum, what the Secretary really seems to be arguing is that if the one-fish rule is held to reflect a permissible allocation of the resource, and if that allocation is exceeded in future years, there may be a conservation issue. Fair enough, but the purpose of this case is to determine if in fact the allocation that the Secretary has made is “fair and equitable,” *see* 16 U.S.C. § 773c(c), and the public interest inquiry for the purpose of the motion for preliminary injunction is whether the absence of the one-fish rule for the 2009 summer season in Area 2C would harm the resource. The Secretary has admitted in express terms that it would not, all hedging to the contrary notwithstanding. The Court agreed with that assessment last year, and it should do so again here.

C. The Public Interest Favors Injunctive Relief.

The public interest criterion for the issuance of a preliminary injunction is satisfied in this case. The D.C. Circuit has long recognized that “there is an overriding public interest...in the general importance of an agency’s faithful adherence to its statutory mandate.” *Jacksonville Port*

Authority v. Adams, 556 F.2d 52, 59 (D.C. Cir. 1977). The only substantive statutory mandate in the Halibut Act with respect to allocation decisions is the requirement that the Secretary determine such allocations are “fair and equitable.” Adherence to this mandate is all that Plaintiffs seek here. Likewise, it is axiomatic that an agency is required to follow Congressional direction. See *Ballard v. Comm’r of Internal Revenue*, 544 U.S. 40, 59 (2005). Consequently, it is in the public interest that an agency be enjoined from acting unlawfully. See, e.g., *Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 66 (D.D.C. 2004) (noting a “substantial public interest” in ensuring that a federal agency “acts within the limits of its authority”); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (1998) (affirming preliminary injunction based in part on the public interest in the faithful execution of the laws); *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992).

Finally, as noted above, temporary injunctive relief will not in any way result in any environmental or conservation harm. The final rule is purely an allocation decision and does not implicate specific resource conservation concerns with respect to the health of the halibut stock. The rule simply addresses how much halibut each of the guided charter and commercial sectors are allowed to catch, not whether the fish will be caught at all. Moreover, because the 2009 commercial allocation has already been set, the relief requested here will not affect consumers’ ability to purchase halibut.

D. Plaintiffs are Likely to Succeed on the Merits.

1. The Secretary Has Never Explained Why the GHL or the GHL-Based Allocation Set Forth in the Final Rule is Fair and Equitable.

The Halibut Act provides in relevant part:

If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges.

16 U.S.C. §773c(c).

It is black letter law that an agency rule that fails to address a factor that is expressly mandated by Congress is unlawful. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (An administrative decision is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem.”); *Getty v. Fed. Savings and Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) (“[W]e have searched the extensive administrative record in vain for any showing that [the agency] actually did give the statutorily required consideration to the [statutory standard].”). NMFS here has failed to explain why its allocation of fishing privileges among halibut fishermen in Area 2C is “fair and equitable,” and the rule under review is therefore unlawful.

In their comments to the agency, Plaintiffs raised in detail that if the agency decides to impose a one-fish daily limit on the charter halibut sector, it must explain why such an allocation is “fair and equitable” under the Halibut Act, and it must do so in sufficient detail that a reviewing court can understand and evaluate that explanation. *See* CHTF Comments at 3-5 (Exhibit D to the Complaint). In response, the agency essentially said the following in the final rule: (1) the one-fish daily limit is based on the GHL, (2) NMFS determined that the GHL was a

fair and equitable allocation when it was adopted in 2003, and (3) because NMFS previously determined that the GHL was fair and equitable in 2003, there is no need to perform an independent analysis here of whether the GHL-based one-fish rule is fair and equitable. The fact is, however, that NMFS never analyzed or determined whether the GHL was fair and equitable when it was adopted in 2003. That failure, coupled with its failure to do that analysis here with respect to the one-fish rule, renders the final rule unlawful.

The agency's discussion in the final rule of whether the one-fish daily limit is fair and equitable can be found in two places. First, in response to the comment that "it is not fair and equitable to impose the one-fish bag limit on the guided halibut anglers when the [commercial] longline fisherman already enjoy a disproportionate share of the resource," NMFS responded that "[t]he GHL for Area 2C was determined to be consistent with the Halibut Act and other applicable law *when it was implemented in 2003.*" 74 Fed. Reg. at 21203 (Comment 32) (emphasis added).

Second, in response to the comment that the Secretary has never made a determination that the GHL represents a fair and equitable allocation, the Secretary cited an analogous provision in the Magnuson-Stevens Act, 16 U.S.C. 1851(a)(4), and stated that its allocation decision need only be "rationally connected" to the furtherance of a "legitimate objective." The "legitimate objective" advanced by NMFS is limiting "the growth of one sector and the resulting reallocation from other sectors that use the same finite resource." According to NMFS, "the GHL accomplished that objective." 74 Fed. Reg. at 21214-15 (Comment 74).

Both of these arguments boil down to the same claim by the agency: the current rule implements the GHL, and NMFS determined in 2003 that the GHL is "fair and equitable." A closer look at the record in 2003, however, demonstrates that NMFS never made such a

determination. Because NMFS did not make a fair and equitable determination either in 2003 or in adopting the current rule, the rule fails to meet the single standard that Congress imposed on the agency in making allocation decisions under the Halibut Act, and the rule must therefore be set aside. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In the final rule, NMFS directs the public (*see* 74 Fed. Reg. at 21204 (Comment 34)) to the 2003 GHLEA Report for the agency's rationale for adopting the GHLE. NMFS does not cite to any particular section or page of the 228-page GHLEA Report. In that EA Report, the "fair and equitable" standard is mentioned only four times, and in each instance the report merely parrots the language of the Halibut Act or the analogous language in the Magnuson-Stevens Act. *See* 2003 GHLEA Report at 1 (citing Section 5(c) of the Halibut Act), 212 (same), 213 (citing National Standard Four of the Magnuson-Stevens Act and discussing potential discriminatory effects against out of state anglers, which is not at issue in this case), and 214 (discussing National Standard 6 of the Magnuson-Stevens Act). No "fair and equitable" analysis of the GHLE appears in the 2003 GHLEA Report. Similarly, the 2003 final rule adopting the GHLE recites the "fair and equitable" standard in the Halibut Act only once, with no accompanying analysis. 68 Fed. Reg. at 47261.

In short, the Court will search the 2003 record in vain for the agency's explanation of why managing the charter harvest to the GHLE would be fair and equitable. Although the courts traditionally have given NMFS substantial deference in making allocation decisions, the courts have also been consistent in requiring something more than an invocation of the statutory standard and a conclusory claim that the standard has been met. The agency must explain its reasoning. *See Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) ("When an

agency merely parrots the language of a statute without providing an account of how it reached its results, it has not adequately explained the basis for its decision.”); *Evangelical Lutheran Church in Am. v. INS*, 288 F. Supp. 2d 32, 47 (D.D.C. 2003) (“If an agency merely parrots the language of a statute without providing a rational—much less reasoned—explanation for its result, the agency has not met its burden.”); *Nat’l Ass’n of Home Builders v. United States Army Corps of Engineers*, 453 F. Supp. 2d 116, 128 (D.D.C. 2006) (“[I]f the [agency’s] decision merely parrots the language of the statute without providing an account of how it reached its results, then the agency has not provided an adequate explanation for its actions.”); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D.D.C. 1997) (rejecting agency decision based on “unsupported conclusory statements as well as facts which are directly contradicted by undisputed evidence in the Administrative Record.”); *Hadaja, Inc. v. Evans*, 263 F.Supp. 2d 346, 354 (D.R.I. 2003) (“[M]erely stating in conclusory fashion that the compromise was considered in light of scientific evidence does not bring the [fishery management plan] within the requirements of [the statute].”). NMFS has failed to provide the required explanation here, and that failure makes the rule unlawful.

It is entirely understandable that the Secretary did not make a “fair and equitable” allocation finding in 2003, because the 2003 GHL rule did not impose any harvest restrictions and therefore did not make any allocation of fish. Indeed, NMFS in 2003 expressly disclaimed any distributional effects: “The implementation of the GHL without any regulatory restrictions would not be expected to have any distributional effects on the guided fishery fleet....” 68 Fed. Reg. at 47261. There were no distributive or allocative effects associated with the 2003 GHL rule because “[t]his rule does not limit guided recreational harvests or public access to fishery resources. This rule serves only to notify the public on an annual basis of the GHGs in Areas 2C

and 3A, to codify the GHL policy and to provide a mechanism for NMFS to notify the Council once the GHL has been exceeded.” *Id.*

As the Secretary stated numerous times in the final rule under review, the GHL was only intended to “serve as a *benchmark for monitoring* the charter vessel fishery’s harvests of Pacific halibut.” *See* 74 Fed. Reg. at 21194, 21202, 21203, 21206, 21219 (emphasis added). The GHL was created to serve as a “standard or reference point against which the harvest of halibut by the charter vessel fishery is measured or judged.” 74 Fed. Reg. at 21206. Thus, by itself, the GHL is just a number with no independent regulatory impact. As the agency summed it up in 2003: “The regulatory effect described in this action is effectively the same as the no action alternative developed in the IRFA.... The net economic effect of this action is the same as the no action alternative.” 68 Fed. Reg. at 47263. Because the 2003 GHL rule had no regulatory effect, there was no reason and no basis to do a “fair and equitable” analysis in 2003.

The agency’s own contemporary description of its 2003 GHL rules as essentially a regulatory nullity will likely raise in the Court’s mind the question of why the agency bothered to publish that rule at all, and whether there must not be more to the GHL than what is described above. It is a good question – good enough, in fact, to have been raised by NMFS itself in an earlier phase of the rulemaking.

In the 2003 final rule, NMFS described ongoing efforts by the Council beginning in 1995 to “address allocation concerns between the commercial IFQ halibut fishery and the guided recreational fishery.” 68 Fed. Reg. at 47257. According to NMFS’ description of the history, the Council first recommended the GHL in 1997. NMFS responded that “publishing the GHL as a regulation without specific management measures would have no regulatory effect on the guided recreational fleet.” 68 Fed. Reg. at 47257. Because the proposed rule would have been a

regulatory nullity, the NMFS Alaska Regional Administrator advised the Council that “a GHL proposed rule would not be developed and forwarded for review by the Secretary.” *Id.*

What the 2003 final rule does not explain is why the Secretary in 2003 ultimately adopted the same “bare” GHL that the agency had refused to enact in 1997. In other words, if the GHL was so ineffectual as to be not worth pursuing in 1997, why did the agency adopt it in 2003? NMFS never answered that question. The last word on the GHL regulations from the agency, therefore, is that they have no regulatory or allocative effect; they are merely a measuring device. As such, it is no surprise that the 2003 rulemaking record does not contain an analysis of whether regulating the guided charter sector to the GHL would result in a “fair and equitable” allocation. Because no allocation was being made, that analysis was not statutorily required. Whatever knots the agency tied itself into between 1997 and 2003, the importance of the 2003 regulations to the current case is clear: the agency did not analyze in 2003 whether regulating the charter sector to the GHL would result in a fair and equitable allocation of the resource.

Besides making clear that the GHL rules did not regulate anyone, NMFS’ 2003 final rule also made clear that any future regulations would have to be based on their own separate regulatory and statutory analysis. After being notified that its 1997 GHL policy would not be submitted for Secretarial approval because no formal management measures were recommended, the Council in February 2000 proposed a “redefined guided recreational GHL and a system of management measures.” 68 Fed. Reg. at 47258. Under this recommendation, harvest restrictions on the guided charter sector would be automatically triggered depending on the degree to which the GHL was exceeded. Once the GHL was exceeded, these measures would be implemented by notice to the public in the Federal Register. *Id.*

NMFS rejected this approach as well, however, by “informing the Council that the current framework cannot be implemented as conceived by the Council because the Administrative Procedure Act (APA) requires that any regulatory action have prior notice and opportunity for public comment before becoming effective.” 68 Fed. Reg. at 47258. As NMFS stated in 2003, the GHL rule established a procedure whereby “if the GHL were exceeded, subsequent harvest restrictions could be implemented as needed under normal APA rulemaking with the accompanying analyses.” 68 Fed. Reg. at 47258. The “subsequent harvest restrictions” referred to by NMFS in the 2003 final rule ultimately found their manifestation in the GHL-based one-fish rule adopted and enjoined in 2008 and now adopted again by the agency in 2009. Because the “fair and equitable” standard is the only substantive standard that Congress required NMFS to consider in the Halibut Act with respect to allocation decisions, the “accompanying analyses” to which NMFS was clearly referring when it rejected the Council’s 2000 GHL proposal (which included automatic harvest restrictions tied to changes in the GHL) was an analysis of whether any future management measure tied to the GHL was “fair and equitable.”

In sum, in the final rule NMFS concedes that it did not do the required “fair and equitable” analysis today, because it purportedly did that analysis in 2003. But in 2003, NMFS stated it would do that analysis in the future. Both the record here and the record in 2003 are completely devoid of any analysis of what a “fair and equitable” allocation among the various fishing sectors would be. Instead, in the final rule the Secretary merely *assumes* that the GHL is a valid allocation number, and then defends the one-fish rule as a rational method of attaining what he has assumed is a valid objective.

If managing to the GHL were statutorily permissible, then the one-fish rule might well be a permissible means of reaching that goal. But the validity of the *means* is not the core issue

here. What is at issue is the validity of the *goal* itself, and that validity cannot simply be assumed. Instead, the agency must explain why that goal is valid under the fair and equitable standard. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ind. Reference Servs. Corp. v. FTC*, 145 F. Supp.2d 6, 25 (D.D.C. 2001). That explanation is what Congress in the Halibut Act expressly required the Secretary to provide in making an allocation decision. See 16 U.S.C. § 773c(c). The agency has not done that analysis here, nor did it do so when it adopted the GHL in 2003. That failure renders the final rule unlawful.

2. The Secretary Cannot Rely on Historical Catch Data From 1995-1999 to Support the Final Rule.

The fact that NMFS determined in 2003 that it must wait until after implementing a future allocation measure before performing a “fair and equitable” analysis is a clear indication that NMFS intended to take changed circumstances into account when performing such an analysis. Thus, even if the GHL represented a “fair and equitable” allocation in 2003 (which, for the reasons stated above, NMFS never determined it did), the historical data that the Council and NMFS used to develop the GHL in 2003 are now more than a decade old and therefore cannot be used to support the one-fish daily limit in the final rule.

As NMFS describes in the final rule, the Council’s development of the GHL began in 1995. The Council’s 1995 problem statement addressed its concerns “about the expansion of the halibut charter industry and how that expansion may affect ‘the Council’s ability to maintain the stability, economic viability, and diversity of the halibut industry, the quality of the recreational experience, the access of subsistence users, and the socioeconomic well-being of the coastal communities dependent on the halibut resource.’” 74 Fed. Reg. at 21214 (Comment 74). To address these various concerns, “the Council established a GHL, *based on historic catches in*

that sector (125 percent of the average harvest from 1995 to 1999)." *Id.* (emphasis added).

When the GHL was adopted in 2003, the "average harvest during the 1995-1999 time period was chosen as being representative of recent trends in guided fishery harvests." 68 Fed. Reg. at 47258.

Based on this historical catch data from 1995-1999, the GHL level was intended to be responsive to annual reductions in halibut stock abundance based on the average 1999-2000 stock abundance. The 1999-2000 period was chosen "because these were the two years most recent to the Council's action." *Id.* In the event the halibut stock fell below the average 1999-2000 stock abundance, as determined by the IPHC, the GHL level for Area 2C would be "reduced incrementally in a stepwise fashion in proportion to the stock reduction." *Id.*

The GHL, therefore, is nothing more than a historical snapshot of the Area 2C guided angler catch and stock status for a certain period of time. The historical catch data upon which the GHL is based is from 1995-1999, while the step-down mechanism is based on halibut stock distribution in 1999 and 2000. *See* 68 Fed. Reg. 47258. Thus, the data used to create the GHL is between nine and fifteen years old. Courts have repeatedly overturned agency decisions, like this one, where the agency relies on stale data to support its analysis. *See, e.g., Lands Council v. U.S. Forest Service*, 379 F.3d 738, 748-49 (9th Cir. 2004) ("We do not suggest that all data relied upon by the agency be immediate, but here the [six years old] data about the habitat... was too outdated to carry the weight assigned to it."); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (overturning agency decision that was based on "stale, scientific evidence."); *See also Alliance Against IFQs v. Brown*, 84 F.3d 343, 348 (9th Cir. 1996) (Though the agency's ultimate decision was upheld, NMFS' reliance on data three years old "pushed the limits of reasonableness.").

In addition, the use of old data here to support the one-fish rule directly violates the standards set forth at 16 U.S.C. § 1853(b)(6), which are expressly incorporated into the Halibut Act at 16 U.S.C. § 773c(c). Subsections 1853(b)(6)(A), (B), and (C) require that when making an allocation decision, the Secretary must take into account:

- (A) present participation in the fishery;
- (B) historical fishing practices in, and dependence on, the fishery; [and]
- (C) the economics of the fishery....

It is impossible for NMFS to address “present participation in the fishery” using numbers that are more than a decade old, and it is equally impossible to determine “dependence on” and the “economics of” the fishery using such numbers.

In response to the comment that the agency used outdated information to support the one-fish daily limit, NMFS responded in the final rule:

“The Council and NMFS have used the best information available at each step of the process, beginning with the GHL, and continuing through this final rule. The Council and NMFS analyzed and considered data that relate to the criteria found at 16 U.S.C. 1853(b)(6) (Magnuson-Stevens Act), and referenced at 16 U.S.C. 773c(c) (Halibut Act), when it developed and implemented the GHL. These data included past and present participation, historical dependence of various sectors on the halibut resource, economic impacts of the action on various sectors, cultural and social framework of the various sectors, impacts on other fisheries, and other relevant considerations. *Data that relate to the criteria at 16 U.S.C. 1853(b)(6) were also analyzed and considered in issuing this final rule, including past and present participation levels, economic impacts of the action on various sectors and fishing communities, impacts on other fisheries, etc.* The commenter is referred to the GHL analysis and the analysis that accompanies this action for further details on the data considered in developing these actions. The GHL analysis is available on the Council Web site at http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues/halibut.htm and the analysis for this action is available on the NMFS Alaska Region Web site at <http://www.alaskafisheries.noaa.gov/sustainablefisheries/halibut/charters.htm>.

74 Fed. Reg. at 21204 (Comment 34) (emphasis added).

Plaintiffs have discussed in the preceding section the fact that, despite the agency’s conclusory claims in the 2009 final rule, it never did the required statutory analysis in 2003, nor

could it have done so given the nature of the 2003 GHL rule. We turn now to NMFS' claim in the passage quoted above that it has updated its analysis in promulgating the final rule under review.

It is plain from the EA Report that NMFS has collected recent data about the historical catch and recent participation in the halibut fishery in Area 2C. For example, the EA Report in Table 4 on page 21 shows that the number of guided anglers fishing for bottomfish, of which halibut is the primary component, increased from 56,173 in 1999 (which is the last year considered in the GHL) to 100,777 in 2007, the last year for which data is provided. Thus, since the GHL was established, the number of guided anglers has increased nearly 79 percent. In contrast, the number of commercial IFQ holders has dropped from 2,389 in 1995 to 1,302 in 2007—a decline of over 45 percent. See NOAA Fisheries Service, “Changes in Halibut QS Holdings between Initial Issuance and Currently Issued (Dec. 31, 2007), available at <http://www.fakr.noaa.gov/ram/07ifqqscompare.pdf>. “Present participation” for the purposes of the Council deliberations in 2007 and 2008 and the Secretary’s analysis in the final rule should consider the amount of halibut caught by 100,000 guided anglers fishing two years ago, not the amount of halibut caught by 56,000 guided anglers over 10 years ago. Similarly, the allocation analysis must take into account the current, reduced number of commercial fishermen. The Secretary must also consider the catch levels of each sector relative to each other under the current distribution of the halibut stock.

NMFS itself enunciated and accepted these requirements in the final rule, but it made no attempt to fulfill them, notwithstanding the fact that it had all of the necessary information collected in the EA Report even before it published the proposed rule.¹ Having stated that

¹ There are two versions of the EA Report, a draft from November 2008, and a final dated March 2009. The harvest information is in both versions.

“present participation” is a basis for the final rule, NMFS’ decision can only be upheld, if at all, on that ground and this record. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The agency’s reliance on stale data and its failure to analyze more recent and readily available information renders the final rule unlawful.

3. The Final Rule is Not a “Fair and Equitable” Allocation as Required by the Halibut Act.

In addition to NMFS’ procedural shortcomings with respect to its “fair and equitable” analysis under the Halibut Act, when that standard is applied to the final rule, it is clear that the agency could not have reasonably found on this record that the one-fish daily limit is “fair and equitable.”

The Rule is Not Fair and Equitable as Between the Commercial and Charter Sectors

The proposed rule explains that the harvest of halibut off Alaska generally occurs in three basic fisheries—commercial, sport (recreational), and subsistence fisheries. *See* 73 Fed. Reg. 78276, 78277. The recreational sector is further divided into the guided sport (charter) and unguided sport sectors. In order to appropriately analyze whether the one-fish rule is “fair and equitable” among all classes of fisherman in Area 2C, it is important to consider what percentage of the total fishery each individual sector currently represents. As the notice of proposed rulemaking demonstrates, between 1997 and 2007 the commercial sector’s fishery quota on average accounted for 75.9 percent of the halibut removals in Area 2C. The sport fishery (consisting of *both* guided and unguided anglers) on average accounted for 19.6 percent, with subsistence, bycatch, and wastage accounting for the remaining 4.5 percent. *See* 73 Fed. Reg. at 78277. Thus, over the last decade, less than 1,500 commercial fishermen have accounted for

more than three quarters of all halibut removals in Area 2C, whereas up to 100,000 guided anglers accounted for only slightly more than 12 percent. *Id.*

There is nothing in either the Halibut Act or the agency's regulations that states that the commercial sector is entitled to this disproportionate amount. In fact, there are several examples of other fisheries where the recreational sector is allocated the largest portion of fishing privileges. *See National Fisheries Institute, Inc. v. Mosbacher*, 732 F.Supp. 210, 225 (D.D.C. 1990) (purpose of final rule to "optimize the social and economic benefits to the Nation by reserving the billfish resource for the U.S. recreational fishery."); *United Boatmen of New Jersey v. Mosbacher*, 1992 U.S. Dist. LEXIS 664 at 4-5 (D.N.J. 1992) (commercial catch of bluefish stock restricted to 20%). The Secretary in the proposed rule acknowledged that the Convention places food production (commercial fishing) and recreational fishing on an equal footing, stating that:

[O]ne of the Convention's primary purposes and goals is "to develop stocks of halibut in Convention waters to those levels which permit the optimum yield from the fishery and to maintain the stocks at those levels." This overarching purpose and goal is the primary concern of NMFS for this fishery. *Optimum yield for a fishery is designed to provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities*, and is proscribed as such on the basis of the maximum sustainable yield from that fishery, as reduced by any relevant economic, social, or ecological factors.

73Fed. Reg. at 78281.

Given that there is no starting presumption in the law as to the proper allocation between commercial and recreational fisheries, and given that the total guided and unguided recreational sectors combined account for less than 20 percent of total removals, it is hard to understand why a 50 percent reduction in only the guided angler component of the recreational catch is "fair and equitable" as compared to the commercial sector's already dominant share of the total fishing quota. Even after the 54 percent reduction in the commercial catch allocation over the past four

years, the 2009 Area 2C commercial catch allocation of 5.02 million pounds is over two and a half times more than the highest Area 2C charter sector catch level (1.952 million pounds in 2005) and two thirds more than the highest combined catch of all guided and unguided recreational fishermen in Area 2C (3.04 million pounds in 2007). *See* 74 Fed. Reg. at 21207 (Comment 46) and 21195 (Table 1).

If one compares the relative harm to the charter sector caused by the one-fish rule with the corresponding benefits to the commercial sector, the results are quite telling. The March 2009 EA Report estimates that not enacting the final rule would have led to a total estimated dollar loss to the commercial sector of \$7 million dollars (in current value) over a *three* year period. *See* EA Report at 39. In the regulatory analysis dated August 28, 2008, in support of the “Catch Sharing Plan for the Pacific Halibut Charter and Commercial Longline Sectors in International Pacific Halibut Commission Regulatory Area 2C and 3A,”² it was estimated that charter sector catch reductions of the magnitude proposed here would result in revenue losses of \$10.4 million *per year* to the charter sector. *See* CHTF Comments, Exhibit D to Complaint at 9. That number was calculated using a very conservative number of \$225 per angler per day. That figure excluded “revenues generated from lodging, food, and services that are charged in addition to the basic charter fee,” as well as “consumer surpluses generated from the trip.” August 28, 2008, EA Report at 74. The actual charter sector revenue losses would therefore be substantially larger. Indeed, as Plaintiffs pointed out in their comments to the agency, a recently released Alaska Sportfishing Economic Report showed that “the average non-resident saltwater guided angler expenditure per day was \$744 per day – nearly three times the average assumed

² The August 28, 2008, EA Report is available at http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues/Area2C3A_CSP908.pdf.

for calculating charter operator losses in the August 2008 Draft Catch Sharing Plan Analysis.”

Complaint Exhibit D at 9.

The disparity between a 10.4 million dollar *annual* harm to the charter sector versus a 7 million dollar benefit *over three years* to the commercial sector was acknowledged by NMFS in its response to Comment 71 in the final rule. *See* 74 Fed. Reg. at 21212-13. In its response, however, NMFS completely ignores the financial impact comparison raised by the comment. It does so by claiming that “[t]he Catch Sharing Plan analysis cited in the comment was prepared for the Council. This analysis has not yet been submitted to NMFS for review.” *Id.* at 21213.

To be sure, if NMFS has a good reason not to consider economic analysis that commenters present to it, then it may disregard that analysis. Here, however, in the notice of proposed rulemaking for the challenged rule, NMFS expressly stated that it considered the impact of the future Catch Sharing Plan for Areas 2C and 3A in preparing the one-fish rule:

NMFS considered this analysis [the EA Report], as well as the Council’s continued support for its June 2007 recommendation, as evidenced by its actions and intent at its October 2008 meeting, *the impacts of potential future actions, such as the Catch Sharing Plan for Areas 2C and 3A* and moratorium on halibut charter businesses recommended by the Council, and statements provided by staff of the Commission concerning halibut stock management, in proposing this rule.

73 Fed. Reg. at 78282 (emphasis and bracketed language added).

Because the notice of proposed rulemaking predates and is the basis for the final rule, it is logically impossible that the Catch Sharing Plan analysis formed the basis for the proposed rule (as the agency claims), but that it could permissibly be ignored by the agency when it announced the final rule. Instead, it appears that NMFS is simply refusing to address the significant facts in the adoption of its final rule.

The Rule Fails to Consider Recent Growth in Other Sectors

Moreover, while the final rule imposes a one-fish daily limit on only the guided sport sector, it places no restrictions the unguided sport and subsistence sectors. *See* 74 Fed. Reg. at 21196 (“Some user groups, such as subsistence and unguided sport users, are not currently subject to measures designed to control aggregate harvests.”). While Plaintiffs do not suggest that these sectors necessarily need to be regulated in the same or similar manner as the guided sector, in their comments Plaintiffs stated that the Secretary must at least provide an explanation of why it is “fair and equitable” to not even consider the unguided sport and subsistence sectors when implementing the one-fish rule.

In response to Plaintiffs’ comment that NMFS did not consider the unguided recreational sector, NMFS stated in the final rule:

NMFS disagrees that this action inappropriately discriminates between guided and unguided anglers. The problem the Council and NMFS are addressing was the growth of the guided recreational sector compared to other halibut user groups. According to the analysis, participation and harvest levels for the unguided recreational sector has remained relatively steady, while participation and harvest levels for the guided recreational sector has increased to a level that prompted action by the Council and NMFS.

74 Fed. Reg. at 21216 (Comment 80).

Similarly, regarding the subsistence sector, NMFS stated:

NMFS did not propose to limit halibut harvests by non-guided sport and subsistence fisheries, or halibut mortality from bycatch and wastage in commercial fisheries because the analysis indicated that removals from categories other than the guided sport sector have remained relatively stable during the past five years and have not grown at the rate of the guided fishery.

74 Fed. Reg. at 21216 (Comment 82).

Thus, NMFS’ argument is that it was reasonable to not consider growth in the unguided and subsistence sectors when implementing the one-fish rule because harvests in those sectors have remained “steady.” However, evidence in the final rule and the EA Report proves

otherwise. As Table 1 of the final rule shows, the unguided sport catch increased by more than 400,000 pounds, or over fifty percent, between 2006 and 2007. *See* 74 Fed. Reg. at 21195 (Table 1). The guided catch, on the other hand, increased during that period by just over 100,000 pounds, or approximately five and a half percent. Moreover, the 2007 guided angler catch is down from its 2005 peak, while the 2007 unguided catch is well above the amount for all years since 2002, with the exception of that sector's peak in 2004 (which was only marginally above the current unguided take). *See id.* Likewise, Table 1 of the March 2009 EA Report shows that the subsistence catch has increased by over 350 percent since the years used to establish the GHL, going from 170,000 pounds in 1998 and 1999 to over 500,000 pounds for each of the past five years. *See* EA Report at 11 (Table 1). It has admittedly been relatively steady in the past five years, but, of course, so has the charter sector (having peaked in 2005).

In sum, although there may be situations in which it is entirely proper to regulate some fishery sectors but not others, the Secretary's stated rationale for doing so here is contradicted by the record. Inasmuch as the commercial catch limit is set by subtracting all "other removals" from the total CEY, the Secretary cannot reasonably make a "fair and equitable" allocation decision on these facts without considering present participation in the unguided recreational and subsistence fisheries as well as the commercial quota share and guided recreational fisheries.

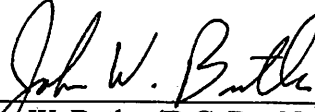
CONCLUSION

The Secretary, both in 2003 and in promulgating the final rule, failed to perform the "fair and equitable" analysis that the Halibut Act mandates for all allocation decisions. Although the Secretary claims to have done an updated analysis that considers present participation in the industry, he has in fact not made any use of the recent data contained in the EA Report, but has instead regulated to a GHL benchmark that was set using data that is between ten and fifteen

years old. The Secretary also failed to take into account the removals by the subsistence and unguided recreational sectors. Finally, the economic evidence in the record demonstrates that the Secretary could not reasonably have found that the one-fish rule was fair and equitable, because the significant harm to the charter sector was not outweighed by total benefits to the commercial sector and other users of the halibut resource. For each of these independent reasons, the Plaintiffs are likely to prevail on the merits.

Plaintiffs have demonstrated immediate and irreparable harm to their businesses, and they have no legal remedy to collect damages from the Secretary. Because the commercial sector's 2009 catch has already been set, granting a preliminary injunction will not burden those fishermen. The only burdens on the Secretary are a slight delay and a requirement that he follow the law. Finally, the public interest will not be affected by the issuance of a preliminary injunction, because the challenged final rule deals only with the allocation of harvest amounts, not the health of the halibut resource. Accordingly, Plaintiffs have met all of the requirements for the issuance of a preliminary injunction, and they respectfully request that the Court promptly order that relief.

Respectfully submitted,



John W. Butler (D.C. Bar No. 437370)
Robert K. Magovern (D.C. Bar No. 497862)
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500 (Main)
(202) 463-2510 (Direct)
(202) 365-0059 (Cell)

Earl W. Comstock (Admitted in Alaska)
COMSTOCK CONSULTING LLC
6225 30th Street, N.W.
Washington, DC 20015
(202) 255-0273

Counsel for Plaintiffs

May 22, 2009.

2009 catch is through May 23 and 2008 catch is through May 24 unless otherwise stated.

Bering Sea and Aleutian Islands

Bering Sea Pollock

By April 11 all sectors, including CDQ, finished the 2009 A season fishery with 313,842 metric tons (mt) of total catch. In 2008 the A season directed pollock fisheries ended by March 29 catching 387,053 mt. The 2009 B season opens at noon, Alaska local time (A.l.t.), June 10 with the following allocations: 212,248 mt for inshore, 168,998 mt for catcher processors, 42,240 mt for motherships, and 48,900 mt for CDQ.

Salmon in A season pollock fishery

For Chinook salmon, the 2009 catch was 9,330 for non-CDQ and 358 for CDQ compared to the 2008 catch of 14,421 for non-CDQ and 604 for CDQ. For non-Chinook salmon, the 2009 catch was 41 for non-CDQ and zero for CDQ compared to the 2008 catch of 22 for non-CDQ and 73 for CDQ. In 2009 the Chinook Salmon Savings Area (CSSA) remains open. In 2008 the CSSA remained open all year. Non-Chinook catch remains low.

BSAI Trawl groundfish catch (metric tons)

The 2009 trawl catch is about 15% less than the 2008 catch for the same time period.

Year	NPT CV	NPT CP	PTR CV	PTR CP	Total
2009	32,765	166,113	185,072	150,564	534,514
2008	38,711	189,528	218,617	179,269	626,125

Trawl halibut mortality

The 2009 total trawl halibut mortality is 118% of the 2008 total. Most of the increase compared to 2008 is in the pollock, rock sole, and yellowfin sole targets. The BSAI trawl limited access sector exceeded the 2009 annual halibut mortality limit of 175 mt for the pollock/Atka mackerel/other species category by 139 mt. However, NMFS projects the BSAI trawl limited access sector will stay below the overall 875 mt limit for the rest of 2009.

The halibut mortality through May 23, 2009 compared to May 24, 2008 is:

All trawl gear by target (Other includes Flathead sole, Atka mackerel, and Rockfish)

2009 Total – 1,658 mt

Pacific cod 216 mt, Pollock 314 mt, Rock sole 499 mt, Yellowfin 490 mt, Other 138 mt

2008 Total – 1,408 mt

Pacific cod 292 mt, Pollock 151 mt, Rock sole 422 mt, Yellowfin 418 mt, Other 125 mt.

Atka mackerel

Eight catcher processors registered for the 2009 A season HLA fisheries in 542 and 543 (six in 2008): three in the Amendment 80 cooperative, four in the Amendment 80 limited access sector, and one in the BSAI trawl limited access sector. The B season allocations become available September 1.

Pacific cod

Hook-and-line catcher/processors

In 2009, 37 hook-and-line catcher processors participated in the A season Pacific cod fishery (36 in 2008). The A season closed February 8 catching 39,470 mt of the 38,951 mt total allowable catch (TAC). The fishery closed February 8 in 2008 and February 12 in 2007. The B season allocation becomes available at noon, A.l.t., August 15, 2009.

Hook-and-line catcher vessels

The fishery for hook-and-line catcher vessels \geq 60 feet LOA remains open with no participation. In 2008 the fishery remained open until August 28 with no participation. In September 2008, NMFS reallocated 150 mt to jig gear and 153 mt to hook-and-line and pot vessels $<$ 60 ft LOA.

Hook-and-line and pot catcher vessels $<$ 60 feet length overall

In 2009, 10 hook-and-line caught 14% and 17 pot vessels caught 86% of the 4,154 mt total catch. The fishery closed March 16, 2009. In 2008, 10 hook-and-line caught 16% and 10 pot vessels caught 84% of the 4,206 mt total catch. The fishery closed March 21, 2008. As in 2008, NMFS reallocated 1,200 mt in March and 400 mt in April from jig gear A and B season allocations to the $<$ 60 ft category. The fishery reopened April 30. Effort is low and no closure date projected. In 2008, the $<$ 60 ft fishery reopened April 30 and closed May 6. Twelve vessels participated (7 pot, 5 hook-and-line).

Jig

In 2009 there has been no effort in the A or B seasons as a result of low Pacific cod prices. In 2008, four vessels started fishing Pacific cod in April and May catching 15 mt.

Pot

The B season allocations become available September 1.

Catcher vessels

The 2009 fishery closed February 1 with 19 vessels catching about 5,673 mt of the 6,718 mt A season TAC. The fishery reopened March 1, 2009. Effort is low and at the current catch rate NMFS projects the fishery to remain open through mid-July. The 2008 fishery closed January 18 with 43 vessels catching about 6,600 mt of the 6,496 mt A season TAC.

Catcher processors

The 2009 fishery closed January 28 with three pot catcher processors catching 1,288 mt of the 1,200 mt A season TAC. The 2008 fishery closed January 20 with five catcher processors catching 1,207 mt of the 1,160 mt A season TAC.

Trawl

The 2009 A season for catcher vessels closed March 21 catching 24,835 mt of the 25,782 mt A season TAC. The 2009 B season opened April 1-5, and the C season opens at noon, A.l.t., June 10 with 6,463 mt remaining. The 2009 B season pollock fishery is projected to use 1,500 mt of Pacific cod. This may leave up to 5,000 mt of Pacific cod available to reallocate to other sectors depending on the trawl catcher vessel C season effort. The 2008 A season for catcher vessels closed March 6 catching 25,807 mt of the 24,932 mt A season TAC. The B season opened April 1 to 4 with 3,360 mt caught, and the C season remained open until November 1 with 1,500 mt caught.

The Amendment 80 cooperative is managing their catch. The Amendment 80 limited access fishery is closed for 2009 on their halibut mortality limit. The 2009 A season closed for AFA catcher/processors effective March 6 and the B and C seasons will remain closed.

Arrowtooth flounder and Greenland turbot

The directed fisheries opened May 1. Trawl catcher processors targeted Greenland turbot in the Aleutian Islands subarea and NMFS closed directed fishing May 28, 2009. In the Bering Sea subarea several hook-and-line catcher processors are targeting turbot. In the last few years the Greenland turbot fishery has accelerated in June by the hook-and-line catcher processors until effort shifts to the Pacific cod fishery in August. In 2008 the Amendment 80 sector significantly increased their arrowtooth flounder and Greenland turbot catch compared to 2007.

Flatfish

Rock sole was the main flatfish target until March when the fleet started targeting yellowfin sole. For rock sole the 2009 total catch of 39,187 mt is close to the 2008 total catch of 40,796 mt. For yellowfin sole the 2009 total catch of 56,827 mt is less than the 2008 total catch of 77,483 mt. Anecdotal reports are that the decrease in yellowfin sole is mostly a result of market conditions.

Gulf of Alaska

Western GOA Pacific cod

The 2009 A season Western GOA inshore Pacific cod fishery closed February 25. A total of 9,148 mt of the 8,735 mt A season TAC was caught by 74 vessels. The percentages by gear are: 42% from pot, 38% from hook-and-line, and 20% from trawl. The 2008 A season Western GOA inshore Pacific cod fishery closed February 29. A total of 10,471 mt of the 10,502 mt A season TAC was caught by 80 vessels. The percentages by gear are: 37% from pot, 21% from hook-and-line, and 42% from trawl. The offshore component remains open in 2009 and closed March 4 in 2008.

Central GOA Pacific cod

High catch rates and a lower TAC caused the 2009 A season inshore fishery to close January 27 about 3 1/2 weeks earlier than the February 20 closure in 2008. Each year 1,500-2,000 mt of the A season TAC is subtracted from the directed fishing allowance for incidental catch to support other fisheries through June 10. In 2009 a total of 11,286 mt of

the 12,767 mt A season TAC was caught by 158 vessels. The percentages by gear are: 37% from pot, 31% from hook-and-line, and 32% from trawl. The 2008 A season Central GOA inshore Pacific cod fishery closed February 20 and opened for 24 hours on February 29. A total of 14,529 mt of the 15,350 mt A season TAC was caught by 167 vessels. The percentages by gear are: 28% from pot, 35% from hook-and-line, and 37% from trawl. The A season offshore component Pacific cod is mostly caught by hook-and-line catcher processors and closed February 19 in 2009 and March 9 in 2008.

Pollock

The 2009 A and B season pollock TACs of 20,203 are 20% lower than the 2008 A and B season pollock TACs of 25,212 mt. Most of the decrease is in Area 620 (29%) and Area 630 (17%). Area 610 had three openings: January 20-22 for 124 mt, March 1-3 for 2,917 mt, and March 10-12 for 2,839 mt. Area 620 had two open: January 20-March 6 for 5,038 mt and March 10-14 for 5,820 mt. Area 630 had three openings: January 20-22 for 681 mt, 12 hours on February 11 with no effort, and March 9-11 for 3,469 mt. The West Yakutat pollock fishery closed March 21 with 1,150 mt caught.

Rockfish

Information on the Rockfish Program can be found at <http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm>. The directed fisheries for the vessels in cooperatives opened May 1, 2009. Eight vessels have fished for four catcher vessel cooperatives. The limited access fisheries open July 1.

As in 2008, two catcher/processor cooperatives with five vessels and five shoreside cooperatives with 44 catcher vessels were formed. Seven catcher/processors and two catcher vessels elected to participate in the limited access fisheries. Three (four in 2008) catcher/processors elected to participate in opt out fishery. Four (five in 2008) catcher vessels registered to participate in the entry level fishery. The catch from vessels not registered to participate in the Rockfish Program fishing in State waters will be deducted from the entry level fishery.

The Western GOA Pacific ocean perch, pelagic shelf rockfish, and northern rockfish and the West Yakutat Pacific ocean perch and pelagic shelf rockfish fisheries will open at noon, A.l.t., July 1, 2009.

Deep and Shallow Water Complex Trawl Fisheries

NMFS closed the deep-water species fisheries for the first season allowance (100 mt) March 3, 2009. The second season allowance of 300 mt became available April 1 and closed April 23, 2009. The trawl shallow-water complex fisheries have remained open all year. Over the last few weeks effort in shallow-water species fisheries is decreasing and increasing in the rockfish fisheries. The remaining amount for the second season allowance is 96 mt in the shallow-water complex. The allowance of halibut mortality becomes available for the both complex fisheries July 1, 2009. For the deep-water complex third season limit 171 mt of halibut mortality is deducted for the rockfish pilot program cooperatives. In 2008 the deep-water complex closed April 21 and the shallow

water complex closed March 10 and reopened for 24 hours on March 21. Both complexes opened on the third season allowance July 1, 2008.

Year	Deep CV	Deep CP	Shallow CV	Shallow CP	Total
2009	217	196	394	60	867
2008	182	212	515	44	952

Hook-and-line gear

Halibut mortality for the hook-and-line fleet is at 197 mt of the 250 mt first season allocation. This leaves 53 mt remaining. The second season allocation of 5 mt becomes available June 10. Currently, most hook-and-line vessels in the GOA are participating in the IFQ fisheries which do not accrue halibut mortality to this limit. In 2008 the hook-and-line fishery closed October 16 due to reaching the halibut mortality limit.

Bering Sea Aleutian Islands Catch Report
 (includes CDQ)
 Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Bering Sea

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Other Rockfish (includes CDQ)	32	412	380	8%	4
	Pacific Ocean Perch (includes CDQ)	71	3,247	3,176	2%	18
	Sablefish (Hook-and-Line and Pot)	175	1,088	913	16%	10
	Sablefish CDQ (Hook-and-Line and Pot)	1	272	272	0%	0
	Sablefish (Trawl)	10	1,156	1,146	1%	1
	Sablefish CDQ (Trawl)	0	102	102	0%	0
	Greenland Turbot	174	4,327	4,153	4%	44
	Greenland Turbot CDQ	8	545	537	1%	0
X	Pollock, AFA Inshore	140,631	352,080	211,449	40%	0
X	Pollock, AFA Catcher Processor	112,526	281,664	169,138	40%	0
X	Pollock, AFA Mothership	28,162	70,416	42,254	40%	0
X	Pollock CDQ	32,523	81,500	48,977	40%	0
	Pollock, Incidental Catch, non-Bogoslof (includes CDQ)	15,591	29,340	13,749	53%	148
	Pollock, Incidental Catch, Bogoslof (includes CDQ)	37	50	13	74%	3

Bering Sea Aleutian Islands Catch Report
(includes CDQ)
Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Aleutian Islands

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Other Rockfish (includes CDQ)	122	472	350	26%	1
	Pacific Ocean Perch, Eastern	1,624	3,571	1,947	45%	0
	Pacific Ocean Perch, Eastern CDQ	54	449	395	12%	0
	Pacific Ocean Perch, Central	1,425	3,804	2,379	37%	0
	Pacific Ocean Perch, Central CDQ	32	456	424	7%	0
	Pacific Ocean Perch, Western	538	5,822	5,284	9%	0
	Pacific Ocean Perch, Western CDQ	1	698	697	0%	0
	Atka Mackerel, Eastern ICA	20	200	180	10%	0
	Atka Mackerel, Eastern (Jig)	0	120	120	0%	0
X	Atka Mackerel, Eastern (Trawl)	11,093	23,792	12,699	47%	15
	Atka Mackerel, Eastern CDQ	1,878	2,889	1,011	65%	0
X	Atka Mackerel, Central (Trawl)	10,470	29,002	18,532	36%	0
	Atka Mackerel, Central ICA	31	20	-11	153%	0
	Atka Mackerel, Central CDQ	1,818	3,478	1,660	52%	0
X	Atka Mackerel, Western (Trawl)	3,297	15,072	11,775	22%	0
	Atka Mackerel, Western ICA	1	20	19	7%	0
	Atka Mackerel, Western CDQ	13	1,808	1,795	1%	0
	Sablefish (Hook-and-Line and Pot)	318	1,320	1,002	24%	9
	Sablefish CDQ (Hook-and-Line and Pot)	13	330	317	4%	0
	Sablefish (Trawl)	25	468	443	5%	5
	Sablefish CDQ (Trawl)	0	41	41	0%	0
	Greenland Turbot (includes CDQ)	1,037	1,947	910	53%	366
X	Pollock	287	15,500	15,213	2%	0
X	Pollock CDQ	0	1,900	1,900	0%	0
X	Pollock, Incidental Catch (includes CDQ)	469	1,600	1,131	29%	3

Note: All weights are in metric tons.

Bering Sea Aleutian Islands Catch Report
(includes CDQ)
Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Bering Sea Aleutian Islands

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Alaska Plaice (includes CDQ)	8,545	42,500	33,955	20%	541
	Arrowtooth Flounder	5,005	63,750	58,745	8%	901
	Arrowtooth Flounder CDQ	154	8,025	7,871	2%	0
	Flathead Sole	8,776	53,580	44,804	16%	64
	Flathead Sole CDQ	365	6,420	6,055	6%	0
	Northern Rockfish (includes CDQ)	804	6,086	5,282	13%	0
	Other Flatfish (includes CDQ)	927	14,790	13,863	6%	127
	Other Species (includes CDQ)	15,553	42,500	26,947	37%	172
X	Pacific Cod, Catcher Processor (Amendment 80)	9,239	21,125	11,886	44%	326
X	Pacific Cod, Catcher Processor (AFA)	3,864	3,626	-238	107%	0
X	Pacific Cod, Catcher Vessel (Trawl)	28,378	34,841	6,463	81%	0
X	Pacific Cod, Catcher Processor (Hook-and-Line)	39,564	76,375	36,811	52%	0
X	Pacific Cod, Catcher Vessel (Hook-and-Line >= 60 ft)	0	314	314	0%	0
X	Pacific Cod, Catcher Processor (Pot)	1,343	2,352	1,009	57%	0
X	Pacific Cod, Catcher Vessel (Pot >= 60 ft)	6,285	13,173	6,888	48%	0
	Pacific Cod (Jig)	0	607	607	0%	0
	Pacific Cod (Hook-and-Line and Pot < 60 ft)	4,249	4,737	488	90%	0
	Pacific Cod, Incidental Catch (Hook-and-Line and Pot)	6	500	494	1%	0
X	Pacific Cod CDQ	10,024	18,890	8,866	53%	0
	Rock Sole	39,187	80,370	41,183	49%	341
	Rock Sole CDQ	797	9,630	8,833	8%	0
	Rougheye Rockfish (includes CDQ)	50	458	408	11%	1
	Shortraker Rockfish (includes CDQ)	60	329	269	18%	2
	Squid (includes CDQ)	108	1,675	1,567	6%	6
	Yellowfin Sole	56,827	187,530	130,703	30%	2,317
	Yellowfin Sole CDQ	112	22,470	22,358	0%	0
	Total:	604,727	1,657,631	1,052,904	36%	5,427

Other flatfish: all flatfish species, except for Pacific halibut, flathead sole, Greenland turbot, rock sole, yellowfin sole, arrowtooth flounder, and Alaska plaice.

Other rockfish: all Sebastes and Sebastolobus species except for Pacific ocean perch, northern, shortraker, and rougheye rockfish.

Other species: sculpins, sharks, skates, and octopus.

For changes to the harvest specifications refer to <http://alaskafisheries.noaa.gov/2009/hschanges.htm>

**Bering Sea Aleutian Islands Prohibited Species Report
(includes CDQ fisheries)**

Through: 23-MAY-09

**National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting**



Chinook Salmon

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	BS Pollock (Pelagic)	Count	9,325	26,825	17,500	35%	0
	BS Chinook Salmon PSQ	Count	358	2,175	1,817	16%	0
	AI Pollock (Pelagic)	Count	5	647	643	1%	0
	AI Chinook Salmon PSQ	Count	0	53	53	0%	0
Total:			9,687	29,700	20,013	33%	0

Halibut Mortality

Non-Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Halibut Mortality (Non-Trawl)	MT	181	832	651	22%	0
Total:			181	832	651	22%	0

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Halibut Mortality (Trawl)	MT	1,658	3,400	1,742	49%	85
Total:			1,658	3,400	1,742	49%	85

Trawl and Hook-and-Line Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Halibut Mortality PSQ	MT	67	343	276	20%	0
Total:			67	343	276	20%	0

Herring (includes CDQ fisheries)

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Pacific Cod	MT	0	25	25	0%	0
	Rockfish	MT	0	9	9	0%	0
	Rock Sole, Flathead Sole, Other Flatfish	MT	0	25	25	0%	0
	Pollock, Atka Mackerel, Other Species	MT	0	184	184	0%	0
	Pollock Pelagic	MT	0	1,296	1,296	0%	0
	Yellowfin Sole	MT	0	146	146	0%	0
	Greenland Turbot, Arrowtooth, Sablefish	MT	0	12	12	0%	0
Total:			0	1,697	1,697	0%	0

Bering Sea Aleutian Islands Prohibited Species Report
(includes CDQ fisheries)

Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Opilio (Tanner) Crab - COBLZ

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Opilio Crab	Count	250,753	3,884,550	3,633,797	6%	4,042
	Opilio Crab PSQ	Count	56,267	465,450	409,183	12%	0
Total:			307,020	4,350,000	4,042,980	7%	4,042

Bairdi Crab, Zone 1

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Bairdi Crab	Count	112,707	875,140	762,434	13%	116
	Bairdi Crab PSQ	Count	6,483	104,860	98,377	6%	0
Total:			119,190	980,000	860,811	12%	116

Bairdi Crab, Zone 2

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Bairdi Crab	Count	235,868	2,652,210	2,416,342	9%	5,047
	Bairdi Crab PSQ	Count	5,676	317,790	312,114	2%	0
Total:			241,544	2,970,000	2,728,456	8%	5,047

Red King Crab, Zone 1

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Red King Crab	Count	48,295	175,921	127,626	27%	948
	Red King Crab PSQ	Count	1,962	21,079	19,117	9%	0
Total:			50,257	197,000	146,743	26%	948

"Other flatfish" for PSC monitoring: all flatfish species, except for Pacific halibut (a prohibited species), flathead sole, Greenland turbot, rock sole, yellowfin sole, arrowtooth flounder.

COBLZ: C. Opilio Crab Bycatch Limitation Zone. 50 CFR 679.21(e) and Figure 13.

Zone 1: Federal Reporting Areas 508, 509, 512, 516.

Zone 2: Federal Reporting Areas 513, 517, 521.

Data is based on observer reports extrapolated to total groundfish harvest. Estimates for all weeks may change due to incorporation of late or corrected data.

Bering Sea Aleutian Islands
Seasonal Non-Sideboard Prohibited Species Report
(excludes CDQ fisheries)

Through: 23-MAY-09
Account: ALL

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Halibut Mortality

Pacific Cod Hook-and-Line Catcher Processor

Season	Begin	End	Units	Total Catch	Limit	Remaining	% Taken
CP - 1st Season	01-JAN-09	10-JUN-09	MT	169	314	145	54%
CP - 2nd Season	10-JUN-09	15-AUG-09	MT	0	0	0	0%
CP - 3rd Season	15-AUG-09	31-DEC-09	MT	0	446	446	0%
Total:				169	760	591	22%

Pacific Cod Hook-and-Line Catcher Vessel

Season	Begin	End	Units	Total Catch	Limit	Remaining	% Taken
CV - 1st Season	01-JAN-09	10-JUN-09	MT	2	10	8	19%
CV - 2nd Season	10-JUN-09	15-AUG-09	MT	0	3	3	0%
CV - 3rd Season	15-AUG-09	31-DEC-09	MT	0	2	2	0%
Total:				2	15	13	13%

Red King Crab, RKCSS

Trawl Gear

Season	Begin	End	Units	Total Catch	Limit	Remaining	% Taken
Rock Sole, Flathead Sole, Other Flatfish (Non Pelagic)	20-JAN-09	31-DEC-09	Count	48,283	49,250	967	98%
Total:				48,283	49,250	967	98%

RKCSS: Red king crab savings subarea. 50 CFR 679.22(a)(3) and Figure 11.

Gulf of Alaska Catch Report

Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Western, Central Pollock

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
X	Pollock, 610 Shumagin	5,936	15,249	9,313	39%	0
X	Pollock, 620 Chirikof	10,962	14,098	3,136	78%	15
X	Pollock, 630 Kodiak	5,252	11,058	5,806	47%	86

Western Gulf

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Arrowtooth Flounder	819	8,000	7,181	10%	3
	Deep Water Flatfish	1	706	705	0%	0
	Shallow Water Flatfish	39	4,500	4,461	1%	0
	Flathead Sole	168	2,000	1,832	8%	0
	Rex Sole	87	1,007	920	9%	0
	Pacific Ocean Perch	22	3,713	3,691	1%	0
	Rougheye Rockfish	10	125	115	8%	1
	Shorthead Rockfish	25	120	95	21%	2
	Thornyhead Rockfish	53	267	214	20%	6
	Pelagic Shelf Rockfish	11	819	808	1%	0
	Northern Rockfish	4	2,054	2,050	0%	0
	Other Rockfish	7	357	350	2%	0
X	Pacific Cod, Inshore	9,381	14,558	5,177	64%	0
X	Pacific Cod, Offshore	549	1,617	1,068	34%	9
	Sablefish (Hook-and-Line)	478	1,312	834	36%	47
	Sablefish (Trawl)	2	324	322	1%	0
	Big Skate	61	632	571	10%	0
	Longnose Skate	33	78	45	42%	0

Gulf of Alaska Catch Report

Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Central Gulf

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Arrowtooth Flounder	14,701	30,000	15,299	49%	358
	Deep Water Flatfish	98	6,927	6,829	1%	5
	Shallow Water Flatfish	2,345	13,000	10,655	18%	110
	Flathead Sole	1,812	5,000	3,188	36%	26
	Rex Sole	2,659	6,630	3,971	40%	3
	Pacific Ocean Perch	949	8,246	7,297	12%	297
	Rougheye Rockfish	47	833	786	6%	1
	Shortraker Rockfish	73	315	242	23%	2
	Pelagic Shelf Rockfish	290	3,404	3,114	9%	60
	Northern Rockfish	454	2,308	1,854	20%	188
	Thornyhead Rockfish	149	860	711	17%	9
	Other Rockfish	40	569	529	7%	3
X	Pacific Cod, Inshore	13,934	21,277	7,343	65%	182
X	Pacific Cod, Offshore	1,352	2,364	1,012	57%	0
	Sablefish (Hook-and-Line)	2,763	3,992	1,229	69%	167
	Sablefish (Trawl)	151	998	847	15%	38
	Big Skate	1,057	2,065	1,008	51%	7
	Longnose Skate	587	2,041	1,454	29%	20

Eastern Gulf

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Rougheye Rockfish	57	326	269	17%	4
	Shortraker Rockfish	78	463	385	17%	6
	Thornyhead Rockfish	82	783	701	10%	11
	Pacific Cod, Inshore	542	1,792	1,250	30%	19
	Pacific Cod, Offshore	0	199	199	0%	0
	Big Skate	65	633	568	10%	3
	Longnose Skate	202	768	566	26%	14

Gulf of Alaska Catch Report

Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



West Yakutat

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Arrowtooth Flounder	21	2,500	2,479	1%	2
	Deep Water Flatfish	1	997	996	0%	0
	Shallow Water Flatfish	0	3,333	3,333	0%	0
	Flathead Sole	0	3,531	3,531	0%	0
	Rex Sole	0	513	513	0%	0
	Pacific Ocean Perch	19	1,108	1,089	2%	0
	Pelagic Shelf Rockfish	0	234	234	0%	0
	Other Rockfish	10	604	594	2%	1
	Pollock	1,149	1,215	66	95%	0
	Sablefish (Hook-and-Line)	1,318	1,557	239	85%	48
	Sablefish (Trawl)	0	227	227	0%	0

Southeast

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Arrowtooth Flounder	24	2,500	2,476	1%	6
	Deep Water Flatfish	1	538	537	0%	1
	Shallow Water Flatfish	0	1,423	1,423	0%	0
	Flathead Sole	0	650	650	0%	0
	Rex Sole	0	846	846	0%	0
	Pacific Ocean Perch	0	2,044	2,044	0%	0
	Pelagic Shelf Rockfish	0	324	324	0%	0
	Other Rockfish	4	200	196	2%	0
	Pollock	0	8,280	8,280	0%	0
	Demersal Shelf Rockfish	51	362	311	14%	7
	Sablefish (Hook-and-Line)	1,665	2,746	1,081	61%	187

Entire Gulf

Sea- sons	Account	Total Catch	Quota	Remaining Quota	% Taken	Last Wk Catch
	Atka Mackerel	214	2,000	1,786	11%	0
	Other Skates	681	2,104	1,423	32%	29
	Other Species	1,328	4,500	3,172	30%	31
Total:		84,876	242,723	157,847	35%	2,014

Deep water flatfish: Dover sole, Greenland turbot, and deepsea sole.

Shallow water flatfish: flatfish not including deep water flatfish, flathead sole, rex sole, or arrowtooth flounder.

Gulf of Alaska Catch Report

Through: 23-MAY-09

**National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting**



Other rockfish in the Western and Central Regulatory Areas and in the West Yakutat District: slope rockfish and demersal shelf rockfish.

Other rockfish in the Southeast Outside District: slope rockfish.

Slope rockfish: aurora, blackgill, bocaccio, chilipepper, darkblotch, greenstriped, harlequin, pygmy, redbanded, redstripe, sharpchin, shortbelly, silvergrey, splitnose, stripetail, vermilion, and yellowmouth.

In the Eastern GOA only, "slope rockfish" also includes northern rockfish.

Demersal shelf rockfish: canary, china, copper, quillback, rosethorn, tiger, and yelloweye.

"Pelagic shelf rockfish" means *Sebastes variabilis* (dusky), *S. entomelas* (widow), and *S. flavidus* (yellowtail).

Other species: sculpins, sharks, squid, and octopus.

For changes to the harvest specifications refer to <http://alaskafisheries.noaa.gov/2009/hschanges.htm>

Gulf of Alaska Prohibited Species Report

Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Non-Chinook Salmon

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Non Chinook Salmon	Count	311	0			35
Total:			311	0			35

Chinook Salmon

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Chinook Salmon	Count	3,480	0			12
Total:			3,480	0			12

Halibut Mortality

Non-Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Other Hook-and-Line Fisheries	MT	197	290	93	68%	0
Total:			197	290	93	68%	0

Trawl Gear

Sea- sons	Account	Units	Total Catch	Limit	Remaining	% Taken	Last Wk Catch
	Trawl Fishery	MT	866	2,000	1,134	43%	30
Total:			866	2,000	1,134	43%	30

No PSC Limits apply to salmon in the GOA.

Other hook-and-line fisheries means all hook-and-line fisheries except sablefish and demersal shelf rockfish in the Southeast District. The hook-and-line sablefish fishery is exempt from halibut PSC limits.

Halibut mortality for the demersal shelf rockfish fishery. Southeast District is not listed due to insufficient observer coverage.

Data is based on observer reports extrapolated to total groundfish harvest. Estimates for all weeks may change due to incorporation of late or corrected data.

Trawl halibut PSC limit data include catch from Rockfish Pilot Program cooperatives.

Gulf of Alaska Halibut Mortality Report

Through: 23-MAY-09

National Marine Fisheries Service
Alaska Region, Sustainable Fisheries
Catch Accounting



Trawl Fisheries

Deep Water Species Complex

Season	Begin	End	Total Catch	Limit	Limit Remaining	% Taken
1st Season	20-JAN-09	01-APR-09	186	100	-86	186%
2nd Season	01-APR-09	01-JUL-09	223	300	77	74%
3rd Season	01-JUL-09	01-SEP-09	0	400	400	0%
4th Season	01-SEP-09	01-OCT-09	0	0	0	0%
Total:			408	800	392	51%

Shallow Water Species Complex

Season	Begin	End	Total Catch	Limit	Limit Remaining	% Taken
1st Season	20-JAN-09	01-APR-09	198	450	252	44%
2nd Season	01-APR-09	01-JUL-09	256	100	-156	256%
3rd Season	01-JUL-09	01-SEP-09	0	200	200	0%
4th Season	01-SEP-09	01-OCT-09	0	150	150	0%
Total:			453	900	447	50%

Year-To-Date

Account	Total Catch	Limit	Limit Remaining	% Taken	Last Wk Catch
Trawl Fishery	866	2,000	1,134	43%	30

Other Hook-and-Line Fisheries

Season	Begin	End	Total Catch	Limit	Limit Remaining	% Taken
1st Season	01-JAN-09	10-JUN-09	197	250	53	79%
2nd Season	10-JUN-09	01-SEP-09	0	5	5	0%
3rd Season	01-SEP-09	31-DEC-09	0	35	35	0%
			197	290	93	68%

Deep-water species complex: sablefish, rockfish, deep-water flatfish, rex sole and arrowtooth flounder. Shallow-water species complex: pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, and 'other species'.

No apportionment between shallow-water and deep-water fishery complexes during October 1 to December 31 (300 mt allocated).

Other hook-and-line fisheries means all hook-and-line fisheries except sablefish and demersal shelf rockfish in the Southeast District.

Halibut mortality for the demersal shelf rockfish fishery. Southeast District is not listed due to insufficient observer coverage.

Note: All weights are in metric tons.

Report run on: May 28, 2009 5:16 AM

Status of FMP Amendments
May 29, 2009

FMP Amendment Status: <u>Actions Since April 2009</u>	Date of Council Action	Start Regional Review	Transmittal Date of Action to NMFS HQ for Review	Proposed FMP Amendment Notice of Availability Published	Proposed Rule Published in Federal Register	Final Rule Published in Federal Register
Amendment 27 (KTC) – Custom Processing Approved: December 9, 2008	December 2007	PR: 5/30/08 FR: 1/30/09	PR: September 5, 2008 FR: May 4, 2009	September 11, 2008 73 FR 52806 Comment period ended November 10, 2008	September 19, 2008 73 FR 54346 Comment period ended November 3, 2008	May 28, 2009 74 FR 25449 Effective 6/29/09
Amendment 28 (KTC) – Post delivery transfers Approved: Feb. 23, 2009	December 2007	PR: 8/14/08 FR: 5/29/09	PR: November 18, 2008	November 25, 2008 73 FR 71598 Comment period ended January 24, 2009	December 12, 2008 73 FR 75661 Comment period ended January 26, 2009	
Amendment 30 (KTC) – Arbitration System Changes	April 2008	PR: 1/28/09				
Amendment 31 (KTC) – C-Share Active Participation	April 2008					
Amendments 33 (KTC) – Revisions to Loan Program (no regulations needed)	June 2008	NOA: 3/27/09	NOA: May 22, 2009	June 1, 2009 74 FR Comment period ends July 31, 2009		
Amendment 34 (KTC) – Adjustments to GOA sideboards for BSAI crab vessels	Oct 2008					
Amendments 62/62: Single Geographic Location and AFA Housekeeping	Oct 2002	PR: 12/5/08	PR: March 27, 2009	April 2, 2009 74 FR 14950 Comment period ended June 1, 2009	April 14, 2009 74 FR 17137 Comment period ended May 29, 2009	
Amendment 85 (GOA) – BSAI Sideboard exemption in GOA Rockfish Program	Oct 2008	PR: 1/30/09	PR: March 16, 2009	March 24, 2009 74 FR 12300 Comment period ends May 26, 2009	April 6, '09; May 13 '09 74 FR 15420; 22507 Comment period ends 5/21/09;6/22/09	

Status of FMP Amendments
May 29, 2009

FMP Amendment Status: <u>Actions Since April 2009</u>	Date of Council Action	Start Regional Review	Transmittal Date of Action to NMFS HQ for Review	Proposed FMP Amendment Notice of Availability Published	Proposed Rule Published in Federal Register	Final Rule Published in Federal Register
Amendment 90 (BSAI) Post delivery transfers for Amendment 80 cooperatives and Amendment 78 (GOA) Rockfish Post-Delivery Transfers Approved: March 16, 2009	February 2008	PR: 9/2/08 FR: 5/29/09	PR: December 8, 2008	December 17, 2008 73 FR 76605 Comment period ended February 17, 2009	January 5, 2009 74 FR 254 Comment period ended February 17, 2009	
Amendments 92/82 to BSAI and GOA FMPS - Trawl License Latency Approved: March 11, 2009	April 2008	PR: 8/25/08 FR: 5/28/09	PR: December 5, 2008	December 12, 2008 73 FR 75659 Comment period ended February 10, 2009	December 30, 2008 73 FR 79773 Comment period ended February 13, 2009	
Arctic FMP and Amd 29 (KTC FMP)	February 2009	NOA and PR: 4/9/09	NOA and PR: 5/19/09	May 26, 2009 74 FR 24757 Comment period ends July 27, 2009		
Amendment 86 (GOA) – fixed gear endorsement for Pacific cod	April 2009					
Amendment 91 (BSAI) Chinook Salmon bycatch management or the BS pollock fishery	April 2009					

Status of Regulatory Amendments
May 29, 2009

Regulatory Amendment Status: <u>Actions Since April 2009</u>	Date of Council Action	Start Regional Review of Rule	Transmittal Date of Rule to NMFS Headquarters	Proposed Rule in <i>Federal Register</i>	Final Rule Published in <i>Federal Register</i>
Groundfish/Crab Regulatory Amendments					
Revise MRA accounting period for non-AFA C/Ps for selected groundfish species in the BSAI * Intend to withdraw proposed rule	December 2006	PR: 7/2/08	PR: Jan. 28, 2009	February 13, 2009 74 FR 7209 Comment period ended March 16, 2009	
Revision to GOA pollock trip limit	December 2007	PR: 8/20/08 FR 2/27/09	PR: Sept. 29, 2008	October 20, 2008 73 FR 62241 Comment period ended November 17, 2008	April 21, 2009 74 FR 18156 Effective 5/21/09
CDQ regulation of harvest	MSA requirement Council - June 2007	PR: 12/17/08			
Observer Program regulation revisions	April 2008	PR: 2/25/09			
Allow online transfers for CDQ , crab IPQ, and cooperatives	NMFS	PR: 1/6/09	PR: May 4, 2009	May 26, 2009 74 FR 24762 Comment period ends June 10, 2009	
Revise definition of "U.S. citizen"	NMFS	PR: 2/23/09			
Crab EDR revision	NMFS	PR: 5/14/09			
Streamline Permits regulations	NMFS				

Status of Regulatory Amendments
May 29, 2009

Regulatory Amendment Status: <u>Actions Since April 2009</u>	Date of Council Action	Start Regional Review of Rule	Transmittal Date of Rule to NMFS Headquarters	Proposed Rule in <i>Federal Register</i>	Final Rule Published in <i>Federal Register</i>
Halibut Regulations					
Implement 1-Fish Bag Limit in Area 2C	NMFS	PR: 10/15/08 FR: 3/13/09	PR: Dec. 3, 2008 FR April 8, 2009	December 22, 2008 73 FR 78276 Comment period ended January 21, 2009	May 6, 2009 74 FR 21194 Effective June 5, 2009
Charter vessel moratorium	April 2007	PR: 9/29/08	PR: Feb. 25, 2009	April 21, 2009 74 FR 18178 Comment period ends June 5, 2009	
Halibut charter catch sharing plan	Oct 2008				
Subsistence Halibut – Include Certain Rural Residents	June 2008				
Remove inactive IFQ permits	June 2006				
OTHER					

Regulatory Actions Completed in 2009
May 29, 2009

- Notice of EFP application – Halibut survival rates: January 22, 2009, 74 FR 3992
- 2009 Chiniak Gully closure –rescinding closure: January 21, 2009, 74 FR 3449
- BSAI pollock and GOA pollock and Pacific cod 2009 TAC adjustments: BSAI: 1/2/09, 74 FR 38 GOA: 1/5/09, 74 FR 233
- Interagency Electronic Reporting System: December 15, 2008, 73 FR 76136
- Amendment 73/77 Removing Dark Rockfish from the BSAI and GOA FMPs: December 31, 2008, 73 FR 80307
- VMS dinglebar gear exemption: January 21, 2009, 74 FR 3446
- BSAI Groudfish 2009/10 Harvest Specifications February 17, 2009,74 FR 7359
- GOA Groundfish 2009/10 Harvest Specifications February 17, 2009, 74 FR 7333
- Annual IPHC Regulations March 19, 2009, 74 FR 11681
- Revisions to MRAs in GOA arrowtooth fishery: March 27, 2009, 74 FR 13348
- Revision to Area 4E seabird avoidance measures March 27, 2009, 74 FR 13355
- GOA pollock trip limit revisions, April 21, 2009; 74 FR 18156

Balsiger



NOAA NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

UNITED STATES DEPARTMENT OF COMMERCE

Help Shape the Future of NOAA

Introduction and Purpose of the Next Generation Strategic Plan

The NOAA Next Generation Strategic Plan sets the course for the agency and is updated approximately every four years. It establishes the agency's long-term vision and goals as well as its short-term objectives and strategies. It creates a roadmap for NOAA's management to make reasoned investment choices and helps the American people monitor NOAA's performance.

This public discourse provides a starting point for informed conversation and debate, through which NOAA can generate broad agreement on challenges and opportunities and provide a tool to cultivate informed customers who are best positioned to help us improve NOAA services. Specifically, the purpose of the strategic plan is to:

- Inform and respond to priorities of the new administration
- Engage and respond to stakeholders
- Understand and respond to long-term external challenges facing NOAA
- Measure progress and improve public accountability

Visit the NOAA Next Generation Strategic Planning website for more information.

http://www.ppi.noaa.gov/PPI_Capabilities/ngsp.html

This site also includes an on-line survey to provide additional comment.

How to use this Packet

The purpose of this packet is to help you better participate in the development of NOAA's Next Generation Strategic Plan. Individuals and organizations can submit their views, opinions and feedback to NOAA's Alaska Regional Team by e-mail, mail or fax or by responding to NOAA's online survey. Contact information is listed throughout this packet.

This packet provides information to help you to think broadly and formulate your ideas about the future of Alaska and the Arctic and within this context, what NOAA should strive to accomplish. Use these pages to take notes during today's briefing or to prepare comments you wish to submit at a later time. We also encourage you to pass this information along so that others may participate and submit comments and ideas as well.

NOAA Next Generation Strategic Planning

Plan Development and Tentative Timeline

NOAA's Office of Program Planning & Integration (PPI) is leading the development of the Next Generation Strategic Plan (NGSP), to be completed in early 2010. The effort to develop the NGSP will be a 9-12 month iterative process of information gathering, analysis, revision, and vetting the most fundamental aspects of the agency's work: its corporate mission and vision for the future; its top-level goals and desired outcomes for society; as well as near-term, concrete objectives and strategies. A key outcome of the planning process will be a determination of whether the current strategic construct (Figure 1) will serve NOAA well in the plan years FY 2013-2017.

Figure 1: NOAA's current goal construct



PPI will coordinate the development of the NGSP using a structured process that will involve many stakeholders, including you. Key objectives for the process are that it:

- engages external stakeholders, as well as internal employees;
- takes into account the forces, trends, and uncertainties of the external environment;
- identifies the societal benefits that NOAA wants to create and how it will do so;
- codifies the shared priorities of NOAA stakeholders and leadership
- provides a strategic framework for evaluating NOAA's investment priorities;
- establishes discipline in the process of strategic thinking and analysis in the organization;
- focuses on the development, evaluation, and selection of NOAA's goals; and
- establishes a means for measuring progress.

Figure 2: Schedule of Activities for the NGSP

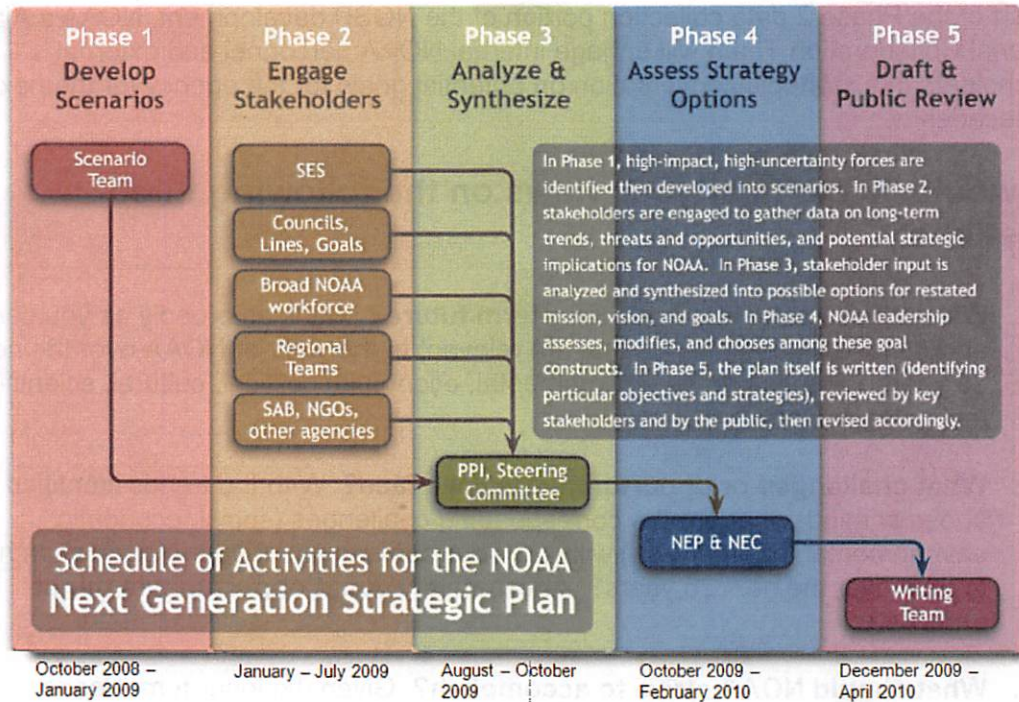


Figure 2 depicts the schedule for plan development. In Phase 1, alternative future scenarios of NOAA’s external environment were developed as a tool to help focus conversations about the future. In Phase 2, key internal and external stakeholders will provide input on future challenges and opportunities related to Alaska to NOAA and potential strategic goals, objectives, and strategies for NOAA via a variety of formats.

In Phase 3, PPI, with guidance from a steering committee, will analyze and synthesize data to develop strategy options to consider. In Phase 4, senior NOAA leadership will assess those options and select a goal construct for the 5-year plan. Finally, in Phase 5 the plan details will be developed and a draft of the plan will be written and reviewed. The process will be completed in spring of 2010.

Your Participation

As part of the Phase 2 data collection portion of the NGSP development, NOAA's Alaska Regional Collaboration Team will engage internal NOAA personnel and external stakeholders in a strategic conversation on potential goals for the agency for the next two decades.

We would like to hear your views on the following three questions:

1. **What trends will shape our long-term future?** Think as broadly as you can about those external trends that are relevant to the work of NOAA over the next 25 years. Trends can be environmental, economic, political, cultural, scientific, technological, etc.
2. **What challenges or opportunities will we face?** With the trends identified above in mind, what are the corresponding challenges (social, economic, environmental, or otherwise) will you, your community, or your organization have to face over the next 25 years? **Alternatively, what opportunities might emerge?**
3. **What should NOAA strive to accomplish?** Given the long-term trends, challenges, and opportunities that you identified, what would be the most important accomplishments that the agency should achieve in the next 25 years?

What will happen to my contributions?

Stakeholder input obtained at this forum, and via phone conversation, mail and email will be synthesized into a report by the NOAA Alaska Regional Collaboration Team to incorporate Alaska specific regional stakeholder input to the strategic planning process. Copies of the report will be made available in September to those who participated in this process and to the public at large. NOAA's corporate Office of Program Planning and Integration will use the information from Alaska and other regions as raw material from which to develop the 25-year vision and goals for the agency, as well as corresponding 5-year objectives and strategies. NOAA's Next Generation Strategic Plan will be available for public comment in the spring of 2010.

I know someone who would like to participate!

Do you know someone who would like to provide input?

If you know someone who would like to participate, we would like to hear from them. Providing input to this process is easy. Offer this packet to help them understand how the process works, our timeline, and contribute as they would have in person. Ideas and comments can be submitted **before July 31, 2009** the following ways.

1. Internet

Go to:

http://www.ppi.noaa.gov/PPI_Capabilities/ngsp.html

and utilize the linked survey.

2. E-mail

Email our NOAA Alaska Regional Coordinator, Amy Holman (amy.holman@noaa.gov) or any of the members of the NOAA Alaska Regional Collaboration Team (see attachment)

3. Fax

Fax your comments to the NOAA Alaska Regional Collaboration Team at 907-271-3711, attn Amy Holman, Regional Coordinator

4. Mail

NOAA Next Generation Strategic Planning
c/o Amy Holman, Regional Coordinator
222 West 7th Ave, Suite 23
Anchorage, AK 99513

NOAA in Alaska

Alaska Regional Collaboration

Team Membership – 2009

Doug DeMaster
Regional Team Leader
Director Alaska Fisheries Science Center
National Marine Fisheries Service
Juneau, Alaska
Douglas.Demaster@noaa.gov

Amy Holman
Regional Team Coordinator
National Ocean Service
Anchorage, Alaska
Amy.Holman@noaa.gov

David Christie
Director, West Coast and Polar Region
Undersea research Center
University of Alaska, Fairbanks
Fairbanks, Alaska
dchristie@guru.uaf.edu

Janet Intrieri
Physical Scientist
Office of Oceanic & Atmospheric Research
Boulder, Colorado
janet.intrieri@noaa.gov

Paula Cullenberg
Interim Director and
Marine Advisory Program Leader
Alaska Sea Grant
Anchorage, Alaska
anpic@uaa.alaska.edu

John Jensen
National Climatic Data Center
National Environmental Satellite Data and
Information Service
Asheville, North Carolina
john.a.jensen@noaa.gov

Steve Davis
Environmental Policy Advisor
National Marine Fisheries Service
Anchorage, Alaska
steven.k.davis@noaa.gov

Peter Jones
Strategic Planner
National Marine Fisheries Service
Juneau, Alaska
peter.d.jones@noaa.gov

James Elkins
Chief, Halocarbons and other Atmospheric
Trace Species Group
Office of Oceanic & Atmospheric Research
Boulder, Colorado
james.w.elkins@noaa.gov

Mark Koehn
Deputy Director, Pacific Marine
Environmental Laboratory
Office of Oceanic & Atmospheric Research
Seattle, Washington
mark.koehn@noaa.gov

Kris Holderied
Director, NOAA Kasitsna Bay Laboratory
National Ocean Service
Homer, Alaska
Kris.Holderied@noaa.gov

Molly McCammon
Executive Director
Alaska Ocean Observing System
Anchorage, Alaska
mccammon@aoots.org

Gary Hufford
Senior Scientist
National Weather Service Alaska Region
Anchorage, Alaska
gary.hufford@noaa.gov

continued on next page

Lance Seman
Station Manager, Fairbanks Command &
Data Acquisition Station
National Environmental Satellite Data and
Information Service
Fairbanks, Alaska
lance.seman@noaa.gov

Carven Scott
Chief, Environmental Science and Services
Division,
National Weather Service Alaska Region
Anchorage, Alaska
carven.scott@noaa.gov

Lisa Taylor
National Geophysical Data Center
National Environmental Satellite Data and
Information Service
Boulder, Colorado
lisa.a.taylor@noaa.gov

Marla Trollan
Communications Specialist
National Marine Fisheries Service
Seattle, Washington
marla.trollan@noaa.gov

John Whitney
Scientific Support Coordinator
National Ocean Service
Anchorage, Alaska
john.whitney@noaa.gov

Dave Zezula
Navigation Manager
National Ocean Service
Anchorage, Alaska
david.j.zezula@noaa.gov