

which showed that the highest number of anglers reported on bottomfish logbook fishing trips in 2004 or 2005 by Appellant was seven by one vessel, five by a second vessel, and four by a third vessel.⁴

Appellant contends that it should receive five transferable permits, each with an angler endorsement of four, rather than three transferable permits with angler endorsements of seven, five and four. Appellant does not actually contend it meets the requirements in the charter halibut regulation for five permits. Rather, Appellant objects to the regulation itself. Appellant contends it should receive five permits, even though it does not meet the regulation, because the regulation is unfair, arbitrary, based on flawed analysis and will greatly harm Appellant economically.⁵

Appellant can file this appeal because the IAD directly and adversely affected its interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that it meets the requirements for five transferable charter halibut permits with angler endorsements of four.

I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue five transferable charter halibut permits with angler endorsements of four.⁶ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision.

For the reasons that follow, I affirm the IAD. I conclude that Appellant is eligible to receive three transferable permits with angler endorsements of seven, five and four and is not eligible to receive any additional permits.

ISSUES

1. Did RAM correctly determine that Appellant met the requirements in the charter halibut regulation for three transferable permits, with angler endorsements of seven, five, and four?
2. May an applicant receive additional charter halibut permits if it does not meet the requirements in the charter halibut regulation for additional permits?

⁴ Revised Official Record Summary (Oct. 19, 2010).

⁵ Appellant's Letter to OAA (Mar. 7, 2011).

⁶ 50 C.F.R. § 679.43(g)(3).

FINDINGS OF FACT

1. Appellant owns five vessels: ██████████ (VESSEL I), ██████████ (VESSEL II), ██████████ (VESSEL III), ██████████ (VESSEL IV), and ██████████ (VESSEL V). Appellant has owned them since 2001.⁷
2. In 2004, Appellant was issued five ADF&G Saltwater Charter Trip Logbooks, one for each of its vessels.⁸
3. In 2004, Appellant reported 115 bottomfish logbook fishing trips to ADF&G with two of its vessels.
4. In 2005, Appellant was issued five ADF&G Saltwater Charter Logbooks, one for each of its vessels.
5. In 2005, Appellant reported 175 bottomfish logbook fishing trips to ADF&G with three of its vessels.⁹
6. In 2008, Appellant was issued five Saltwater Charter Logbooks, one for each of its vessels.
7. In 2008, Appellant reported 169 halibut logbook fishing trips to ADF&G with five vessels.
8. In 2004 and 2005, the highest number of anglers that Appellant took on a bottomfish logbook fishing trip with one vessel was seven. The highest number of anglers that Appellant took on a bottomfish logbook fishing trip with another vessel was five. The highest number of anglers that Appellant took on a bottomfish logbook fishing trip with another vessel was four.¹⁰
9. On March 30, 2010, Appellant timely submitted his application for a charter halibut permit.¹¹

PRINCIPLES OF LAW

In March 2007, pursuant to section 773c(c), the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.¹² Pursuant to

⁷ Appellant's Letter of Appeal to OAA at 2 (Mar. 7, 2011).

⁸ Official Record List Summary and List of Trips by Appellant (Jan. 26, 2010). This is also the source for Findings of Fact 3 – 7.

⁹ Official record summary (created Jan. 26, 2010).

¹⁰ Revised Official Record Summary (Oct. 19, 2010).

¹¹ Application (received Jan. 28, 2010).

¹² Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A, (Mar. 31, 2007), available on NMFS Alaska Region website,

section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).¹³

The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. NMFS may issue charter halibut permits only to applicants that meet the requirements in the charter halibut regulations.

To receive a charter halibut permit, an applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,¹⁴ and a recent participation period, which is the sport fishing season for halibut in 2008.¹⁵

To receive a non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips to ADF&G in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).¹⁶

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips to ADF&G with the same vessel in one year in the qualifying period (2004, 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).¹⁷

The angler endorsement number on a charter halibut permit is the highest number of anglers reported on any trip in the qualifying period (2004, 2005), unless the highest number is less than four. If that is the case, the angler endorsement number will be four.¹⁸ Each subsequent permit's angler endorsement equals the highest number of anglers reported on any trip in the qualifying period (2004, 2005) for a vessel not already used to determine an angler endorsement.¹⁹

If an applicant will receive no permit because it did not participate in the qualifying period or the recent participation period due to circumstances that meet the unavoidable circumstance regulation, NMFS will award that applicant a permit.²⁰

As an administrative judge, I must interpret and apply the regulations, as adopted by the Secretary of Commerce, to decide an appeal.

http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf. IPHC

Area 2C is Southeast Alaska. For coordinates of Area 2C, see 50 C.F.R. § 300.61,

¹³ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

¹⁴ 50 C.F.R. § 300.67(f)(6).

¹⁵ 50 C.F.R. § 300.67(f)(7).

¹⁶ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

¹⁷ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

¹⁸ 50 C.F.R. § 300.67(e)(1),(3),(5).

¹⁹ 50 C.F.R. § 300.67(e)(2),(4).

²⁰ 50 C.F.R. § 300.67(g).

ANALYSIS

1. Did RAM correctly determine that Appellant met the requirements in the charter halibut regulation for three transferable permits, with angler endorsements of seven, five, and four?

Under the charter halibut regulation, RAM first determines if an applicant submitted a timely application.²¹ Appellant submitted a timely application.

Once RAM makes that determination, RAM takes the following steps to evaluate the application:

Step 1: applying 50 C.F.R. § 300.67(b), does applicant meet the participation requirements for a non-transferable permit?

Step 2: applying 50 C.F.R. § 300.67(c), does the applicant meet the participation requirements for any additional permits?

Step 3: applying 50 C.F.R. § 300.67(d), does the applicant meet the participation requirements for any of its permits to be a transferable permit?

Step 4: applying 50 C.F.R. § 300.67(e), does the applicant meet the participation requirements for an angler endorsement greater than four?

RAM correctly applied these steps in evaluating Appellant's application.

Step 1: RAM determined that Appellant met the participation requirements for a non-transferable permit in 50 C.F.R. § 300.67(b), namely Appellant took at least five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and at least five halibut logbook fishing trips in the recent participation period (2008).²²

Step 2: RAM determined that Appellant met the participation requirement for two additional permits in 50 C.F.R. § 300.67(c), which states:

(c) *Number of permits.* An applicant that meets the participation requirements in paragraph (b) of this section [to receive at least one non-transferable charter halibut permit] will be issued the number of charter halibut permits *equal to the lesser of the number of permits* determined by paragraphs (c)(1) or (c)(2) of this section as follows:

(1) The *total number of bottomfish logbook fishing trips* made pursuant to the applicant's ADP&G Business License in *the applicant-selected year* divided by five, and rounded down to a whole number; or

(2) The *number of vessels* that made the bottomfish logbook fishing trips in the applicant-selected year. [Italics added]

²¹ 50 C.F.R. § 300.67(b)(1)(i).

²² These requirements are specifically listed at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

The applicant-selected year means the year in the qualifying period, either 2004 or 2005, which the applicant selects for NMFS to use in determining the number of applicant's permits.²³

Applying 50 C.F.R. § 300.67(c) to this applicant, the result is as follows:

*The applicant-selected year: **2005.***²⁴

*The total number of bottomfish logbook fishing trips in 2005: **174.***

*The total number of bottomfish logbook fishing trips in 2005 divided by five, rounded down to the nearest whole number: $174 / 5 = 34.8$, rounded to **34.***

*The number of vessels that made those trips: **3.***

Appellant receives **the lesser of 34 or 3.**

Appellant receives 3 permits.

Although this regulation may seem confusing, the underlying rationale is fairly straightforward. If an applicant only used one vessel in the applicant-selected year (2004 or 2005), the applicant receives one permit. Appellant used three vessels in 2005. Therefore, Appellant can only receive three permits, no matter how many trips Appellant took with those three vessels in 2005 and no matter how many more vessels Appellant used after 2005.

Put another way, the regulation prevents an applicant from receiving a greater number of permits than the number of charter vessels that the applicant used in the qualifying period, with the proviso that the applicant must choose one year in the qualifying period, either 2004 or 2005, to determine the number and type of permits it receives. To receive five non-transferable permits, an applicant must have participated with five vessels in its applicant-selected year.

Step 3: RAM correctly determined that Appellant met the requirements in 50 C.F.R. § 300.67(d) for its three permits to be transferable: Appellant had three vessels that each took fifteen or more bottomfish logbook fishing trips in the applicant-selected year, which is 2005, and Appellant had three vessels that each took fifteen or more halibut logbook fishing trips in 2008.

Step 4: RAM correctly determined that Appellant's permits will have angler endorsements of seven, five and four, respectively, because the highest number of anglers that Appellant took on a bottomfish logbook fishing trip in 2004 or 2005 was seven with one vessel, five with the next vessel and four with the next vessel.²⁵

²³ 50 C.F.R. § 300.67(f)(1).

²⁴ Application (received Jan. 28, 2010).

²⁵ Official Record Summary (created Mar. 26, 2010).

I conclude that NMFS correctly determined that Appellant met the requirements in the charter halibut regulation for three transferable permits with angler endorsements of seven, five, and four, respectively.

2. May an applicant receive additional charter halibut permits even it does not meet the requirements in the charter halibut regulation?

Appellant does not argue that it meets the requirements of the charter halibut regulation for five permits. Appellant argues that it should receive two additional transferable charter halibut permits because the charter halibut regulation is unfair, arbitrary, based on flawed analysis and will hurt Appellant economically. Specifically, Appellant argues it should receive a permit for the following reasons: Appellant owned five vessels in the qualifying period (2004, 2005), clearly intended to use them in the future and has used all of them since 2005; Appellant would have participated with all five vessels in 2004 and 2005 if it knew that NMFS would award permits based on those years; NMFS's use of 2004 and 2005 as the qualifying years is arbitrary; NMFS's analysis of the proposed regulation was flawed;²⁶ Appellant needs five permits with four anglers to be profitable and efficient because it has five boats; a denial of two additional permits may terminate, or at least curtail, Appellant's business which will, in turn, hurt the local economy that has benefitted greatly Appellant's business activities; NMFS should award permits only to persons who participated in the charter halibut fishery after 2008 and are still participating.²⁷

I do not have authority to order that NMFS award a permit for any of those reasons because the charter halibut regulation does not authorize NMFS to award a permit for any of those reasons. The sole basis for initial issuance of five permits is documented past participation in the qualifying period and the recent period by five vessels.

Appellant is correct that there are different ways that the Council, NMFS and the Secretary of Commerce, acting under The Halibut Act, could have structured a program of limited access for the charter halibut fisheries. But I must apply the program that the Secretary did adopt. It would be arbitrary if I, as an individual appellate officer, ordered that an applicant to receive a permit because denial of a permit would hurt the applicant economically, or any of the other reasons offered by this applicant, when a regulation does not spell out that standard and when other applicants were not judged by that standard.

In publishing the final rule, NMFS responded to public comments that the rule was unfair to persons who got into the charter halibut fishery after 2005 or expanded operations after 2005.²⁸ Appendix 1 to this Decision contains NMFS's response to Comments 3, 4, 5, which explains why the Secretary of Commerce, acting through

²⁶ Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A, National Marine Fisheries Service (lead agency) (Nov. 6, 2009), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/analyses/halibut/earirffa_charter_vessel_moratorium110609.pdf.

²⁷ Appellant's Letter to OAA (Mar. 7, 2011).

²⁸ Final Rule, 75 Fed. Reg. 554, 563 – 595 (Jan. 5, 2010) (response to public comments). Several comments touched on this subject including Comments 3, 4, 5, 45, 49, 51, 76, 108, 142, 143, 151, 156.

NMFS, NMFS concluded it was permissible to issue permits based on participation in 2004 and 2005.

I conclude that Appellant does not meet the participation requirement in the qualifying period for additional permits. Under the charter halibut regulation, the only way this applicant can obtain additional charter halibut permits is by transfer from a person who has a transferable permit.²⁹

CONCLUSIONS OF LAW

1. RAM correctly determined that Appellant met the requirements in the charter halibut regulation for three transferable permits, with angler endorsements of seven, five, and four.
2. Appellant cannot meet the participation requirement in the qualifying period in 50 C.F.R. §§ 300.67(c) and (d) and for a fourth and fifth non-transferable or transferable charter halibut permit because Appellant only used three vessels to participate in the charter halibut fishery in its applicant selected year (2005).
3. Appellant does not qualify for a fourth or fifth charter halibut permit through initial issuance.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This Decision is effective on February 13, 2012, unless by that date the Regional Administrator reverses, remands, or modifies the Decision pursuant to 50 C.F.R. § 679.43(k), (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Standard Time on January 23, 2012, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or issuance of a Decision on Reconsideration.

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Mary Alice McKeen
Administrative Judge

Date issued: January 13, 2012

²⁹ 50 C.F.R. § 300.67(i) (transfer provisions).

of the non-commercial sectors exhibit relatively static growth over time such that year-to-year assumptions about their harvest prove to be correct. The charter halibut fishery has grown in recent years, however, depending on the demand for halibut by charter vessel anglers. Although this rule is not designed primarily to limit the harvest by the charter halibut fisheries, it will make existing and future harvest restrictions more effective because conservation gains from individual harvest restrictions will not be eroded by unlimited growth in the fleet of charter vessels fishing for halibut. In this manner, this rule will contribute to the achievement of the overall target harvest rate of halibut established by the IPHC.

Avoids excessive share. An excessive share of halibut fishing privilege is not defined in either the Halibut Act or in the National Standard 4 guidelines. The latter states simply that an allocation must deter any entity from acquiring an excessive share of fishing privileges, and avoid creating conditions that foster inordinate control by buyers and sellers (50 CFR 600.325(c)(3)(iii)).

This rule sets an excessive share standard of five charter halibut permits. Existing businesses that initially qualify for more than five permits will be able to continue business at levels above this excessive share standard; however, they will be prevented from acquiring more permits than their initial allocation. Transfers of a permit or permits that will result in the person, business, or other entity receiving the permit(s) holding more than five permits will not be approved by NMFS with limited exception.

Some consolidation of charter halibut permits may occur under this rule, but will be limited by the five-permit excessive share standard. Further, the number of businesses that are allowed an initial allocation of permits in excess of this standard will not increase. A 10 percent ownership criterion will apply to prevent a corporation from exceeding the excessive share standard by owning or controlling subsidiary businesses each holding the maximum number of permits. The 10 percent ownership criterion is the same as that used for implementing the American Fisheries Act and defined at 50 CFR 679.2. Under this definition, two entities are considered the same entity if one owns or controls 10 percent or more of the other. Hence, an excessive share of privileges to operate charter vessels fishing for halibut is prevented and the dominance of any businesses in the charter halibut fishery will not be allowed to increase any more than it is

at the time of initial allocation of permits.

Comments and Responses

This action was published as a proposed rule on April 21, 2009 (74 FR 18178), and public comments on it were solicited until June 5, 2009. NMFS received 166 comment submissions containing 157 unique comments. These comments were reviewed, organized into seven topical categories, and responded to as follows:

Fairness and Legal Authority

Comment 1: The proposed rule does not meet the National Standards for Fishery Conservation and Management as defined in the Magnuson-Stevens Act (16 U.S.C. 1851(a)(4)).

Response: This action is authorized by the Halibut Act at section 773c, not the Magnuson-Stevens Act. Section 773c(c) of the Halibut Act provides the requirements that must be met by the Council and the Secretary when developing and implementing regulations for halibut. The Secretary has found this rule to be consistent with this requirement of the Halibut Act as explained above under the heading "Consistency with Halibut Act."

Comment 2: The Halibut Act of 1982, (at section 773c(c)) states that rules shall be fair and equitable and they shall not discriminate among participants.

Response: The Halibut Act at the section cited actually prohibits discrimination between residents of different States. This rule does not discriminate between residents of different States as the criteria for an initial allocation of charter halibut permits applies to all applicants regardless of the State in which they reside. This action complies with the requirements of the Halibut Act, as discussed in the "Consistency with Halibut Act" section above.

Comment 3: Several comments stated that the proposed rule is not fair and equitable because it requires applicants to demonstrate participation in the halibut charter fisheries in 2004 or 2005 (historical participation period). The comments note that the historical participation requirement illegally discriminates against businesses that are currently in operation because:

- The proposed rule would impose *ex post facto* regulations, contrary to the Constitution of the United States;
- The Magnuson-Stevens Act at 16 U.S.C. 1853(b)(6) states that when implementing a limited entry program, present participation and historical practices must be considered. It does not say anything about historical

participation on which NMFS is basing this rule;

- While obtaining all relevant licenses and permits to operate a charter business, there was no notification by the licensing agencies that rules were being made that would retroactively disallow charter operators from continuing to operate their businesses;

- Many small business owners will not have the right to appeal under the unavoidable circumstances provision as the proposed rule states that an applicant must demonstrate that it had a specific intent to participate in the qualifying period; and

- The proposed rule clearly shows the Council's intention to act favorably towards the charter vessels that operated during 2004 and 2005 by excluding charter businesses that started operating between 2006 and 2009.

Response: This rule is not illegal or contrary to the U.S. Constitution. An *ex post facto* law is a law passed after the occurrence of an event or action which retrospectively changes the legal consequences of the event or action. That is not the case with this rule. This rule does not make charter halibut fishing that was legally performed after 2005 and before the effective date of this rule illegal, but instead establishes specific eligibility criteria for receiving a harvest privilege. Hence, this rule does not change the legal consequences of past participation in the charter halibut fishery. Persons who entered the fishery after 2005, however, had constructive notice, published February 8, 2006 (71 FR 6442), that they were not assured of future access to the charter halibut fishery if a management regime, such as the one implemented by this rule, were implemented.

The Council and the Secretary considered historical practices in the charter halibut fisheries in Areas 2C and 3A by looking at the number of charter vessel businesses and vessels participating in these fisheries, the range in the number of logbook fishing trips made, and the number and distribution of communities in which these fishing trips terminated in 2004 and 2005. These factors are reasonable measures of dependence on the charter halibut fisheries. *See also* the discussion of historical fishing practices above under the heading "Consistency with Halibut Act."

Prior to this rule, NMFS has not implemented any licensing requirements for operators of vessels with one or more charter anglers onboard. However, the Council has a long history of developing management measures for the charter halibut fishery, as described in the preamble to the

proposed rule (74 FR 18178, April 21, 2009), and the control date notice published February 8, 2006 (71 FR 6442). Persons entering the charter halibut fishery for the first time after 2005 were on notice that their future access to that fishery was not assured.

Regarding an appeal, all charter halibut permit applicants have a right to an appeal under § 300.67(h)(6) of this rule. However, if a charter vessel business was not started until 2006 or later and cannot demonstrate that it intended to participate in prior years, it will not be able to meet the criteria for the unavoidable circumstance exception. See the response to Comment 109 for a discussion of the unavoidable circumstances exception to the charter halibut permit qualification requirements.

The Council selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on participation in the charter halibut fishery when it acted in early 2007. The Council did not select a larger number of qualifying years because the normal entry and exit from the charter halibut fishery from year to year could result in more charter halibut permits than vessels participating in any one year with a qualifying period of too many years. The choice of combining minimum participation during a qualifying year and the recent participation year further serves the purpose of limiting charter halibut permits to those businesses that have demonstrated a long-term commitment to the charter halibut fishery and gives consideration to present participation and historical dependence, factors that must be considered pursuant to the Halibut Act.

Before developing eligibility criteria for the charter halibut limited access system, the Council announced a control date of December 9, 2005, to provide notice to any person contemplating entry into the charter halibut fishery after that date. A control date notice published in the **Federal Register** on February 8, 2006 (71 FR 6442), further indicated that future access to the charter halibut fishery was not necessarily assured to persons entering the fishery for the first time after that date.

Comment 4: One commenter proposed changes to the moratorium to make it fair, equitable, and non-discriminatory. These changes included revising the charter halibut permit qualification criteria to require participation only in more recent years and making all charter halibut permits transferable to allow established

businesses to grow by purchasing permits.

Response: Although alternative programs might be found to be fair and equitable and non-discriminatory, as required by the Halibut Act, this rule was developed by the Council to meet its stated objectives. The Council intended to recognize historical and recent participation by granting permits to charter businesses that demonstrate consistent participation in and dependence on the charter halibut fisheries. The Council also recommended a higher participation requirement for transferable permits than for non-transferable permits to balance its objective to reduce fishing effort and its objective to minimize disruption to the charter fishing industry. The Council's recommended qualifying criteria for transferable charter halibut permits will allow businesses to grow by purchasing additional permits up to the excessive share limit of five charter halibut permits, which is consistent with the commenter's suggestion. NMFS finds that this rule meets the requirements of the Halibut Act (see discussion above under the heading "Consistency with Halibut Act").

Comment 5: The Council does not have the authority to ban charter businesses that began operating between 2006 and 2009 from operating a guided halibut fishing business, or to include rules that merely allocate the harvest level among users rather than reduce the harvest level as required by agency goals.

Response: The Halibut Act, at section 773c(c), provides authority to the Council and the Secretary to "develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nationals or vessels of the United States or both" The Halibut Act, at 16 U.S.C. 773c(a) and (b), also provides the Secretary with general responsibility to carry out the Convention, the Halibut Act, and to adopt such regulations as may be necessary. In reviewing this rule, the Secretary has found that the Council's recommendation for this limited access system is consistent with the Halibut Act (see the discussion above under the heading "Consistency with Halibut Act").

Fishery management generally, and management of the halibut fisheries in particular, is not necessarily limited to the direct control of harvests. Allocation of fishing privileges also is specifically authorized by the Halibut Act if the regulations that allocate fishing privileges meet certain criteria. See the "Consistency with Halibut Act" section

above for further discussion of how this rule is consistent with all Halibut Act requirements.

Comment 6: A limited access program on charter vessels is not a conservation measure to protect the halibut but an attempt to limit individuals from the resource. Since halibut is a resource that belongs to all citizens, it is only reasonable that they should have the first opportunity to harvest what is rightfully theirs. Charter operators afford citizens a reasonable opportunity to catch fish. The people should have the first opportunity to gather, and the remains of the annual surplus can then be opened to commercial harvesting. Citizens should not be limited from harvesting their resource until there is a conservation concern.

Response: This rule is reasonably calculated to promote conservation as described above under the heading "Consistency with Halibut Act." NMFS agrees that halibut are a public resource; however, the limited access system established by this rule does not limit individual anglers from opportunities to access the halibut resource. This rule limits the number of charter vessels in the guided sport fishery for halibut in only two of the 10 IPHC regulatory areas. The Analysis prepared for this action (see **ADDRESSES**) estimates that charter vessel capacity will be sufficient to meet the demand for the number of anglers who took guided charter vessel trips in 2008 in Areas 2C and 3A (see also response to Comments 21 and 43).

Although charter vessels provide an important means of access to the halibut resource, they are not the only way that the public can access the resource. The commercial fishery provides access to halibut to those who prefer to purchase it in grocery stores or restaurants. The subsistence fishery provides access to the halibut resource by those who qualify to conduct subsistence halibut fishing. Non-guided recreational fishing also is a source of public access to the halibut resource. This rule does not constrain or limit any of these other means of public access to the halibut resource. In fact, the catch limits specified annually for the commercial halibut fishery by the IPHC for areas in and off of Alaska are set after estimated harvests by all other non-commercial removals are subtracted from the constant exploitation yield (see discussion under "Management of the Halibut Fisheries" in the preamble to the proposed rule (74 FR 18178, April 21, 2009).

Comment 7: Commenter urged you to pass the proposed rule for the guided halibut fishery. All businesses need stable, predictable regulation to plan