

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SCOTT VAN VALIN, *et al.*,

Plaintiffs,

v.

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

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

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
INTERVENE AS DEFENDANTS SUBMITTED BY LINDA BEHNKEN,
CHRISTOPHER KNIGHT, WILLIAM THOMAS, JR., STEVE BOX, DAVID GIBSON,
SHERRI WOHLHUETER AND KURT WOHLHUETER, ANNAH TAFT PERRY,
NORTH PACIFIC SEAFOODS, INC., ERIK BAHNSEN , WAYNE BROWN ,
SANDY CRAIG , LUKE WIEDEL, CAROLYN HEUER, JERROD GALANIN,
SEAFOOD PRODUCERS COOPERATIVE, RYAN NICHOLS, THE CITY OF
PELICAN, AND THE CITY OF PORT ALEXANDER**

I. INTRODUCTION

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

Proposed Intervenor-Defendants have three specific interests they wish to present to the Court. First, they have a strong interest in the conservation of the halibut stocks. Allowing charter fishermen to continue to overfish their quota in Area 2C, as they have every year since 2003, will significantly affect halibut fishing in future years. Intervenor-Defendants do not view halibut

fishing one year at a time, as Plaintiffs do, but view halibut as a resource that must be protected for generations to come.

Second, proposed Intervenor-Defendants have an interest in a clear and precise regulation of the industry. They too have huge investments in halibut fishing and need to know whether their IPHC designated quota of fish will be available to them. Overfishing of halibut stocks by the charter industry affects Intervenor-Defendants' share of future harvests.

Lastly, proposed Intervenor-Defendants wish to correct factual inaccuracies and omissions presented to the Court by the charter industry. The Court should make its final decision on accurate and complete facts.

It is very significant that the charter industry has never claimed that its allotment of halibut in Area 2C under the CEY is unfair or incorrect. They do not deny that the harvest amount they are allocated, called the Guideline Harvest Level ("GHL"), is a conservation-based determination. What Plaintiffs are seeking in this action is to prevent the National Marine Fisheries Service ("NMFS") from implementing the conservation-based harvest levels set for the charter industry.

Exceeding the GHL is first and foremost a conservation issue. It is not a simple allocation issue as Plaintiffs repeatedly claim. Plaintiffs have been allocated 931,000 pounds of halibut, but they do not want to be held to that level. In fact, as discussed below, the TRO allows the guided sport industry to fish at a rate which will allow a catch almost double the conservation-based GHL provided for in the existing regulation.

The proposed Intervenor-Defendants include individual fishermen and family members, college students, and small boat owners who depend on the halibut resource for their income. Proposed Intervenor-Defendants include subsistence fishermen and Native Alaskans who depend

on halibut subsistence fishing to feed their families. Proposed Intervenor-Defendants include local governments whose communities and citizens rely on the halibut resource. In the case of one community, about 25% of the residents live below the poverty level. Proposed Intervenor-Defendants include charter boat captains and owners who view the issues from a long-term conservation perspective, not the Plaintiffs' short-term "this year's catch" view. Proposed Intervenor-Defendants include a member of the North Pacific Fishery Management Council ("Council") who actually participated in the Council's decision making process on these conservation issues. Proposed Intervenor-Defendants include people who sit on the two IPHC advisory boards.

As shown below, and based on the decision of this Circuit in *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), these proposed Intervenor-Defendants are entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, proposed Intervenor-Defendants respectfully request that they be permitted to intervene pursuant to Fed. R. Civ. P. 24(b).

II. STATEMENT OF FACTS

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

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

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

Plaintiffs argue that even though the halibut population has declined such that the appropriate GHL is now set at 931,000 pounds in accordance with 50 C.F.R. 300.65(c), NMFS cannot require the guided sport industry to adhere to that GHL, even though there is no dispute that this is the correct, conservation-based GHL. Allowing the resource to be overfished by allowing the guided sport industry to exceed the conservation-based GHL harms the resource and causes direct, immediate, and irreparable harm to proposed Intervenor-Defendants.

A. Conservation Issues

1. The Halibut Resource Is Declining

The Pacific halibut fishery is cyclical and is currently experiencing a decline in abundance. Indeed, the exploitable biomass in IPHC Area 2C has declined 55%. IPHC Eighty-fourth Annual Meeting Handout, Jan. 2008 at 83-84, which can be found at <http://www.iphc.washington.edu/HALCOM/pubs/annmeet/2008/bluebook/bluebook08.pdf>; Affidavit of Seafood Producers Cooperative (“Seafood Cooperative Aff.”) attached as Exhibit 2, ¶ 7 (“In written materials provided at the annual meeting, IPHC staff stated the halibut resource is at the lowest level in a decade”); Affidavit of Linda Behnken (“Behnken Aff.”), attached as Exhibit 3, ¶ 10. When a resource is in decline, it is especially important to prevent overfishing.

Commercial setline halibut fishermen such as proposed Intervenor-Defendants who have permitted halibut harvesting rights¹ have a direct and tangible interest in conserving the resource and preventing its overharvest, as do halibut processors. Individuals such as proposed Intervenor-Defendants who depend on the resource for their subsistence needs have the same interest. Similarly, local governments that depend on revenue generated from the commercial setline halibut fishery have a significant interest in preserving and protecting the halibut resource.

2. Allowable Catch Limits Are Being Exceeded

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

In contrast, the commercial guided sport industry in Area 2C has exceeded its portion of the CEY, the GHL, every year since the GHL was established. The commercial

¹ In 1995, an Individual Fishermen’s Quota (“IFQ”) permit program was initiated for the commercial setline halibut fleet. Fishermen were allocated Quota Shares (“QS”) based on their past level of fishing. QS is translated annually into pounds of halibut, the amount fluctuating directly with the total setline catch limit for a management area. Without a QS setline, halibut fishing is prohibited. QS were issued for IPHC management areas. Thus, commercial fishermen with QS for management Area 2C (southeast Alaska) cannot fish in management Area 3A (central Gulf of Alaska) without a QS for that area. Fishermen can buy and sell QS. Ex. 3, Behnken Aff., ¶ 3.

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

Proposed Intervenor-Defendants whose professional, subsistence, and other interests depend on the continued viability of the halibut resource have a significant interest in preventing that resource from being overfished.

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

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

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

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

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

The recent publication of the recreational harvests of halibut in IPHC Regulatory Areas 2C and 3A in 2006 by the Alaska

Department of Fish and Game has, with other removals, indicated that the [CEY] established by the Commission for these areas has been exceeded... The achievement of the Commission's conservation mandate is dependent on adherence to catch limits and total yield.

See Ex. 3, Behnken Aff., Appendix A, Letter from Bruce Leaman, Executive Director, IPHC, to Stephanie Madsen, Chair, North Pacific Fishery Management Council, December 1, 2006. As noted above, only the guided sport sector is exceeding its harvest allocation.

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

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

See Ex. 3, Behnken Aff., Appendix B, Letter from Jim Balsiger, Chairman, IPHC, to Secretary Gutierrez, January 23, 2007.

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

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

See Ex. 3, Behnken Aff., Appendix C, Letter from Bruce Leaman, Executive Director, IPHC, to Sue Salveson, January 30, 2008.

In sum, the agency charged with responsibility for conserving the halibut resource and protecting it for present and future generations identifies overfishing by the commercial guided sport industry as a threat to the conservation of the resource. As NMFS stated in the preamble to the proposed Rule, “conservation of the halibut resource is the overarching goal of the IPHC....” 72 Fed. Reg. 74257, 74258 (Dec. 31, 2007). NMFS has acknowledged this concern about the effects of charter boat overfishing stating:

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

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

In other words, and as confirmed by the January 30, 2008 IPHC letter cited in this section, statements that there is no conservation issue are based on the assumption that all sectors live within their allocation and the CEY is not exceeded in Area 2C or elsewhere. The facts are that the IPHC establishes its halibut conservation program area by area and the IPHC is concerned about the conservation of halibut in Area 2C, the area governed by the regulations at issue. In fact, the IPHC stated in their 2008 annual report that “it has become paramount that harvest rates be brought down to the target harvest rate in Area 2.” IPHC, Eighty-fourth Annual Meeting Handout, Jan. 2008, at 84, found at <http://www.iphc.washington.edu/HALCOM/pubs/annmeet/2008/bluebook/bluebook08.pdf>.

Proposed Intervenor-Defendants, whose subsistence needs, livelihood, and other interests depend on a healthy halibut resource, have a direct and substantial interest in the conservation of that resource. Proposed Intervenor-Defendants, charter boat operators, setline fishermen, halibut

processors, subsistence users, and community governments are directly and immediately harmed by any conservation threat to the halibut resource.

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

Commercial setline fishermen are distributed through Area 2C. Ex. 3, Behnken Aff., ¶ 15. The guided sport charter fleet fishing is concentrated near coastal communities. *Id.* Alaska Department of Fish and Game (“ADFG”) data shows that the charter halibut catch per rod hour has declined in many areas and by more than 50% around Sitka, Alaska, where approximately 40% of the Area 2C charter halibut harvest occurs. *Id.* at ¶¶ 15, 16; Ex. 2, Seafood Cooperative Aff., ¶ 3. Declines in catch per unit of effort are a classic sign of diminished resource abundance and localized depletion. The fact that the charter fleet now travels farther to catch the same fish also indicates localized depletion. *Id.* at ¶ 16.

As NMFS has stated:

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

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

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

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

Id.

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

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

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

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

This represents an open-ended allocation to the guided recreational fishery from the quota available to the commercial halibut fishery. Hence, as the guided recreational fishery expands, its harvests reduce the pounds available to be fished in the commercial halibut fishery and, subsequently, the value of quota shares (QS) in the IFQ Program.

Id.

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

This open-ended reallocation of fish from commercial setline fishermen to the commercial guided sport sector causes severe economic harm to individual setline fishermen,

forcing many to consider leaving the halibut fishery and forcing many to confront the loss of their homes and vessels pledged as collateral for loans to purchase QS. This is a direct, immediate, and irreparable injury to proposed Intervenor-Defendants.

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

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

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

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

Halibut is one of Alaska's most important subsistence fish species. Environmental Assessment and Regulatory Impact Review for a Regulatory Amendment to Define a Halibut Subsistence Fishery Category in Convention Waters, NMFS, 2003, at 100, found at

<http://www.fakr.noaa.gov/analyses/subsistence/halibut0403.pdf>. Subsistence fishing occurs in near shore areas which are readily accessible to subsistence users. *Id.* at 99-100. The commercial guided sport fishery operates in near shore areas, competing with local anglers and subsistence users. Localized depletion caused by the guided sport industry poses an immediate, direct, and irreparable threat to subsistence fishermen, and coastal communities. As a proposed Intervenor-Defendant explains:

The charter industry operates near towns, allowing its non-resident clients to over harvest the same areas rural native subsistence fishermen have depended on for thousands of years. Halibut is a traditional food for all Native people, having important cultural and nutritional significance. Rural Alaska people, who live far from roads and urban grocery stores, depend on local subsistence resources to feed their families.... Depleting subsistence resources has harmed the subsistence lifestyle of native and non-native residents from the rural coastal Alaska communities....

Affidavit of William Thomas, Jr. (“Thomas Aff.”), attached as Exhibit 4, ¶ 2. Indeed, the Alaska Department of Fish and Game has found that subsistence harvests have declined in Area 2C and in other areas where the guided sport industry operates inshore in waters on which subsistence fishermen depend. Hall, J.A., Koster, D., and Turek, M., Subsistence Harvests of Pacific Halibut in Alaska, 2006, Alaska Dept. of Fish and Game, Division of Subsistence, Dec. 2007, at 17-18, found at <http://www.subsistence.adfg.state.ak.us/TechPap/TP333.pdf>.

Charter boat harvests in near shore areas have also caused localized depletion of other important subsistence resources such as rockfish. Ex. 4, Thomas Aff., ¶ 3; Ex. 3, Behnken Aff., ¶ 17.

C. The Legal and Regulatory Regime

1. The GHL Is A Defined And Fixed Allocation

The GHL is the halibut quota established for the commercial guided sport fishery. As NMFS has stated: “The GHLs are established as a total maximum poundage.” 68 Fed. Reg.

47257, 47258 (Aug. 8, 2003). “[T]he GHL was to provide a limit on the total amount of harvests in the guided fishery....” 68 Fed. Reg. 47259. The preamble to the Rule recognizes “it is the Council’s policy that the charter vessel fishery should not exceed the GHL.” 73 Fed. Reg. 30504, 30505 (May 28, 2008). This was clearly the intent of the Council members who debated and voted for this policy. Ex. 3, Behnken Aff., ¶¶ 19, 20, 22.

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

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

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

Since the GHLS were first established, the CEY has been reduced. However, it has never been reduced in an amount sufficient to trigger a step down reduction in GHL from the highest GHL level of 1,432,000 pounds, identified as Category A in the regulations. 2008 is the first year the Area 2C CEY has been decreased sufficiently to trigger a GHL reduction from Category A. The 2008 Area 2C CEY reduction was of such a magnitude that the Area 2C GHL was dropped from the maximum Category A level to the fourth of the five possible levels. As the preamble to the Rule states:

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

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

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

D. The Purpose Of The Rule

In describing the purpose of the Rule, NMFS stated:

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

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

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

Id.

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

Thus, the Rule is not intended to retrospectively deal with an overage in a prior year’s GHL. Its purpose is to implement 50 C.F.R. 300.65(c) which provides for a lower GHL when the CEY is reduced. The issue is not addressing a GHL exceedance in the circumstance when the base GHL remained unchanged. The issue is implementing a conservation program based on

the fact that the CEY and, therefore, the GHL has changed. This dichotomy, regulation to address GHL exceedances versus regulations to address a lower GHL based on a lower CEY, was reflected in the Council debate. As NMFS explained in the preamble to the proposed Rule:

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

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

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

Id.

In short, there are two stages of GHL management: management to achieve the GHL based on the CEY level and then management of any exceedances of that GHL. Ample quotations can be found to show that for GHL exceedances, the existing policy is to not disrupt charter fishing by making in-season adjustments, a policy reflected in the procedure for dealing with GHL exceedances retrospectively. However, in 2008, because of the reduced CEY, the issue was implementing 50 C.F.R. 300.65(c) which pegs the Area 2C GHL to changes in the Area 2C CEY. As noted above, Plaintiffs do not challenge that this is the correct conservation-based GHL. The Rule implements this GHL under the Halibut Act.

In sum, the Rule was adopted under the Halibut Act, *infra.* at p.3, to achieve the conservation goals of the IPHC when the Area 2C CEY was reduced, this triggering the lower GHL already established in regulation – a regulation and GHL never challenged by Plaintiffs. Proposed Intervenor-Defendants have a direct and immediate interest in NMFS implementing the regulations setting lower GHLS when CEY is reduced. Plaintiffs seek to prevent the lower, conservation based GHLS from being implemented.

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

E. Conclusion

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

III. PROPOSED INTERVENOR-DEFENDANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

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

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

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

In addition to the qualifications for intervention under Rule 24(a)(2), a party seeking to intervene as of right in this Circuit must demonstrate that it has standing under Article III of the Constitution. *Fund for Animals*, 322 F.3d at 731. As shown below, proposed Intervenor-Defendants satisfy all of the requirements for intervention as a matter of right.

A. Proposed Intervenor-Defendants Would Have Standing To Challenge the Rule
Standing, being jurisdictional, must be addressed prior to determining whether the four factors under Rule 24(a)(2) are met. *Id.* at 732.

1. Proposed Intervenor-Defendants Have Constitutional Standing

Constitutional standing derives from the requirement that federal courts can act only upon a justiciable case or controversy. U.S. Const. Art. III. If a party lacks Article III standing, the court lacks subject matter jurisdiction to hear the case. To satisfy the case or controversy requirement of Article III, a plaintiff must, generally speaking, demonstrate that he has suffered

“injury in fact,” that the injury is “fairly traceable” to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997); *Fund for Animals*, 322 F.3d at 732-733.

Both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Eleventh Circuit have specifically found that harm to economic interests constitutes injury-in-fact sufficient to confer Article III standing. *Fund for Animals*, 322 F.3d at 733; *Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244, 1252 (11th Cir. 2003), citing *Bennett v. Spear*, 520 U.S. at 167-68. Indeed, in a case in which the issue was regulations affecting the amount of fish which could be harvested, this Court held:

Economic harm of this sort is a canonical example of injury in fact sufficient to establish standing. *E.g.*, *National Wildlife Fed’n v. Hodel*, 839 F. 2d 695, 704 (D.C. Cir. 1988)(recognizing that injury to “traditional economic interests [] will support standing.”

North Carolina Fisheries Ass’n, Inc. v. Gutierrez, 518 F.Supp.2d 62, 82 (D.D.C. 2007).

In *North Carolina Fisheries Ass’n*, the issue was implementation of a fishery management plan setting management restrictions to meet target harvest levels. *Id.* at 69-70. The Court found that by affecting the amount of fish that could be caught, the agency had created a situation in which some fishermen would suffer economic harm satisfying the requirements for standing. *Id.* at 83. That is precisely the circumstance confronted by proposed Intervenor-Defendants. Plaintiffs want to implement a fisheries management program allowing them to overfish their halibut allocation. Such a management program affects proposed Intervenor-Defendants by reducing the availability of fish because of conservation and allocation reasons.

Fund for Animals involved an attempt by the Natural Resources Department of the government of Mongolia, referred to as the “NRD,” to intervene in a case brought by a wildlife conservation organization challenging the Department of the Interior’s decision to list the argali

sheep as threatened, instead of endangered, under the Endangered Species Act within certain countries including Mongolia. The Court found that the NRD had Article III standing with respect to any decision to list the argali sheep under the ESA. It found that the placement of the argali sheep on the endangered list would result in the cancellation of import permits for American hunters to bring trophies home, thereby causing a loss of tourist dollars, some of which were spent on conservation programs for the argali. This was found to be a concrete and imminent injury fairly traceable to the regulatory action that the Plaintiffs sought in the lawsuit.

Mongolia's sheep are the subject of the disputed regulations, the country benefits from the [Department's] current regulations, and Mongolia would suffer concrete injury if the court were to grant the relief the plaintiffs seek.

Fund for Animals, 322 F.3d at 733.

When, as here, the proposed Intervenor is “an object of the action (or forgone action) at issue,” there can be “little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Fund for Animals*, 322 F.3d at 734, quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). In such cases, it is not even required that parties file evidentiary submissions to support standing – to the contrary, in many, if not most, cases the petitioner's standing is self-evident. *Fund for Animals*, 322 F.3d at 733.

In this case, while the NRD is not itself the object of the challenged agency action, sheep that Mongolia regards as its national property and natural resource plainly are its subject. And for the purpose of determining whether standing is self-evident, we see no meaningful distinction between a regulation that directly regulates a party and one that directly regulates the disposition of a party's property.

Id. at 734.

Similarly, in *Alabama-Tombigbee Rivers Coalition, supra*, businesses that operate under federal permits have standing to challenge federal action that may affect their rights pursuant to those permits. In addition, permits have been held to convey property rights traditionally protected by law, and, therefore, are sufficient to confer standing under these circumstances. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 818-819 (9th Cir. 2001); *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1482 (9th Cir. 1993); *Foss v. National Marine Fisheries Service*, 161 F.3d. 584, 586, 588 (9th Cir. 1998).

In *Fund for Animals*, as in the instant case, the plaintiffs' own complaint, in and of itself, established the proposed Intervenor's standing.

But even if we were to harbor any doubts about the NRD's standing, they would be dissipated by evidence in the district court record. First, there are the [plaintiff's] own pleadings, which are admissible as evidence in support of its opponent's cause.

Fund for Animals, 322 F.3d at 734. Based on the plaintiffs' complaint, the Court in *Fund for Animals* found that Mongolia was itself "an object of the action . . . at issue." Likewise, based on the allegations of the Complaint in the instant case, commercial setline fishermen are an object of the action at issue. See Complaint at ¶¶ 8, 43, 44, 53, and 62.

Here, individual commercial setline halibut fishermen have permits issued under the IFQ Program to fish for halibut. Ex. 3, Behnken Aff., ¶ 3. Their economic livelihood depends on their ability to fish for halibut. Plaintiffs' objective is to reduce the amount of halibut available for harvest by fishermen who are not part of the guided sport industry. Plaintiffs' Complaint makes that clear.

Factually, the potential injury in the instant case is even more apparent and immediate than that in *Alabama-Tombigbee Rivers Coalition, supra*. In that case, the Eleventh Circuit found that harm to economic interests caused by the mere listing of a species as either threatened

or endangered under the ESA constituted injury-in-fact sufficient to confer Article III standing. *Alabama-Tombigbee Rivers Coalition*, 338 F.3d at 1252-1254.

Alabama-Tombigbee Rivers Coalition involved a challenge by a non-profit coalition of entities that used Alabama waterways in their businesses to the listing of the Alabama sturgeon as endangered. The Court found the coalition had Article III standing to challenge the listing of the sturgeon under the ESA:

. . . the Coalition is operating against the backdrop of a continuing policy that was triggered by the listing and is effectuated by the machinery of the ESA. . . the listing has injured the Coalition's members and will continue to do so.

Alabama-Tombigbee Rivers Coalition, 338 F.3d at 1253.

In *Alabama-Tombigbee Rivers Coalition*, the threat to the coalition's members was from the proposed listing of the sturgeon under ESA. In the instant case, the relief sought is to allow charter boat fishermen to increase their harvest and force consequent reductions in commercial and other harvests. Proposed Intervenor-Defendants are the object of the fishery management program Plaintiffs seek to impose.

In a context similar to the instant situation, the United States Court of Appeals for the First Circuit explained:

. . . [T]he adverse effect is certain. The fishing groups seeking intervention are the real targets of the suit and are the subjects of the regulatory plan. Changes in the rules will affect the proposed intervenors' business, both immediately and in the future.

Conservation Law Foundation v. Mosbacher, 966 F.2d 39, 43 (1st Cir. 1992). Even associations of commercial fishermen and those representing them have been held to have Article III standing with respect to regulations implementing fishery conservation and management measures.

Parravano v. Babbitt, 861 F. Supp. 914, 928 (N.D. Cal. 1994), *aff'd.*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

The threat of more severe reductions in the commercial halibut harvest constitutes injury sufficient to confer Article III standing. Given the facts of this case, it is not possible to argue that the concrete injuries proposed Intervenor-Defendants will suffer would not be traceable to the instant case and to the relief sought by Plaintiffs.

Those harms fall into five categories. First, those proposed Intervenor-Defendants who have permits to fish under IFQ Program will suffer direct harm if the guided sport industry exceeds its GHL and the amount of fish available for harvest by setline fishermen is reduced because of conservation or allocation reasons. As noted above, increases in charter boat harvests above the GHL result in a direct deduction from the quota available to setline fishermen.

As one proposed Intervenor-Defendant setline fisherman stated: “My livelihood depends on sustainable harvest levels of halibut, and the over-harvesting by charter operators threatens the resource and my business.” Affidavit of Steve Box (“Box Aff.”), attached as Exhibit 5, ¶ 5. Still another proposed Intervenor-Defendant setline fisherman stated: “I am entirely dependent on commercial fishing for my livelihood.... If the halibut quota is cut any further, *i.e.*, due to charter overages, I may lose my quota share, boat, and salmon permit; in other words, I would lose my whole commercial fishing business.” Affidavit of David Gibson (“Gibson Aff.”), attached as Exhibit 6, ¶ 6. In the words of another proposed Intervenor-Defendant, “continued over-harvesting by the charter sector will force the IPHC and the North Pacific Fishery Management Council to reduce my access in order to maintain the sustainability of the halibut stock.” Affidavit of Christopher Knight (“Knight Aff.”), attached as Exhibit 7, ¶ 9. Ryan Nichols, a college student who borrowed money to purchase halibut QS and is using the money earned from fishing halibut to repay his loan and to pay for college is finding it very hard to meet his financial obligations because of reduction in his QS. Affidavit of Ryan Nichols (“Nichols

Aff.”), attached as Exhibit 8, ¶¶ 3, 4. Similarly, Sherri and Kurt Wohlhueter, commercial setline fishermen, have seen their halibut allocations cut and fear that they will not be able to hire and pay for crew “if quota reductions continue.” Affidavit of Sherri Wohlhueter and Kurt Wohlhueter (“Wohlhueter Aff.”), attached as Exhibit 9, ¶ 5. There is also the plight of Taft Perry, a setline fishermen who states that “further reduction in our catch necessitated by charter overages will leave us unable to make our annual payments.” Affidavit of Annah Taft Perry (“Perry Aff.”), attached as Exhibit 10, ¶ 3. Finally, Linda Behnken, who has served as a member of the Council and was a Council member when the GHL program was developed by the Council, is also a setline fisherman who depends on healthy halibut resource. Equally important, if the guided sport industry exceeds the GHL, it could reduce her QS causing a “devastating” economic impact. Ex. 3, Behnken Aff., ¶¶ 1, 5, 6, 9, 12. All of these fishermen hold Area 2C halibut QS.

Each of these individual setline fishermen depends on the halibut fishery for their livelihood. Each has borrowed money to purchase the rights to fish for halibut – and each faces the reality of economic loss if the setline quota is cut further to make up for overfishing by the guided sport industry. Many have pledged their vessels, homes, or other fishing permits as collateral and could see these forfeited. *See* Ex. 5, Box Aff., ¶¶ 3, 5; Ex. 6, Gibson Aff., ¶¶ 2-6; Ex. 7, Knight Aff., ¶¶ 3, 4, 8, 10; Ex. 10, Perry Aff., ¶¶ 2-4; Ex. 9, Wohlhueter Aff., ¶¶ 3, 5, 6. As Taft Perry explains, she has already “suffered catastrophic losses” because of halibut harvest reductions and further reductions because overfishing by charter boat operators will be devastating. Ex. 10, Perry Aff., ¶ 4.

These commercial setline fishermen are not large corporations but are small family businesses. The average Area 2C commercial setline fisherman holds less than 5,000 pounds of

halibut QS which results in an annual gross of \$12,000-\$40,000. Ex. 3., Behnken Aff., ¶ 9; Ex. 2, Seafood Cooperative Aff., ¶ 9.² Indeed, 79% of the Area 2C setline fishermen own 10,000 pounds or less of halibut IFQ and 57% hold less than 3,000 pounds. Ex. 3, Behnken Aff., ¶ 4. They are concerned about their ability to stay in business and to continue as commercial fishermen. *Id.*, ¶ 14. Sixty-seven percent have purchased all or a portion of their halibut QS. *Id.*, ¶ 9; Ex. 3, Behnken Aff., ¶ 4. As noted above, many have borrowed to do so and they face the prospect of lenders calling loans, threatening pledged collateral such as homes and vessels. At the April 2008 Council meeting, three of the principal lending institutions expressed disquiet about the stability of the commercial setline sector and stated that lending standards may be altered. Ex. 2, Seafood Cooperative Aff., ¶ 14.

Reductions in the halibut harvest by setline fishermen are also felt very directly by halibut processors. Proposed Intervenor-Defendant North Pacific Seafoods, Inc., employs 800 workers and halibut is a primary resource for its processing plants. This processor has seen halibut production in its Area 2C plants drop 25% since 2004 when the charter boat fleet began exceeding its GHL. North Pacific Seafoods, Inc. expects to suffer a 25% loss of revenue if the Rule is overturned and to lay off 10% of its workers. Affidavit of North Pacific Seafoods, Inc. (“North Pacific Seafoods Aff.”), attached as Exhibit 11, ¶¶ 1, 2, 5, 6. Similarly, the Seafood Producers Cooperative expects to see its revenues cut by \$2 million because of the recent reduction in Area 2C setline quotas. That will reduce the earnings of its 140 plant workers. Ex. 2, Seafood Cooperative Aff., ¶ 2. The Seafood Cooperative, the largest fishermen owned cooperative in the United States, was created in 1944 and 25% of its revenue is derived from the

² By way of contrast, one of the Plaintiffs testified to the Council that the annual gross income for his charter boat lodge was approximately \$12 million while another Plaintiff testified to gross income in his charter boat lodge at \$7-8 million. Ex. 3, Behnken Aff., ¶ 9.

halibut fishery. *Id.*, ¶¶ 1, 2. The Cooperative has participated as a member of both of the IPHC advisory boards and has participated before the Council throughout the 15-year period the Council has wrestled with the charter halibut issue. *Id.*, ¶ 5. The Cooperative depends on the setline commercial harvest, and overfishing by the guided sport industry directly affects the Cooperative's fishermen members and its employees.

In the same way, proposed Intervenor-Defendants who are charter boat operators see their livelihood threatened because they depend on a healthy, viable halibut resource and continued overfishing of the GHL is a threat to that resource. *See* Affidavit of Erik Bahnsen ("Bahnsen Aff."), attached as Exhibit 12, ¶¶ 3, 4; Affidavit of Wayne Brown ("Brown Aff."), attached as Exhibit 13; Affidavit of Sandy Craig ("Craig Aff."), attached as Exhibit 14, ¶¶ 4, 5 (Sandy Craig is also a setline fisherman confronting the same economic hardships discussed above, *see* Craig Aff., ¶¶ 8-9); Affidavit of Luke Wiedel ("Wiedel Aff."), attached as Exhibit 15 ¶¶ 2, 3.

Similarly, proposed Intervenor-Defendants who are subsistence fishermen and Native Alaskans see their access to the resource and their ability to feed their families, significantly and adversely affected by overharvesting by the guided sport industry, particularly as it depletes fish stocks in inshore areas. *See* Ex. 4, Thomas Aff., ¶¶ 2, 3 (Mr. Thomas is also a commercial setline fishermen suffering the same harm discussed earlier in this section. *Id.*, ¶¶ 5-8); Affidavit of Carolyn Heuer ("Heuer Aff."), attached as Exhibit 16, ¶ 1 ("We are dependent on halibut and my ability to feed my family is threatened."); Affidavit of Jerrod Galanin ("Galanin Aff."), attached as Exhibit 17, ¶¶ 1, 4, 5.

Proposed Intervenor-Defendant City of Pelican, an isolated fishing community in Area 2C without road connections to any other town, whose population is 30% Alaska Native or

American Indian, is harmed directly by GHL exceedances because it depends on revenue from commercial fish taxes to provide essential services for city resident, because its residents who are setline fishermen are seriously impacted by GHL overages, and because its citizens who are subsistence users are threatened by reductions in the halibut resource. Affidavit of the City of Pelican (“City of Pelican Aff.”), attached as Exhibit 18, ¶¶ 2-8. *See also* Ex. 4, Thomas Aff., ¶ 4; Ex. 2, Seafood Cooperative Aff., ¶ 12. Similarly, the City of Port Alexander states that threats to the viability of the halibut resource and reduction in the setline quota caused by quota reallocations are of grave concern “since the economic survival of the community depends on the commercial halibut and salmon fleet.” Affidavit of the City of Port Alexander (“Port Alexander Aff.”), attached as Exhibit 19, ¶¶ 2, 5. The dependence of members of this community on the halibut resource is particularly acute since 23% of the community’s residents live below the poverty line. Ex. 3, Behnken Aff., ¶ 15.

Proposed Intervenor-Defendants have suffered, are suffering, and will suffer a variety of direct and adverse effects caused by overfishing by the guided sport industry – harms the Rule, addresses – and harms Plaintiffs seek to perpetuate by overturning the Rule. Proposed Intervenor-Defendants satisfy the case or controversy for constitutional standing.

2. Proposed Intervenor-Defendants Have Prudential Standing

Prudential standing refers to judicially self-imposed limits on the exercise of federal jurisdiction. Generally, prudential standing requires that the plaintiff’s grievance fall within the zone of interests protected or regulated by the statutory provision invoked in the suit. *Bennett v. Spear*, 520 U.S. at 162.

In an analogous case, the United States Court of Appeals for the District of Columbia Circuit held that a trade association representing industry members had standing to challenge federal actions which affected their economic interests and fell within the “zone of interests”

contemplated by the controlling law. *National Coal Ass'n v. Hodel*, 825 F.2d 523, 526-27 (D.C. Cir. 1987) (trade association of coal producers had standing under a Mineral Leasing Act to challenge a decision by the Secretary of the Interior when the association alleged competitive injury and fell within the Act's "zone of interests").

Even if it were not clear that proposed Intervenor-Defendants meet the test of prudential standing under the Halibut Act, a decision of the D.C. Circuit has held that a proposed intervenor need not show they have a cause of action in order to intervene:

The parties argue that Nina's standing to intervene turns on whether she may bring a cause of action, a question they agree depends on whether Virginia or Maryland law applies to this case. . . . We believe that the parties are looking at this question through the wrong analytical lens. In a motion to intervene under Rule 24(a)(2), the question is not whether the applicable law assigns the prospective intervenor a cause of action. Rather, the question is whether the individual may intervene in an already pending cause of action. *See Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (*en banc*) ("[I]n the context of intervention the question is not whether a lawsuit should be begun, but whether already initiated litigation should be extended to include additional parties."). As the Rule's plain text indicates, intervenors of right need only an "interest" in the litigation--not a "cause of action" or "permission to sue." *See Fed. R. Civ. P. 24(a)(2)*. In *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 92 S. Ct. 630, 30 L.Ed.2d 686 (1972), the Supreme Court concluded that the lack of a cause of action does not, in and of itself, bar a party from intervening. *Id.* at 537, 92 S. Ct. at 635-36.

Jones v. Prince George's County, Maryland, 348 F.3d 1014, 1017-1018 (D.C. Cir. 2003).

In the instant case, proposed Intervenor-Defendants clearly fall within the zone of interests regulated by the Halibut Act. Pursuant to that statute, the amount of fish available for use by proposed Intervenor-Defendants for subsistence or for economic benefit is regulated by the Halibut Act. 16 U.S.C. §§ 773b, 773c, 773e. Further, allocations between sectors are regulated under Halibut Act. 16 U.S.C. § 773c.

B. Proposed Intervenor-Defendants' Motion Is Timely

Under Fed. R. Civ. P. 24, any claim for intervention must be timely filed. Evaluation of the timeliness of a motion to intervene lies within the sound discretion of the District Court. *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997). It is well settled in this Circuit particularly where intervention is sought as of right that the amount of time which has elapsed since the litigation began is not in itself the determinative test of timeliness. *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir. 1972).

Whether a motion to intervene is timely “is to be determined from all the circumstances” of the case.

(T)he amount of time which has elapsed since the litigation began is not in itself the determinative test of timeliness. Rather, the court should also look to the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already in the case.

Natural Resources Defense Council v. Costle, 561 F.2d 904, 907, (D.C. Cir. 1977), quoting *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir. 1972) and *NAACP v. New York*, 413 U.S. 345, 366 (1973). A court should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right than if it is permissive intervention. *U.S. v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1294-1295 (D.C. Cir. 1980).

In *NAACP, supra*, it was found that the District Court abused the “sound discretion” it is accorded to assess timeliness when it relied solely upon the age of the case and its closeness to settlement in denying a motion to intervene, while failing to take into account the purpose for which intervention was sought. In *Hodgson, supra*, looking at the purpose for which the intervention was sought, the court allowed an application for intervention seven years after the case was filed.

Even if there was a delay in seeking intervention, a determination of timeliness would also have to weigh, as *Hodgson* instructs, on whether that delay would unfairly disadvantage the original parties. *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907-908 (D.C. Cir. 1977).

Plaintiffs filed their Complaint on June 2, 2008. Proposed Intervenor-Defendants have acted diligently in bringing this motion to intervene. The less than three week interval between the filing of the Complaint and the bringing of this motion was necessitated by obtaining the necessary declarations filed herewith – a process made difficult and time consuming by the fact that the proposed intervenors are primarily fishermen whose fishing season has begun and who are therefore not readily accessible. The motion to intervene is being filed before Defendants' answer is filed. A temporary restraining order was entered on June 11, 2008, and a hearing on Plaintiffs' Motion for Preliminary Injunction is set for June 20, 2008. The motion to intervene is being filed at a time when no dispositive motion has been filed. Intervention will not prejudice any party or delay the proper resolution of this action. No separate briefing has been scheduled on the requested preliminary injunction. The parties can certainly prepare for oral argument based on issues raised by intervenors, and if they do need more time, this Court can extend the temporary restraining order currently in place for an additional 10 days. Fed. R. Civ. P. 65(b).

We have found no case where a motion to intervene, filed prior to a hearing on a preliminary injunction, was denied on the basis of timeliness. In *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998), the Court of Appeals for this Circuit stated:

As to timeliness, Upjohn sought to intervene a few weeks after Mova initiated its action, and before the district court ruled on the preliminary injunction; this cannot be regarded as untimely.

Other circuits are in accord. In *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60 (1st Cir. 2008), the court granted a motion to intervene filed nine months after the intervenor

became aware of the lawsuit, where the court found the case had not progressed beyond the initial stages when the motion was filed, no action beyond the filing of the Amended Complaint had occurred, and the only pending item was a scheduled hearing in which the court would consider the two competing injunction proposals.

In the absence of any discovery or substantive legal progress, we cannot say the litigation was in any way at an “advanced stage.”

Geiger, 521 F.3d at 65. *See also Association of Connecticut Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 102 -103 (D. Conn. 2007)(motion to intervene filed just after a motion for preliminary injunction was filed and before the filing of any significant substantive motions was timely); *Jones v. Blinziner*, 536 F. Supp. 1181, 1188-1189 (N.D. Ind. 1982)(amended motion to intervene, which raises an issue not raised in the complaint, granted although filed after hearing on preliminary injunction where it would not unduly delay or prejudice original parties).

C. Proposed Intervenor-Defendants Assert An Interest Relating To The Subject Of The Action

In the intervention area, the “interest” test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. *Nuesse v. Camp*, 385 F.2d at 700. A greater impetus to intervention inheres in administrative cases. *States Marine Intern., Inc. v. Peterson*, 518 F.2d 1070, 1080 n.25 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976).

In *Fund for Animals*, the Court held that once it is established the proposed intervenor has constitutional standing – that alone is sufficient to establish it has an interest relating to the property or transaction which is the subject of the action. *Fund for Animals*, 322 F.3d at 735. *See also Yniguez v. Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) (because Article III standing requirements are more stringent than those for intervention, a determination that a party would have standing under Article III compels the conclusion that it has an adequate interest under Rule

24(a)(2)); *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior*, 100 F.3d 837, 842 (10th Cir. 1996).

Proposed Intervenor-Defendants, therefore, need show nothing further than they already have by demonstrating Article III standing. Nevertheless, proposed Intervenor-Defendants independently meet the interest requirements of intervention. As shown above, proposed Intervenor-Defendants have a direct and substantial economic and subsistence interest in the challenge lodged by Plaintiffs. Plaintiffs' direct objective is to prevent proposed Intervenor-Defendants from fishing or to severely restrict such fishing. The challenge brought by Plaintiffs seeks to alter existing fishery management programs to the consequent economic disadvantage of proposed Intervenor-Defendants. Plaintiffs' action also will diminish the availability of halibut for people who depend on the resource, including subsistence users. Proposed Intervenor-Defendants have a direct, clear, and identifiable interest in this action.

In *Coalition of Arizona/New Mexico Counties*, the United States Court of Appeals for the Tenth Circuit, citing the D.C. Circuit decision in *Nuesse*, found that a wildlife photographer had the requisite interest to intervene in a case challenging the listing of the spotted owl as endangered under the ESA. After stating that a person with an economic interest in the species at issue would clearly have the requisite interest to intervene, the court went on to say that mere "involvement with the Owl in the wild" and a "persistent record of advocacy for its protection" amounted to "a direct and substantial interest in the listing of the Owl for the purpose of intervention as of right" even though the proposed intervenor had "little economic interest in the Owl itself." *Coalition of Arizona/New Mexico Counties*, 100 F.3d at 841.

In cases challenging administrative regulations, the interest of those who are governed by the regulations are sufficient to support intervention. 7C C. Wright, A. Miller & M. Kane,

Federal Practice and Procedure, § 1921 at 492 (2d ed. 1986). Indeed, ownership of a permit the use of which is at issue in a case, such as the fishing rights held by proposed Intervenor-Defendants represents a protectable interest. See *Sierra Club v. United States Env. Protection Agency*, 995 F.2d 1478, 1485 (9th Cir. 1993) (finding a sufficient interest relating to the subject matter by “permit-holding property owners . . . where the statute directly regulates their conduct”).

No doubt can exist that Plaintiffs’ motive in this action is to force Defendants to allow Plaintiffs to proceed in a way that significantly restricts proposed Intervenor-Defendants’ access to the resource. When the “relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third party’s legally protectable interests, that party satisfies the ‘interest’ test of [Rule] 24(a)(2)” *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1494 (9th Cir. 1995) (permitting community organizations deriving an economic return from logging activities to intervene as of right in an environmental organization’s suit to limit and enjoin these logging activities); see also *Nuesse v. Camp*, 385 F.2d at 699. Nor is there any reasonable doubt that the relief sought by Plaintiffs will have a dramatic negative economic effect on proposed Intervenor-Defendants.

Interests identical to those of proposed Intervenor-Defendants were found to be sufficient to support intervention when fishermen and processors were permitted to intervene in a challenge to an amendment to the Management Plan for the groundfish fishery of the Gulf of Alaska. *Alaska Factory Trawler Association v. Baldrige*, 831 F.2d 1456 (9th Cir. 1987). Other similarly situated parties have also been held to meet the requirements for intervention. In *Center for Marine Conservation v. Brown*, 917 F. Supp. 1128 (S.D. Tex. 1996), groups representing the shrimping industry were allowed to intervene in a challenge to Defendants’

management of the Gulf of Mexico commercial shrimp fishery. There, an environmental group asserted that additional fishery management measures were needed.

Similarly, in *Conservation Law Foundation v. Mosbacher*, the Court allowed industry trade associations and industry participants to intervene. There, a conservation group sought to compel the Secretary of Commerce to develop fishery management measures that it claimed were necessary to prevent overfishing. The Court allowed fishing groups participating in the fishery to intervene. The Court found that “[c]hanges in the rules will affect the proposed intervenors’ business, both immediately and in the future.” 966 F.2d at 43. The Court noted that the plaintiff was seeking “more extensive regulation by a federal agency” of these industries’ productive use of natural resources. *Id.* at 40; *see also Kleissler v. United States Forest Service*, 157 F.3d 964 (3rd Cir. 1998) (permitting industry and community groups with a financial stake in logging operations in national forests to intervene as of right in a suit by an environmental group to enjoin logging activity pending compliance with the National Environmental Policy Act); *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (permitting a trade association representing farmers to intervene as of right in a suit to restrict pumping of water from an aquifer for, among other things, these farmers’ use); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994) (permitting timber purchasers to intervene in an action challenging U.S. Forest Service logging regulations).

Guidance can also be gleaned from other judicial precedent. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967), the economic and social interests of those involved in an industry that would be altered by implementation of a judicial decree were sufficient to meet the standards for intervention as a matter of right. Interests similar to or even less compelling than proposed Intervenor-Defendants’ direct economic, subsistence, and ecological interests have been held sufficient to justify intervention. *See, e.g.*,

Community Nutrition Institute v. Bergland, 32 Fed. R. Serv. 2d (Callaghan) 910 (D.D.C. 1981) (association of dairy farmers had a sufficient stake to intervene in an action to invalidate milk marketing regulations); *United States v. Oregon*, 839 F.2d 635 (9th Cir. 1988) (residents of state mental institution had a sufficient interest in litigation concerning their living conditions); *United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984) (Idaho's interest in its fish resources was sufficient to support intervention in litigation concerning whether other states' fishing regulations were consistent with Indian treaty rights); *New York Public Interest Research Group, Inc. v. Regents of University of State of New York*, 516 F.2d 350, 352 (2d Cir. 1975) (pharmacists' interests in their profession and the impact of regulations justified intervention in a case evaluating regulations of the pharmacy profession); *Louisiana v. Department of Energy*, 507 F. Supp. 1365 (W.D. La. 1981), *aff'd*, 690 F.2d 180 (Temp. Emer. Ct. App. 1982), *cert. denied*, 460 U.S. 1069 (1983) (a company with a royalty interest in oil producing properties had a sufficient interest to intervene in a suit involving the interpretation of oil pricing regulations); *United States v. Niagara Falls*, 103 F.R.D. 164 (W.D. N.Y. 1984) (association of businesses delivering waste to a treatment plant had a sufficient interest to intervene in an action against the treatment plant under the Clean Water Act); *New England Petroleum Corp. v. Federal Energy Administration*, 71 F.R.D. 454 (S.D. N.Y. 1976) (competitor of an oil company had a sufficient interest to intervene in an action brought by the oil company to compel its participation in government programs); *General Motors Corp. v. Burns*, 50 F.R.D. 401 (D. Hawaii 1970) (association of automobile dealers had a sufficient interest to intervene in an action to invalidate motor vehicle licensing regulations).

Although it is not required for this prong of the intervention standards to demonstrate that the harm to proposed Intervenor-Defendants is irreparable, the facts are that it is. As shown

above, overfishing by the guided sport industry threatens the continued viability of the resource in Area 2C and leads to a direct allocation of fish away from commercial setline fishermen.

Each day the guided sport industry fishes at a rate that will exceed its GHL guarantees the CEY will be exceeded and guarantees a reduction in the setline quota. As the City of Port Alexander stated:

If the one halibut daily limit is not implemented in June, the halibut chart [fleet] will once again exceed its GHL and will likely cause a CEY overage.

Ex. 19, Port Alexander Aff., ¶ 5. Commercial setline fishermen, processors, and coastal communities suffer. That the actual quota reductions will occur next year in the case of the setline commercial sector is irrelevant because the cause of those reductions, overfishing by the guided sport industry, is occurring at this very moment. And there is no question that GHL exceedances by the guided sport industry in 2008 will be deducted from the setline quota next year. Ex. 3, Behnken Aff., ¶ 14. Similarly, each day the guided sport industry fishes at a rate that will exceed its GHL constitutes an overharvest of the CEY and contributes to localized depletion, threatening the viability of the resource and threatening subsistence users who depend on halibut to feed their families. Overfishing by the guided sport industry is a direct and immediate threat to subsistence users. Ex. 3, Behnken Aff., ¶ 15.

The threat to the resource and to proposed Intervenor-Defendants is occurring at this very moment because of fishing practices and patterns employed right now by the guided sport industry. In fact, given the TRO that allows the guided sport industry to fish under the 2007 regulations, that industry is fishing right now at a rate that allows a catch almost double the conservation-based GHL established in the Rule for 2008. Ex. 3, Behnken Aff., ¶ 11. The 2008 GHL is 931,000 pounds. Under the 2007 regulations, the regulations in place under the TRO,

the guided sport industry harvested 1.7 million pounds of halibut. *Id.* This cannot be good for a resource at a historic low in population size. *Id.* at ¶¶ 10, 11, 12.

D. Proposed Intervenor-Defendants' Ability To Protect Their Interests May Be Impaired Or Impeded If The Motion To Intervene Is Denied

As noted above, Plaintiffs are, in reality, contending that management of the halibut fishery must be such as to allow them to increase their halibut harvest at the expense of others and of the resource. If the relief sought by Plaintiffs is granted, the livelihood of proposed Intervenor-Defendants and the other interests of proposed Intervenor-Defendants will be greatly affected. Denial of the motion to intervene will seriously impair the interests of proposed Intervenor-Defendants.

In *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242 (11th Cir. 2002), the United States Court of Appeals for the Eleventh Circuit found that the State of Florida was entitled to intervene as of right in a suit by the State of Georgia to compel the Army Corps of Engineers to increase the water supply available to the City of Atlanta from a source under the control of the Corps. Florida argued that Georgia was seeking a de facto partial apportionment of the water in the basin at issue, in violation of a compact between the states. The Court found that Florida's interest could be impaired by the disposition of the suit, even though Georgia did not seek to enjoin or interfere with the prior compact process, and even though Florida might be able to file a separate action with respect to its rights. *Georgia v. United States Army Corps of Engineers*, 302 F.3d at 1253-55. In the instant case, Plaintiffs are specifically seeking to overturn management measure to protect the resource on which proposed Intervenor-Defendants depend and use. Any judgment in this case will be binding on NMFS, and no independent action by proposed Intervenor-Defendants could alter that result.

Where a party seeking to intervene in an action claims an interest in the very property and very transaction that is the subject of the

main action, the potential *stare decisis* effect may supply that practical disadvantage which warrants intervention as of right.

Chiles v. Thornburgh, 865 F.2d 1197, 1214 (11th Cir. 1989).

E. Proposed Intervenor-Defendants' Interests Are Not Adequately Represented By Any Other Party

To satisfy this requirement, an applicant for intervention need only show “that representation of [its] interest [by existing parties] ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. The United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), *Appleton v. F.D.A.*, 310 F. Supp. 2d 194, 197 (D.D.C. 2004).

While proposed Intervenor-Defendants oppose Plaintiffs’ challenge, as do the Defendants, proposed Intervenor-Defendants have direct economic, subsistence, and management interests which the government lacks. Where a private party may make a more vigorous presentation of the arguments than a government party, its representation by the government may be inadequate. *United States v. American Tel. & Tel. Co.*, 642 F.2d. 1285, 1293 (D.C. Cir. 1980); *National Farm Lines v. Interstate Commerce Comm’n*, 564 F.2d. 381, 383 (10th Cir. 1977); *Natural Resources Defense Council v. Costle*, 561 F.2d. 904 (D.C. Cir. 1977). Moreover, at least one court has held that “[t]he burden of persuasion that representation is adequate appears to rest on the party *opposing* intervention.” *Caterino v. Barry*, 922 F.2d 37, 42 n.4 (1st Cir. 1990) (emphasis in original).

In *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior*, the United States Court of Appeals for the Tenth Circuit reversed the District Court and allowed intervention as of right by a wildlife photographer in a case challenging a decision to list the spotted owl as endangered under the ESA. The court found that the minimal burden of showing that representation by existing parties may be inadequate was

satisfied, even though the proposed intervenor and the government would both be attempting to defend the decision to list the owl:

We have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation.

Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior, 100 F.3d 837, 845 (10th Cir. 1996), quoting *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977).

Where a proposed intervenor is a private party that seeks to advance its own interests, whereas a public defendant is required to balance a range of interests likely to diverge from those of intervenors, there can be no adequate representation of the intervenor's interest by that public body. *Meek v. Metropolitan Dade County, Florida*, 985 F.2d 1471, 1478 (11th Cir. 1993).

Where a government agency seeks to protect its decision making process, as opposed to a proposed intervenor which seeks to protect the economic and statutory interests of its members, there is no adequate representation by the government agency of the proposed intervenor's interest. *Georgia v. United States Army Corps of Engineers*, 302 F.3d at 1259. A federal defendant, with a primary interest in the management of a resource, does not have interests identical to those of an entity with economic interests in the use of that resource. *Id.* Not only does do proposed Intervenor-Defendants have direct economic, subsistence, and management interests which the government lacks, but proposed Intervenor-Defendants and the government may have divergent views on the conservation status of the halibut resource and on the impact of the Rule on proposed Intervenor-Defendants. Thus, proposed Intervenor-Defendants may make arguments the government will not make.

Proposed Intervenor-Defendants satisfy the minimal burden of showing that representation by the government may be inadequate. The interests of the government and proposed Intervenor-Defendants are not the same. The government is interested in establishing and implementing a regulatory system. Proposed Intervenor-Defendants are interested in their livelihood and the long-term viability of the resource. In addition, proposed Intervenor-Defendants may have a different view as to some of the issues included in this case.

IV. PERMISSIVE INTERVENTION IS APPROPRIATE

Anyone may be permitted to intervene in an action, upon timely motion, when that intervenor's "claim or defense that shares with the main action a common question of law or fact" and the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b); *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005).

Proposed Intervenor-Defendants seek to oppose Plaintiffs' efforts to restrict the halibut fishery. Proposed Intervenor-Defendants' defenses involve questions of fact and law that are in common with the government's defenses. Moreover, this Motion is timely and intervention will not delay or prejudice adjudication of the rights of the original parties. Accordingly, proposed Intervenor-Defendants should be permitted to intervene as a defendant.

V. CONCLUSION

For the reasons stated above, proposed Intervenor-Defendants respectfully requests that the Court grant their motion to intervene in this case and to file their Answer.

Dated: June 18, 2008

Respectfully submitted,

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