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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

FAIRWEATHER FISH, INC., and CAPTAIN RAY WELSH, Plaintiffs, v. PENNY PRITZKER, in her official capacity as Secretary of Commerce; the NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; KATHRYN D. SULLIVAN, in her official capacity as Administrator of the National Oceanic and Atmospheric Administration; and the NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NATIONAL MARINE FISHERIES SERVICE, Defendants.	CASE NO. 3:14-cv-5685-BHS DEFENDANTS' COMBINED BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

By passing and later amending the Magnuson Stevens Act ("MSA"), Congress commanded the National Marine Fisheries Service ("NMFS") and regional Fishery Management Councils ("Councils") to sustainably manage the fisheries which "contribute to the food supply, economy, and health of the Nation." 16 U.S.C. § 1801(a)(1). The Northern Pacific Halibut Act ("Halibut Act") of 1982 is a distinct statute implementing a convention between the United States and Canada, but adopts the MSA's regulatory scheme in several important respects. 16 U.S.C. § 773c(c).

To meet the goals of each statute, NMFS may implement "limited access privilege programs," or the creation of individual fishing allowances – known as "Quota" or "Quota Share" – that promote "fishing safety[,] fishery conservation and management[,] [and] social and economic benefits." Id. at §§ 1853a(c)(1)(C)(i)-(iii). As the word "limited" implies, however, Congress' scheme necessitates certain trade-offs: limited access programs forgo an open-access, free-for-all fishery to create sustainable conditions for fish, fishermen, and fishing communities.

In 1993, NMFS and the Northern Pacific Fishery Management Council ("Council") created such a program for halibut and sablefish, two species harvested off the west coast of Alaska. This "Individual Fishing Quota Program" ("Fishing Quota Program") sought to maintain and strengthen the fishing communities that depend on sablefish and halibut, requiring that holders of Quota Share own *and* operate their fishing vessels during harvest. In an effort to mitigate transition costs, however, NMFS approved an exception to the "owner-onboard" restriction. Under this exception, original recipients of Quota Share are allowed to fish using hired "skippers" or "masters."

But this exception ultimately threatened to swallow the rule. Rather than transfer Quota Share to a new generation of local fishermen, original recipients acquired ever-larger portions of the Quota market. As opportunities for new fishermen declined, permit prices rose, further crowding out would-be entrants. NMFS responded by imposing several additional Quota Share restrictions, each of which failed to fully halt permit consolidation.

NMFS tried again in 2014, this time closing the "hired master" exception for Quota Share acquired by transfer after February, 2012. The agency's decision followed review and approval by the Council, hundreds of pages of technical analysis, and a robust notice-and-comment period. As a rational response to a problem that NMFS has long sought to address, the "Hired Master Rule" is lawful under the MSA, Halibut Act, and the Administrative Procedure Act ("APA"), a statute that requires extremely deferential review of the agency's action.

This suit is a challenge to the Hired Master Rule by original recipients of Quota Share who can no longer use hired masters for a limited amount of their Quota, *i.e.*, Quota received by transfer after February, 2010. Assuming Plaintiffs are correct that this restriction means a loss of income, that result is not contrary to law. Indeed, the MSA explicitly allows rules that render federally-created allowances less valuable. See 16 U.S.C. § 1853a(b). Nor does the Hired Master Rule offend other substantive requirements in the MSA or Halibut Act: the Rule concerns only the use of intangible fishing *allowances* created two decades prior, and has no connection to statutory guidelines for human safety, the "optimum yield" of fisheries, discarded fish, or the equitable allocation of *new* allowances.

Nor is the Hired Master Rule retroactive, as Plaintiffs claim. The Rule's regulation of previously-acquired Quota Share is not regulation of the consummated acquisitions themselves, a subtle but important distinction that forecloses any finding of retroactive effect. As an agency

action with only prospective operation, the Hired Master rule is entirely in keeping with NMFS' delegated powers and with due process.

Finally, the Hired Master Rule is consistent with the Rehabilitation Act, a statute which forbids disability discrimination in federal programs. The Quota Share Program does not discriminate on the basis of disability because NMFS has forbidden *all* Quota Share recipients – disabled and non-disabled alike – from using hired masters for any reason. In addition, the prohibition against using hired masters for all Quota Share acquired after February 10, 2010 is limited in scope and does not deny meaningful access to the Quota Share Program. Further, Plaintiffs' requested accommodation – that all disabled Quota Share holders be allowed to use hired masters in perpetuity – would fundamentally undermine core objectives of the Program, such as decreasing the consolidation of Quota Share and promoting an owner-onboard fleet.

When Congress passed the MSA and Halibut Act, it understood that maintaining sustainable fisheries and preserving fishing communities are not without cost. While restrictions like the Hired Master Rule may limit some returns on investment, they do so in service of coastal economies and in harmony with congressional design. For this reason and those set forth below, Defendants respectfully request that the Court grant Defendants' cross-motion for summary judgment and deny Plaintiffs' motion for summary-judgment.

LEGAL BACKGROUND

I. THE MAGNUSON-STEVENS ACT.

In 1976, Congress enacted the Fisheries Conservation and Management Act – now known as the MSA – to "conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. §§ 1801(b)(1), (3). The Act establishes an

Exclusive Economic Zone extending seaward from each coastal state, and, with exceptions not relevant here, subjects each fishery within the Economic Zone to NMFS' management authority. Id. at §§ 1802(11), 1811.

The MSA establishes eight regional fishery management councils, which are composed of federal, state, and territorial fishery management officials with expertise in conservation, management, or harvest of fishery resources within the council's geographic purview. Id. at § 1852(b). The principal task of each council is to recommend Fishery Management Plans and Plan amendments to "achieve and maintain, on a continuing basis, the optimum yield" from fisheries under their authority. Id. at §§ 1801(b)(4), 1852(a)(1), (h)(1). Councils may also submit regulations "necessary or appropriate" to implement a Plan or Plan amendment, or to modify existing regulations. Id. at § 1853(c). As applicable here, the North Pacific Fishery Management Council has authority to recommend Fishery Management Plans, amendments, and regulations for fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. Id. at § 1852(a)(1)(G).

Councils submit recommendations to NMFS for review and approval, disapproval, or partial approval. Id. at §§ 1852(h), 1853(c), 1854(a)–(b). NMFS reviews each recommendation for consistency with the MSA's 10 "National Standards," the relevant Fishery Management Plan, and applicable law. Id. at §§ 1851(a), 1854(a)–(b). If NMFS approves all or part of a council's proposal, the agency must publish notice in the Federal Register and request public comment for a period of up to 60 days. Id. at §§ 1854(a)(1), (b)(1).

Among the tools available to councils is a "limited access system," or a fishery where participation is restricted by regulation or by a Fishery Management Plan. Id. at §§ 1802(27), 1853(b)(6). A limited access system may include a "limited access privilege program," which

creates Quota Share corresponding to a portion of the fishery's total allowable catch. Id. at §§ 1802(26), 1853(b)(6); see generally Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank, 693 F.3d 1084, 1087-88 (9th Cir. 2012). The creation and allocation of Quota does not create "any right, title, or interest in or to any fish before the fish is harvested by the holder" and does not "confer any right of compensation to the holder. . . if . . . revoked, limited, or modified." 16 U.S.C. §§ 1853a(b)(3), (4). See id. at § 1802(23).

II. THE HALIBUT ACT.

Congress enacted the Halibut Act to implement a convention between the United States and Canada, signed in 1953 and amended by protocol in 1979 ("Halibut Convention" or "Convention"). 16 U.S.C. § 773(a). The Convention authorizes the International Pacific Halibut Commission to adopt regulations for conservation of halibut along the west coasts of the United States and Canada, but these regulations are not effective in the United States until approved by the Secretary of State and the Secretary of Commerce ("the Secretary"). Id. at § 773b. Moreover, the Halibut Act authorizes NMFS to adopt regulations necessary for implementation of the Convention and the Act itself. Id. at § 773c.

The regional councils established under the MSA may also recommend regulations for halibut management. Id. at § 773c(c). NMFS may approve recommendations that are fair and equitable, reasonably calculated to promote conservation, and carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges. Id. Additionally, any regulation recommended by a council and adopted by NMFS must be consistent with the MSA's provisions for limited access systems. Id. (citing 16 U.S.C. § 1853(b)(6)). But unlike the MSA, the Halibut Act includes no requirement to manage halibut with respect to "optimum yield." See 16 U.S.C. § 1851(a)(1).

III. THE REHABILITATION ACT.

The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., was the "first major federal statute designed to protect the rights of . . . the handicapped people of this country." Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990). The Act provides that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under . . . any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794(a).

The Department of Commerce has implemented the Rehabilitation Act through regulations that apply to "any program or activity conducted by the agency." 15 C.F.R. § 8c.30(a). See also id. at § 8c.2. Under the regulations, the Department of Commerce, including NMFS, may not "limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service." Id. at §8c.30(b)(1)(vi). "With respect to any agency program . . . under which a person is required to perform services or to achieve a level of accomplishment," a "qualified individual" is:

> an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature.

Id. at § 8c.3(4)(1).

FACTUAL BACKGROUND

I. INITIAL EFFORTS TO PRESERVE THE SABLEFISH AND HALIBUT FISHERIES THROUGH LIMITED ACCESS PROGRAMS.

Pacific Halibut (*Hippoglossus stenolepis*) can reach 500 pounds and reside in colder waters on both sides of the Pacific Ocean, while the sablefish (*Anoplopoma fimbria*) is a smaller,

elongated species occupying waters from northern Mexico to the Bering Sea. Sablefish is managed as part of the "groundfish" fishery under the MSA, while halibut is regulated under the Halibut Act. By the early 1990s, both fisheries – each of which relies on "hook and line" gear – were at risk of overcapitalization in Alaskan coastal waters.

In an effort to protect halibut, sablefish, and the communities that harvest each species, NMFS adopted the North Pacific Council's recommended limited access privilege program in 1993. See 58 Fed. Reg. 59375 (Nov. 9, 1993). The Program created Quota Share allowing "qualified persons" to harvest a portion of allowable catch for sablefish or halibut, and allocated the share based upon each "qualified person's" adjusted harvest of fish during the late 1980s. 57 Fed. Reg. 57130, 57133 (Dec. 3, 1992). A qualified person, in relevant part, "is a citizen of the United States at the time of application for [Quota Share]," or a "non-individual entity," such as a "corporation, partnership, [or] association." 50 C.F.R. § 679.40. A holder of Quota Share generally must remain onboard the harvesting vessel at all times, including when landing. 50 C.F.R. §§ 679.42(c), (i).

Quota Share is transferable, permitting "second generation" fishermen to harvest sablefish and halibut even if they were not initial recipients of Quota, and efficiently allocating harvesting privileges within the fleet. 57 Fed. Reg. at 57136. As NMFS noted early on, however, the free transfer of Quota Share "could lead to an excessive share of harvesting privileges . . . held by a single individual or corporation" or "to localized overfishing." Id. Accordingly, Quota Share can usually move only within predefined areas, and only between vessels of similar size and purpose. See id. at 57134 (describing vessel categories); id. at 57136 (describing restrictions); see generally 50 C.F.R. § 679.41(g) (implementing restrictions). Generally, a recipient of transferred Quota Share must have either received Quota Share during

the initial allocation or crewed a vessel in any United States fishery. 50 C.F.R. §§ 679.41(g)(1), (2). "The rationale for this measure is to assure that [Individual Fishing Quotas] remain in the hands of fishermen who have a history of past participation and current dependence on the fishery." 57 Fed. Reg. at 57133.

These transfer restrictions soon proved inadequate to preserve the character of the halibut and sablefish fisheries, risking consolidation of Quota Share among a small number of fishermen and discouraging formation of an "owner-operated" fleet. See 78 Fed. Reg. at 24708. Thus, NMFS limited the total Quota Share held by any one person and the annual harvest from any one vessel. See 50 C.F.R. §§ 679.42(e)-(f), (h). Because these measures sometimes created very small, commercially unattractive portions Quota Share, NMFS consolidated these portions into undivided wholes, or "blocks." See 78 Fed. Reg. at 24708 (April 26, 2013). With certain exceptions, these blocks may be used and transferred as normal Quota Share. 50 C.F.R. §§ 679.41(e), 679.42(g). Moreover, in certain circumstances holders may consolidate, or "sweep up" blocked Quota Share with other Quota to create a single, indivisible unit. Id. at §§ 679.41(e)(1), (2).

II. THE HIRED MASTER RULE.

Despite NMFS' additional restrictions, evidence indicates that ongoing Quota Share consolidation threatens to exclude new fisherman and produce a fleet largely divorced from the coastal communities that have traditionally depended on the halibut and sablefish fisheries. AR 10173. According to the Council and NMFS, this phenomenon largely flows from an exception to the requirement that holders of Quota Share remain onboard the harvesting vessel at all times. See 50 C.F.R. at § 679.42(i)(1). Under this exception, an initial recipient of Quota Share may use a "hired master" to harvest fish if the recipient has retained a twenty percent interest in the

harvesting vessel, encouraging the holder to acquire and retain Quota Share rather than let the Quota pass to new fisherman. Id.; 78 Fed. Reg. at 24708-09.

Seeking to secure transition to an owner-operator fleet, the Council heard testimony on the "hired master exception" beginning in February of 2010. By April of 2011, the Council proposed to bar hired masters from harvesting Quota Share acquired after February 12, 2010 (the "control date") *unless* that Quota Share is consolidated, or "swept up," with "blocked" Quota Share acquired before the control date. Id. at 24710. This measures will further Council objectives by "(1) preventing further increase in the use of hired masters while minimizing disruption to operations of small businesses that have historically used hired masters, and (2) discouraging further consolidation of [Quota Share] among initial recipients who use hired masters." Id. at 24709. NMFS proposed a rule to this effect on April 26, 2013, id., and issued a final rule on July 28, 2014. 79 Fed. Reg. 43679.

The rule became effective on December 1, 2014 (the "effective date"), or nearly five years after the control date. Id. The Council and NMFS approved a control date earlier than the effective date to discourage a speculative rush on Quota Share after the Rule's promulgation. A later control date (such as the rule's effective date) would have encouraged users of hired masters to *increase* their consolidation of Quota Share by placing them on notice of impending restrictions. See id. at 43681; 78 Fed. Reg. at 24709. Thus, a later control date would have exacerbated the very problem that the Hired Master Rule seeks to address.

III. PROCEDURAL HISTORY.

According to affidavits filed with its motion for summary judgment, Plaintiff Fairweather Fish ("Fairweather") is a corporation based in or near Seattle that fishes for halibut and sablefish using hired masters. ECF No. 25-3 ¶¶3-5. Fairweather acquired Quota Share on five separate

occasions between the Hired Master Rule's control date and effective date, and claims that its inability to fish the Quota means a significant loss of revenue. Id. at ¶¶8-10. Plaintiff Ray Welsh acquired halibut Quota Share in July, 2010, and testifies that he suffered a stroke in 2005. ECF No. 25-2 ¶¶3, 4. According to Captain Welsh, this stroke has left him unable to harvest Quota Share absent the use of hired masters. Id. at ¶¶4-6.

Plaintiffs participated in the Hired Master Rule's development to varying degrees. Captain Welsh did not comment on the proposed Rule at all, while Fairweather commented that the Proposed Rule violated MSA National Standards 1 and 4. AR 50040. Plaintiffs subsequently filed this action on August 27, 2014. ECF No.1. Their amended complaint alleges that the Hired Master Rule has retroactive effect and violates MSA National Standards 1, 2, 4, 9, and 10, as well as the Rehabilitation Act. ECF No. 18

STANDARD OF REVIEW

Because the Halibut Act and the Rehabilitation Act do not supply a standard of review, Plaintiffs' claims under these statutes are subject to the scope and standard of review set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 701. See San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014). Likewise, the MSA explicitly adopts the APA's standard of review. See Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1116 (9th Cir. 2006) (citing U.S.C. § 1855(f)(1)) . Under this standard, agency actions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. (citations omitted). The "arbitrary and capricious" standard "is highly deferential," and the Court must "not substitute [its] judgment for that of the agency." San Luis & Delta-Mendota Water Auth., 747 F.3d at 601. Instead, the Court may

> reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important

> aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008). The Court is to be "most deferential" when, as in the Hired Master Rule, "the agency is making predictions, within its area of special expertise, at the frontiers of science." Id. at 993 (quotations, citation omitted). See San Luis & Delta-Mendota Water Auth., 747 F.3d at 605 (upholding "important biological opinion on an extremely complicated and technical subject matter" notwithstanding characterization of the opinion as a "ponderous, chaotic document"); Ctr. for Biological Diversity v. EPA, 749 F.3d 1079, 1087-88 (D.C. Cir. 2014) (cataloguing "[d]ecades of decisions" recognizing deference to agency decisionmaking).

NMFS' interpretation of the MSA, the Halibut Act, and the Rehabilitation Act is reviewed under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., which requires deference to the agency's reasonable interpretation of all three statutes. 467 U.S. 837, 842-44 (1984). See Pac. Coast Fed'n of Fishermen's Ass'ns, 693 F.3d at 1091. Likewise, the Court must defer to NMFS' interpretation of its own regulations, such as those implementing the Fishing Quota Program or the MSA's ten National Standards. See Natural Res. Def. Council, Inc. v. U.S. Dep't of Transp., 770 F.3d 1260, 1270 (9th Cir. 2014); Go v. Holder, 744 F.3d 604, 610 (9th Cir. 2014) (Wallace, J., concurring) ("where an agency interprets its own regulation, *even if through an informal process*, its interpretation of an ambiguous regulation is *controlling* . . . unless plainly erroneous or inconsistent with the regulation") (quotation omitted).

ARGUMENT

I. THE HIRED MASTER RULE IS CONSISTENT WITH THE MSA AND THE HALIBUT ACT.

To comply with the MSA, including its National Standards, a regulation need not advance each Standard to its absolute limit. The Ninth Circuit has noted that "[t]here is a necessary tension, perhaps inconsistency," among the Standards." Alliance Against IFQs v. Brown, 84 F.3d 343, 349 (9th Cir. 1996). "The tension, for example, between fairness among all fishermen, preventing overfishing, promoting efficiency, and avoiding unnecessary duplication, necessarily requires that each goal be sacrificed to some extent to meeting the others." Id. Thus, NMFS must "exercise discretion and judgment in balancing among the conflicting national standards in section 1851," and a reviewing Court must uphold the balance that NMFS has struck as long as it is rational. Id. at 350. See also Lovgren v. Locke, 701 F.3d 5, 32 (1st Cir. 2012) ("What matters" in MSA cases "is that the administrative judgment, right or wrong, derives from the record, possesses a rational basis, and evinces no mistake of law.") (quotation omitted).

Plaintiffs' summary judgment arguments warp the MSA, APA, Halibut Act, and Fishing Quota Program beyond recognition. Their application of the National Standards is critically misguided at several points, invoking Standards that do not apply to the Hired Master Rule, misconstruing those that do, and raising arguments that were not before the agency during rulemaking. As explained below, the Rule is a rational, well-documented response to absenteeism in the sablefish and halibut fisheries, and passes muster under governing law. For that reason, Defendants are entitled to summary judgment on Plaintiffs' fifth through ninth claims for relief.

A. The Hired Master Rule Is A Rational Attempt To Preserve The Character Of Sablefish And Halibut Fisheries.

The Hired Master Rule is a rational effort to achieve "owner-onboard" fisheries, a key goal of the Fishing Quota Program since its inception. When the Council began developing the Program, it noted that the status quo threatened "economic stability in the fixed gear halibut and sablefish fisheries and communities." AR 20224. Participation in these fisheries was especially risky due to overcapitalization, an extremely short fishing season, and declining stocks, prompting worries that fishermen would leave the occupation altogether. Id. at 20235. That exodus, in turn, threatened the small coastal communities that depend on the fishing industry for both population and income. Id. at 20236 (noting that of 1,443 vessel owners who participated in the sablefish fishery between 1985 and 1990, a mere six percent participated in all six years).

In response, the Council set out to reduce volatility and stabilize coastal communities by "assuring that the . . . fisheries are dominated by owner/operator operations" and "limit[ing] the concentration of quota shares ownership and [Individual Fishing Quota] usage that will occur over time." AR at 20243. Because these objectives conflicted with other goals of the Fishing Quota Program – such as "maintain[ing] the existing business relationships among vessel owners, crews, and processors" – the Council "attempted to select a set of [Program] elements that provided a reasonable balance." Id. at 20244. However, the Council and NMFS were careful to underscore that a prevailing goal was "constraint[] on the degree of fleet reduction for social reasons." Id. "In particular, the Council wishe[d] to see quotas remaining in the hands of fishermen who would use them. It did not wish to see quotas held by absentee landlords . . . . " Id.

Ultimately, the Council and NMFS balanced conflicting goals by restricting ownership and transfer of Quota Share "to avoid absentee ownership of quotas." Id. at 20260. But the

Council also recommended the "hired master exception," discussed above, to avoid disrupting existing business relationships. Id. The Council estimated that this compromise would "prevent what in many fisheries has been the normal progression from owning and operating a vessel to having a hired skipper run the boat," id. at 20265, and concluded that resulting fleet was "desirable for social or broadly defined economic reasons, including a decrease in structural changes that might otherwise occur." Id. at 20263. See also 57 Fed. Reg. at 57137 (noting that Program seeks to "limit consolidation of [Quota Share] and to assure that practicing fishermen, and not investment speculators, remain as the 'stock holders' of the fishery resource under limited access management")

Progress towards this goal has been slow. When developing the Hired Master Rule, NMFS and the Council noted that use of hired masters by absentee Quota Share holders has gone up, not down. Between 1998 and 2009, the number of participants in the halibut fishery declined by nearly 32 percent, while the number of Quota Share holders hiring masters increased by nearly 91 percent. Because the number of Quota Share holders eligible to hire masters decreased by 50 percent during this time, it is beyond debate that fewer holders of Quota Share are hiring more masters, crowding out new entrants and foreclosing transition to an owner-onboard fishery. See AR 10223. Numbers for the sablefish fishery are roughly similar. See 10225. And because fewer participants hold more Quota Share, Quota prices have risen. See id. at 10205 ("the practice of hiring skippers keeps [Quota Share] prices higher than they would be if [Quota Share] held by inactive initial recipients was placed in the market").

The Hired Master Rule squarely addresses this problem by generally prohibiting hired masters from harvesting Quota Share purchased after the control date. Under the Rule, affected Quota Share will either go unused or will be transferred to fishermen who will personally remain

onboard fishing vessels, gradually eliminating the use of hired masters while simultaneously easing prices for Quota Share.[1] NMFS and the Council reached this conclusion only after analyzing the best available scientific data, including calculations of initial Quota Share holders affected by the Rule, trends in sablefish and halibut fisheries, and the nature of Quota Share ownership and transfer over several years. AR 10201-205.

The Council and NMFS also acknowledged that the Hired Master Rule "would require some business owners to change their business models," but pointed to several ways by which these businesses could adapt. For instance, holders of Quota Share affected by the Rule may fish the recently acquired Quota Share themselves, use hired masters for Quota Share purchased before the control date, finance the transfer of Quota Share to hired masters or other crew, or, in some circumstances, consolidate Quota Share acquired after the control date with quota share acquired before the control date, creating an indivisible whole that is fishable by hired masters. AR 10209; 79 Fed. Reg. at 43682. These options reinforced NMFS' conclusion that the Hired Master Rule properly "balances the interests of initial recipients of halibut and sablefish [Quota Share] with the interests of new entrants to the fisheries." 79 Fed. Reg. at 43684.

Consistent with the Council's recommendation and NMFS' review, the record demonstrates that NMFS promulgated the Hired Master Rule only after evaluating possible alternatives, analyzing a wealth of recent data, and articulating a rational connection between Quota Share consolidation and the Rule's restrictions on hired masters. In so doing, the agency has satisfied the highly deferential standard of review for rulemaking under the MSA, the

[1] As the record explains, the Hired Master Rule applies downward pressure on Quota Share prices by (1) preventing initial Quota Share recipients from hoarding Quota Share; and (2) imposing an "owner-onboard" requirement that, as an additional burden on Quota Share use, will be reflected in the Quota's value. See AR 10209.

Halibut Act, and the APA. See Alliance Against IFQs, 84 F.3d at 349; 16 U.S.C. § 1851(a)(8) (National Standard 8, providing that "management measures shall . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data . . . to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities"). As Set forth below, Plaintiffs' attempts to cast doubt on this conclusion do not withstand scrutiny.

B. The MSA's National Standards Do Not Govern Those Portions Of The Hired Master Rule Promulgated Under The Halibut Act.

As an initial matter, several of Plaintiffs' arguments are facially invalid, since they have alleged violations of the Halibut Act by way of the MSA's National Standards. As noted above, fishery management plans and regulations *under the MSA* must comport with that Act's National Standards, 16 U.S.C. § 1851, but regulations under the Halibut Act are promulgated under a largely distinct congressional scheme. See 79 Fed. Reg. 43680 (describing how the Hired Master Rule is promulgated under each statute). Regulations under the Halibut Act need not comport with the MSA's National Standards, but must instead be "consistent" with the MSA's "criteria" for limited access programs. 16 U.S.C. § 773c(c) (citing 16 U.S.C. § 1853(b)(6)). The criteria and the MSA's National Standards overlap only in their requirement that regulations under both Acts must be "fair and equitable." Compare id. at § 1851(a)(4) with id. at § 1853(b)(6)(F).[2]

[2] Plaintiffs claim that NMFS has "considered the MSA national standards equally applicable to those parts of the [Individual Fishing Quota] Program promulgated under the Halibut Act," citing the final rule implementing the Program. Pls' Br. at 25 n.8 (citing 58 Fed. Reg. 59377-79). This argument misreads the rule in question, which notes only that the "fair and equitable" requirement of National Standard 4 finds its match in the Halibut Act. 58 Fed. Reg. at 59378. See also 79 Fed. Reg. at 43686 ("The 'fair and equitable' requirement in the Halibut Act is substantially the same as the "fair and equitable" requirement found in National Standard 4 of the [MSA]"). Elsewhere, the rule repeatedly notes that National Standards "[do] not apply to the

Because all other National Standards do not apply to the Quota Program for halibut, the Hired Master Rule for that species cannot "violate" the MSA's Standards under any source of law. With the exception of National Standard 4, therefore, the Court need not examine or decide Plaintiffs' halibut-related arguments under the MSA. In particular, Plaintiffs cannot demonstrate that the Hired Master Rule is unlawful by alleging adverse effects to the halibut fishery under National Standards 1, 2, 9, and 10. See Pls. Br. at 26-27, 29. Regardless, Plaintiffs' construction and application of the National Standards miss the mark for reasons described below.

C. The Hired Master Rule Will Achieve Optimum Yield.

National Standard 1 requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(1). As defined by the MSA, the "optimum yield" is the amount of fish which:

> (A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;
>
> (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and
>
> (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

16 U.S.C. § 1802(33).

Implementing regulations further refine National Standard 1 by defining the "optimum yield from each fishery" as "a long-term series of catches such that the average

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halibut [Quota] Program." 58 Fed. Reg. at 59377. In short, Federal Defendants have never deviated from the unescapable conclusion that most of the MSA's National Standards *do not* apply to regulations promulgated under the Halibut Act.

catch is equal to the [optimum yield], overfishing is prevented, the long term average biomass" is maintained, "and overfished stocks and stock complexes are rebuilt consistent with timing and other requirements" of the MSA. 50 C.F.R. § 600.310(e)(3)(i)(B). Pursuant to this language and the MSA itself, NMFS has "broad discretion to define optimum yield and overfishing." Nw. Envtl. Def. Ctr. v. Brennen, 958 F.2d 930, 935 (9th Cir. 1992).

The Hired Master Rule complies with National Standard 1 because it will not affect the optimum yield for the groundfish fishery (there is no explicit optimum yield for sablefish, only an optimum yield for the grounfdish fishery, of which sablefish comprises one small part).[3] See 80 Fed. Reg. 11919 (March 5, 2015); 80 Fed. Reg. 10250 (Feb. 25, 2015). As NMFS explained, the Hired Master Rule permits so many responses to its Quota Share restrictions – including personal harvest, sale, and consolidation with blocked Quota Share – that very little Quota Share is expected to go unfished after the Rule's implementation. 79 Fed. Reg. at 43687; AR 10209. Indeed, any effect of the Rule on optimum yield would likely to be positive, since the Rule will encourage full harvest by decreasing Quota Share prices and increasing liquidity. AR 10209.

Without legal or record support, Plaintiffs argue that the Rule will "prevent [Quota Share] sales and purchases, thereby interfering with normal business operations in a way not intended" in the Fishing Quota Program. ECF No. 25 ("Pls.' Br.") at 25. This unsubstantiated theory is doubly wrong. First, the Hired Master Rule will *accelerate* Quota

[3] As noted, there is no "optimum yield" requirement for halibut under the Halibut Act. See supra at 5. Regardless, the Hired Master Rule is not likely to change halibut harvest for the reasons set forth above, since the Rule's application to halibut and to sablefish is uniform in all relevant respects.

Share transfers for the reasons just described, creating a market that can better respond to changing conditions. Second, the fine-tuning of Quota Share transfer incentives was always "intended" as part of the Fishing Quota Program: at the Program's inception, the Council and NMFS were acutely aware that transition towards an owner-onboard depended on a precise balance between free-transfer and regulations designed to halt consolidation. See supra at 11-13. The Hired Master Rule is therefore entirely consistent with the Program's attempts to encourage new entrants while achieving optimum yield. See AR 20224 (noting that Fishing Quota Program sought to address "adverse trends in halibut and sablefish stocks"). Because Plaintiffs cannot supply evidence to the contrary, the Court should reject their arguments under National Standard 1. See Brennen, 958 F.2d at 935 (rejecting optimum yield argument where plaintiff "ha[d] not produced any evidence" weighing against NMFS' conclusions).

D. The Hired Master Rule Relies On The Best Available Data.

National Standard 2 requires that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). "In deciding whether scientific information is the 'best available,' substantial deference is accorded to the Secretary's assessment of the quality of what *is* available." Gen. Category Scallop Fishermen v. Sec'y, U.S. Dep't of Commerce, 635 F.3d 106, 115 (3d Cir. 2011) (emphasis added). See also Conservation Cong. v. Finley, 774 F.3d 611, 620 (9th Cir. 2014) ("The determination of what constitutes the *best* scientific data available belongs to the agency's special expertise, and thus when examining such a determination, a reviewing court must generally be at its most deferential.") (construing nearly identical provision in Endangered Species Act) (citation and quotation omitted).

"[B]y specifying that decisions be based on the best scientific information *available*, the [MSA] recognizes that such information may not be exact or totally complete." Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994, 1003 (9th Cir. 2004). Accordingly, "the Secretary can act when the available science is incomplete or imperfect, even where concerns have been raised about the accuracy of the methods or models employed." Gen. Category Scallop Fishermen, 635 F.3d at 115 (citation omitted).

As noted, the Hired Master Rule drew on a bevy of data showing that use of hired masters had increased in tandem with the consolidation of Quota Share. To cite only one passage from the proposed rule, NMFS explained that:

> Between 1998 and 2009, the number of individual initial recipients who hire masters in the halibut fishery increased from 110 to 210 (a 91 percent increase), while in the sablefish fishery the number of individual initial recipients using hired masters increased from 46 to 91 (a 98 percent increase). The percentage of halibut IFQ landed by hired masters increased from 7.9 percent of the total IFQ landings in 1998 to 19.3 percent in 2009. Similarly, the percentage of sablefish IFQ landed by hired masters increased from 7.7 percent of the total IFQ landings in 1998 to 15.0 percent in 2009.

78 Fed. Reg. at 24709. See also supra at 8-9, 13-14.

While Plaintiffs claim that the above data is not the "best available," they do not identify any "better" data that NMFS might have used. "Bereft of any contrary science, plaintiffs' bare allegation that the agency's distinction conflicts with the 'best scientific evidence available'" must fail. Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1120 (9th Cir. 2006). See also Brennen, 958 F.2d at 936 (9th Cir. 1992) (rejecting challenge under National Standard 2 where plaintiff had "not pointed to any scientific evidence inconsistent with the Secretary's decision").

Instead of pointing to data that NMFS should have analyzed before promulgating the Hired Master Rule, Plaintiffs complain that NMFS *offered* "no evidence that the [Rule] will accelerate" transfer of Quota Shares. Pls.' Bt. at 26. But unless Plaintiffs can show that such data exists, Defendants cannot have violated the MSA's mandate to employ the "best scientific

information *available*." 16 U.S.C. § 1851(a)(2) (emphasis added). Cf. San Luis & Delta-Mendota Water Auth, 747 F.3d at 602 ("where the information is not readily available, we cannot insist on perfection: The 'best scientific data available,' does not mean 'the best scientific data possible.'") (citation omitted). In this case, Plaintiffs have identified no data on the Rule's effect that might have been available to NMFS *prior* to the Rule's adoption, completely foreclosing their argument. See Washington Crab Producers, Inc. v. Mosbacher, 917 F.2d 29 (9th Cir. 1990) ("the record supports the Secretary's assertion that the information . . . [was] unavailable at the time of the Secretary's decision, because . . . fishery planning is completed *after* development of ocean regulations").[4] Indeed, Plaintiffs have nowhere challenged NMFS' determination that "[i]t is difficult to predict with precision the impacts" of the Hired Master Rule "because the response of each [Quota Share] holder will be different." 79 Fed. Reg. at 43685.

Plaintiffs also interpret the record to show that the Hired Master Rule is unnecessary, since, on their reading of the data, "transition to an [owner-onboard] fleet is occurring." Pls.' Br. at 26. As a threshold matter, this argument challenges only the *weight* of record evidence, not whether NMFS considered the "best available" evidence in the first place. For that reason, Plaintiffs interpretation lends no support to its argument under National Standard 2, which does

[4] Plaintiffs reference "testimony" purporting to show that the Hired Master Program will not achieve its intended goal, citing to anecdotal observations from a Quota Share broker. Pls.' Br. at 26 (citing AR:30579-80). But as the Ninth Circuit and the MSA's implementing regulations make clear, National Standard 2 requires not only data, but data produced by scientific methods. See Oregon Trollers Ass'n, 452 F.3d at 1120; Brennen, 958 F.2d at 936; 50 C.F.R. § 600.315(a)(1)(ii)(4) ("Scientific information includes, but is not limited to, factual input, data, models, analyses, technical information, or scientific assessments."). Conversely, Plaintiffs' testimony is simply a lay, non-scientific opinion entitled to no weight by the Court, much less evaluation as "scientific data." Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989); Price Road Neighborhood Ass'n v. U.S. Dep't. of Transp., 113 F.3d 1505, 1511 (9th Cir. 1997).

not require that NMFS reach particular conclusions after evaluating the "best available data." See Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 843 (9th Cir. 2003) ("Courts defer to agencies when specialists express conflicting views, because an agency must have discretion to rely on the reasonable opinions of its own qualified experts.") (citation omitted).

But even if the Court were to entertain this theory under National Standard 2, it in no way casts doubt on the Hired Master Rule. While Plaintiffs are correct that second-generation fishermen now hold more Quota Share than they did in 2000, the Fishing Quota Program and the Hired Master Rule do not aspire to a "partial" or "increased" owner-onboard fleet. Instead, the Program's essential goal is an entirely owner-onboard fleet, a milestone that NMFS and the Council believe is unachievable as long as the Hired Master Exception remains in effect. Because it is uncontested that fewer Quota Share holders now rely on more hired masters to harvest a growing proportion of Quota Share, the agency's conclusion on this point is rational and entirely consistent with National Standard 2.

E. Although The Hired Master Rule Is Not A "Distribution," "Allocation," Or "Assignment" Of Fishing Privileges, The Rule Is Fair And Equitable Within The Meaning Of Governing Regulations.

National Standard 4 requires that "[i]f it becomes necessary to *allocate or assign* fishing privileges among various United States fishermen, such allocation shall be . . . fair and equitable to all such fishermen." 16 U.S.C. § 1851(a)(4) (emphasis added). Likewise, the Halibut Act requires that regulations promulgated under the Act are "consistent" with the MSA's "criteria" for limited access programs. Id. at § 773c(c). These criteria require that NMFS consider, among other factors, "the fair and equitable *distribution* of access privileges in the fishery." 16 U.S.C. § 1853(b)(6)(f) (emphasis added).

The requirements of National Standard 4 do not apply to the Hired Master Rule, which does not "assign" or "allocate" fishing privileges. NMFS has defined these terms as they appear in the MSA, concluding that "[a]n 'allocation' or 'assignment' of fishing privileges is a direct and deliberate *distribution* of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals." 50 C.F.R. § 600.325(c)(1) (emphasis added). The Hired Master Rule, conversely, "*limits* the use of hired masters to harvest . . . [Quota Share] that *has been* allocated or assigned." 79 Fed. Reg. at 43687 (emphasis added). Likewise, the Final Master Rule is not a "distribution" under the Halibut Act, since the Rule regulates Quota Share *already* distributed.[5] Because the "fair and equitable" requirement does not apply to the Hired Master Rule in any respect, Federal Defendants are entitled to summary judgment on Plaintiffs' sixth claim for relief. See Nat'l Coal. For Marine Conservation v. Evans, 231 F. Supp. 2d 119, 131 (D.D.C. 2002) (rejecting claim under National Standard 4 where challenged action had only "incidental allocative effects"); Little Bay Lobster Co. v. Evans, No. CIV. 00-007-M, 2002 WL 1005105, at *24 (D.N.H. May 16, 2002) aff'd sub nom. 352 F.3d 462 (1st Cir. 2003) (same).

Even if the MSA's requirement of "fair and equitable" allocations applied to a rule that allocates nothing at all, the Hired Master Rule easily satisfies National Standard 4. "When

[5] Plaintiffs concede, as they must, that the Hired Master Rule merely "changes" preexisting Quota Share, but contend that this change is also an "allocation," since fishery participants will presumably respond to the Rule by transferring Share. Pls.' Br. at 27. The hypothetical response of Quota Share holders, however, is plainly not a "*direct and deliberate* distribution" of Quota Share *by NMFS*, and thus cannot qualify as an "allocation," "assignment," or "distribution." 50 C.F.R. § 600.325(c)(1) (emphasis added). Under Plaintiffs' reading of the regulation, it is difficult to conceive of any agency action which would not qualify as an allocation of Quota Share, since individual fishery participants might chose to transfer Share in response to regulation of fishing vessels, fishing season, or any number of other factors which could change the Quota's value.

determining fairness and equity, the focus is on the purpose of a regulation and not its impact." Charter Operators of Alaska v. Blank, 844 F. Supp. 2d 122, 131 (D.D.C. 2012) (citation omitted). Thus, agency action satisfies National Standard 4 if the action is "rationally connected to the achievement of optimum yield or with the furtherance of a legitimate [Fishery Management Plan] objective.'" Fishermen's Finest, Inc. v. Locke, 593 F.3d 886, 890 (9th Cir. 2010) (quoting 16 U.S.C. § 600.325(c)(3)(i)(A)). And because "'an allocation is the advantaging of one group to the detriment of another . . . [,] 'an allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups.'" Id. (citing 50 C.F.R. § 600.325(c)(3)(i)(B)).

The Hired Master Rule makes important strides towards an "owner-onboard" fleet, a goal of both the Council and NMFS since the Fishing Quota Program's inception. Because NMFS issued the Rule only after determining that its costs are outweighed by benefits to coastal communities and to fishermen, the Rule would easily pass muster under National Standard 4. See 79 Fed. Reg. at 43687; AR 10209. Thus, even if Plaintiffs' "entirely legitimate interest in making a living from the fishery has been sacrificed to an administrative judgment about conservation of fish and efficiency of the industry," that outcome is a lawful and "unavoidable consequence of the statutory scheme." Alliance Against IFQs v. Brown, 84 F.3d 343, 350 (9th Cir. 1996).

Plaintiffs do not contest this judgment, but complain that NMFS' decision was not reduced to a monetary cost-benefit analyst. Pls.' Br. at 27-28. No such requirement exists in National Standard 4, which simply suggests that "[t]he Council should make an initial estimate

of the relative benefits and hardships imposed by the allocation," and does not require that NMFS reduce this analysis to dollars and cents. 50 C.F.R. § 600.325(c)(3)(i)(B).[6]

Likewise, neither the MSA nor its implementing regulations demand that NMFS subordinate conservation and management measures to the interests of disabled fishermen. Pls.' Br. at 28. While these considerations may inform NMFS' application under National Standard 4, they preordain no outcomes for particular participants or litigants. See Fishermen's Finest, Inc. v. Locke, 593 F.3d 886, 896 (9th Cir. 2010) ("[t]he Council is not tied down by the need to allocate in order to preserve . . . fisheries for participants"). Instead, regulations promulgated under National Standard 4 and the Halibut Act are "fair and equitable" if NMFS "drew a line based on all the relevant information and alternatives available at the time, and . . . offered a rational reason for this line in [its] response to public comments." Yakutat, Inc. v. Gutierrez, 407 F.3d 1054, 1069 (9th Cir. 2005). Even if National Standard 4 applied in this case, which it does not, the Hired Master Rule meets this standard.

F. The Hired Master Rule Minimizes Bycatch And Promotes Human Safety At Sea To The Maximum Extent Practicable.

National Standard 9 requires that "[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch." 16 U.S.C. § 1851(a)(9). National Standard 10 requires that "[c]onservation and management measures shall, to the extent practicable, promote the

[6] Plaintiffs argue that NMFS' "Regulatory Impact Review is devoid of discussion" concerning National Standard 4. Pls.' Br. at 28. This argument is both false, see AR 10215, and irrelevant, since the Regulatory Impact Review is not designed to evaluate consistency with the National Standards, but to comply with the provisions for interagency review in Executive Order 12866 and the Regulatory Flexibility Act ("RFA"). AR 10173. The Final Rule itself, not the Regulatory Impact Review, amply explains why the Final Rule complies with National Standard 4, and Plaintiffs have not pled claims under the RFA. 79 Fed. Reg. at 43687-68.

safety of human life at sea." 16 U.S.C. § 1851(a)(10). Plaintiffs contend that the Hired Master Rule violates both Standards, but they have waived these challenges by failing to raise them during the rulemaking process. In any event, Plaintiffs' claims are meritless because the Hired Master Rule does not implicate human safety or bycatch.

i. Plaintiffs Have Forfeited Challenges Under Standards Nine And Ten By Failing To Alert NMFS To These Concerns During Proposed Rulemaking.

"Parties must alert an agency to their position and contentions" during rulemaking, and therefore waive "arguments that are not raised during the administrative process." N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1081 (9th Cir. 2011). Otherwise, rulemaking would become a "game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated." Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978).

Plaintiffs have waived their claims under National Standards 9 and 10, since these arguments were not raised during the notice and comment period for the proposed Hired Master Rule. Because the agency had no opportunity to consider and respond to theories that the Rule increases halibut bycatch or decreases human safety at sea, Plaintiffs cannot now accuse NMFS of ignoring these concerns. Accordingly, Federal Defendants are entitled to summary judgment on Plaintiffs' claims under both Standards 9 and 10, and the Court need not address these arguments on their merits. See Te-Moak Tribe of W. Shoshone Indians of Nevada v. U.S. Dep't of the Interior, 565 F.App'x 665, 668 (9th Cir. 2014) (finding plaintiffs had waived issues not raised during public comment period under the National Environmental Policy Act); City of

Santa Clarita v. U.S. Dep't of Interior, 249 F.App'x 502, 505 (9th Cir. 2007) (same, for rule promulgated under Clean Water Act).

ii. The Hired Master Rule Has No Effect On Halibut Bycatch.

"'Bycatch' means fish that are harvested in a fishery, but that are not sold or kept for personal use." 50 C.F.R. § 600.350(c). NMFS has promulgated numerous, detailed regulations designed to limit bycatch in the halibut and groundfish fisheries, and has not disturbed these regulations by issuing the Hired Master Rule. See 50 C.F.R. §679.21. Indeed, sablefish harvest under the Fishing Quota Program is *exempt* from halibut bycatch limits, since the Council and NMFS recognize that the Program produces a net minimization of bycatch. See 80 Fed. Reg. 11932; 90 Fed. Reg. 10263. Because the Hired Master Rule does not allow more bycatch or permit fishing methods leading to greater bycatch, it does not violate National Standard 9.

Plaintiffs disagree, arguing that owners of Quota Share affected by the Hired Master Rule will now harvest halibut as bycatch, not as fish permissibly covered by the Fishing Quota Program. See Pls.' Br. at 29. This argument initially fails because Plaintiffs have provided absolutely no evidence to support their theory.[7] In any event, National Standard 9 is not violated when individual fishermen, rather than NMFS, are responsible for bycatch. See Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150, 167 (D.D.C. 2000) ("Given that pelagic

[7] Plaintiffs reference NMFS' observation, made when first promulgating the Fishing Quota Program, that a "prohibition on [Quota Share] sales could seriously restrict any inseason adjustments by individual fishermen and thus result in significant discards . . . due to the difficulty in exactly matching landings to one's [Quota Share]." AR 20259. When establishing the Fishing Quota Program, NMFS responded to this problem by allowing Quota Share holders to harvest over their Individual Fishing Quotas with only limited penalties. Id. This dynamic has no bearing on Plaintiffs' argument under National Standard 9, since the Hired Master Rule does not forbid the sale of Quota Share. In any event, the Hired Master Rule does not affect the regulations addressing the mismatch between landings and Quota Share, and Plaintiffs have offered no reason to doubt the efficacy of those regulations in reducing bycatch. See 50 C.F.R. §§ 679.40 (d), (e).

sharks are caught only incidentally, NMFS would have to eliminate *all* pelagic shark quotas to guarantee a reduction in bycatch."). Because the MSA does not require NMFS to affirmatively end all halibut bycatch when promulgating regulations, the Hired Master Rule's maintenance of the preexisting bycatch regulations is entirely consistent with National Standard 9. See Pac. Coast Fed'n Of Fishermen's Ass'n v. Locke, No. C 10-04790 CRB, 2011 WL 3443533, at *15 (N.D. Cal. Aug. 5, 2011) (National Standard 9 not violated where "action might not reduce bycatch or bycatch mortality *as much* as other management measures . . . might have").

iii. The Hired Master Rule Promotes The Safety Of Human Life At Sea Because It Does Not Affect Safety.

Although National Standard 10 was never at issue during the Hired Master Rule's development and is thus not properly before the Court, the Rule complies with National Standard 10 because it does not address itself to components of the groundfish and halibut fisheries that affect safety at sea. The Rule's narrow restrictions on Quota Share ownership do not regulate the act of fishing itself, and thus do not influence human safety at all. See 50 C.F.R. § 600.35(c) (considerations under National Standard 10 should include "operating environment," "gear and vessel loading requirements," and "limited season and area fisheries"). Such rules comply with National Standard 10 virtually *per se*, because "[t]he fact that the measures are 'neutral,' and do not affirmatively promote safety, does not mean that they do not promote safety 'to the extent practicable.'" Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1123 (9th Cir. 2006).

The Court should reject Plaintiff's undeveloped argument that the Rule violates National Standard 10 because it allegedly "[forces] disabled fishermen to choose between losing their income and being aboard a vessel." Not only does the Rule satisfy National Standard 10 for the reasons described above, but courts have consistently dismissed arguments that a regulation's incidental, downstream effects on individual fishermen or vessels is somehow a failure of NMFS

to "promote" safety to the "extent practicable." 16 U.S.C. § 1851(a)(10). See Oregon Trollers Ass'n, 452 F.3d at 1123 (9th Cir. 2006); Nat'l Coal. For Marine Conservation v. Evans, 231 F. Supp. 2d 119, 134 (D.D.C. 2002) (rejecting argument where "NMFS pointed out . . . that whether the fishers choose to undertake these risks is beyond NMFS's control, and the fishers have the opportunity to explore other, non-risky options"). Here, for instance, initial recipients affected by the Rule may respond to its restrictions by transferring their Quota Share, consolidating the Quota, fishing the Quota, or simply leaving the Quota unused. In short, Plaintiffs' dilemma is illusory and, in any event, not attributable to the Hired Master Rule in a fashion that would violate National Standard 10.

II. THE HIRED MASTER RULE HAS ONLY PROSPECTIVE EFFECT.

Although the Hired Master Rule did not become effective until December, 2014, it regulates the use of Quota Share acquired after February, 2010, nearly five years prior to the effective date. As explained above, the difference between the Rule's "control date" and "effective date" was necessary to prevent the very dilemma NMFS set out to solve, *i.e.*, the consolidation of Quota Share to the exclusion of new fishermen. Were the "control" and "effective" dates identical, Program participants would have been incentivized to purchase and hold as much Quota Share as possible before the Rule's operation, cornering the market. See also AR 1029 ("The Council recognizes that any [control] date would affect some individuals who would claim ignorance of the Council's action(s) or who would claim intent to purchase [Quota Share] that was not available as of February 12, 2010.").

By regulating the future use of previously acquired Quota Share, the Hired Master Rule affects the prospective use and value of that Quota. Plaintiff Fairweather confuses this process with retroactive rulemaking, in which an agency seeks to undo or amend consummated

transactions themselves. As set forth below, the Hired Master Rule has no such effect. At most, it upsets Fairweather's investment in Quota Share without seeking to unwind the investment itself, a commonplace and entirely permissible exercise of NMFS' delegated authority.

A. The Hired Master Rule Prospectively Regulates The Use Of Quota Share After The Rule's Effective Date.

"[T]he presumption against retroactive legislation is deeply rooted" in the law, since "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). Accordingly, "statutory retroactivity has long been disfavored," though not flatly prohibited, and courts ordinarily do not give effect to retroactive law. Id. at 268. This principle applies equally to administrative rulemaking. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

The Ninth Circuit applies rules retroactively only if two conditions are satisfied. First, a reviewing court should "determine whether the statute or regulation clearly expresses that the law is to be applied retroactively." Sacks v. SEC., 648 F.3d 945, 951 (9th Cir. 2011). When an administrative rule is at issue, this step itself contains two parts: "whether Congress has expressly conferred power on the agency to promulgate rules with retroactive effect and, if so, whether the agency clearly intended for the rule to have retroactive effect." Elim Church of God v. Harris, 722 F.3d 1137, 1141 (9th Cir. 2013) (quotation omitted).

If the agency action does not purport to operate retroactively, the court must next "consider whether application of the regulation would have a retroactive effect by attaching new legal consequences to events completed before its enactment." Sacks, 648 F.3d at 951 (citation omitted). Conversely, if "the law changes the legal consequences of conduct that takes place after the law goes into effect, the law operates on that conduct prospectively." U.S. ex rel.

Anderson v. N. Telecom, Inc., 52 F.3d 810, 814 (9th Cir. 1995), as amended (May 26, 1995). Moreover, a "statute does not operate [retroactively] merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Landgraf, 511 U.S. at 269. "Thus, for example, even though 'a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property,' a change in the property tax regime" is not retroactive for purchasers who bought property before the amendment. Polone v. Comm'n of Internal Revenue, 505 F.3d 966, 972 (9th Cir. 2007) (quoting Landgraf, 511 U.S. at 270 n.24). If a rule has retroactive effect but does not purport to operate retroactively, the reviewing Court must not give effect to the Rule. Elim Church of God, 722 F.3d at 1141.

As an initial matter, the Hired Master Rule does not "clearly express[] that the law is to be applied retroactively." Sacks, 648 F.3d at 951. Instead, the Rule prospectively "*prohibits* an initial [Quota Share] recipient from using a hired master to harvest [Individual Fishing Quota] derived from . . . [Quota Share] received by transfer after February 12, 2010." 79 Fed. Reg. at 43679 (emphasis added). As the Rule explains, the effective date of this prohibition is December 1, 2014, or nearly five months *after* the Rule's publication in the Federal Register.[8] Id. On its

[8] For this reason, there is no merit to Plaintiffs' claim that Hired Master Rule violates 5 U.S.C. § 553(d), which requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date." See Pls.' Br. at 23. As noted, the Hired Master Rule became effective several months after publication in the Federal Register. Consistent with this unmistakable timeline, the cases cited by Plaintiffs for their argument are irrelevant. For instance, Serv. Employees Internationl Union, Local 102 v. County. of San Diego declined to apply a "salary test" rule under the Fair Labor Standards Act in a dispute between county employees and the county not because the rule was published absent notice, but because the Department of Labor had elsewhere conceded that the test was impermissibly retroactive. 60 F.3d 1346, 1353. (9th Cir. 1994). And in Bohner v. Daniels, the court determined only that a Bureau of Prisons rule did not meet the *exceptions* to 5 U.S.C. § 553(d), which the Bureau conceded it had otherwise violated. 243 F. Supp. 2d 1171, 1175 (D. Or. 2003) aff'd sub nom.

face, therefore, the Hired Master Rule operates only prospectively. See, e.g., Polone, 505 F.3d at 972; Koch v. SEC, 177 F.3d 784, 786 (9th Cir. 1999) ("the fact that Congress delayed" a statute's effective date, "rather than making it effective upon enactment, suggests that Congress did not mean . . . [the statute] to be retroactive").

Nor does the Hired Master Rule "[attach] new legal consequences to events *completed* before its enactment." Landgraf, 511 U.S. at 270 (emphasis added). By regulating the future use of Quota Share, not its prior transfer, the Hired Master Rule "falls squarely into the Supreme Court's warning that 'a statute does not operate [retroactively] merely because it is applied in a case *arising from* conduct antedating [a] statute's enactment.'" Polone, 505 F.3d at 972 (quoting Landgraf, 511 U.S. at 269) (emphasis added). The Hired Master Rule does not nullify Fairweather's acquisition of Quota Share, nor does it impose any liabilities or obligations on the acquisition itself. Instead, the Hired Master Rule's only effect is to restrict what Fairweather may do with its Quota Share *in the future*. This operation is prospective and entirely consistent with the MSA, which expressly notes that Quota Share "may be revoked, limited, or modified at any time." 16 U.S.C. § 1853a(b)(2).

B. The Prospective Diminution Of Plaintiff's Holdings Is Not An Imposition Of "New Legal Consequences" To Prior Activity.

Fairweather complains that the Hired Master Rule "attaches new legal consequences" to its prior acquisition of Quota Share because it "is unable to harvest [Quota Share] and the value of [its] lawful contracts was destroyed." Pls.' Br. at 22. But even assuming that the value of Plaintiffs' Quota Share has been "destroyed," that destruction is an incidental change *in fact*

Paulsen v. Daniels, 413 F.3d 999 (9th Cir. 2005). Neither case holds that five months' warning of a final rule's effect violates the APA's requirement for 30 days' "cooling off" period.

compelled by prospective operation of law, not a retroactive reworking of Fairweather's Quota Share purchase itself.[9] Consistent with this understanding, courts have uniformly dismissed retroactivity arguments where a plaintiff objects to regulation causing a prospective loss of income or return on investment. As one court has explained:

> It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.

Chemical Waste Mgmt. v. EPA, 869 F.2d 1526 (D.C. Cir. 1989).

Thus, in American Mining Congress v. Environmental Protection Agency, 965 F.2d 759, 769 (9th Cir. 1992), plaintiff argued that a rule mandating permits for inactive mines "retroactively" devalued the return on prior investments in those mines. The Ninth Circuit disagreed, explaining that while "[t]he rule may frustrate the economic expectations of some inactive mine owners . . . [,] regulations are not retroactive merely because they require a change

[9] Plaintiff Fairweather also complains that because NMFS approves Quota Share transfers, the agency ought to have notified Fairweather that its transfers might be unadvisable in light of the impending Hired Master Rule, which at the time of most Fairweather purchases was not even a formal Council proposal. Pls.' Br. at 22. This argument, which says nothing about the Rule's retroactive effect, suffers from at least three defects. First, NMFS had no means of forecasting the precise contours of the final Hired Master Rule, and thus had no opportunity to opine on the Rule's intersection with Fairweather's business ventures. See Oregon Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006) (defining "final agency action" under the APA). Second, the MSA and its implementing regulations do not condition approval of Quota Share transfers on hypothetical rulemaking or Council proposals, likely precluding NMFS from deciding proposed transfers with reference to these actions. See 50 C.F.R. § 679.41(c). Third, NMFS lacks a discrete, mandatory duty to opine on the wisdom of Quota Share transfers, and Plaintiffs' claim is therefore not actionable under the APA, 5 U.S.C. § 706(1). See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004). In any event, Plaintiffs' argument would not excuse Fairweather's purchase of Quota Share *after* NMFS published the proposed Hired Master Rule, since, by Plaintiffs' admission, Fairweather undertook these transactions with full knowledge of the Rule's likely effect. Pls.' Br. at 22 (explaining that Fairweather purchased the Quota Share anyway because it "did not believe" the Hired Master Rule would become final).

in existing practices." Id. at 770. Likewise, plaintiffs in Mobile Relay Associates v. FCC, 457 F.3d 1, 3 (D.C. Cir. 2006), sought review of an order restricting the scope of licenses on certain electromagnetic spectrums. As in American Mining Congress, the court rejected plaintiffs' contention that "frustrated expectations" are tantamount to retroactive rulemaking. Id. at 11. "To conclude otherwise," the court explained, would impermissibly "hamstring . . . any agency whose decision affects the financial expectations of regulated entities." Id. See generally Geoffrey C. Weien, Retroactive Rulemaking, 30 Harv. J.L. & Pub. Pol'y 749, 752 & n.21 (2007) (observing that "most cases challenging agency action under Bowen at the appellate level result in agency victories," and cataloguing decisions).

This case is indistinguishable from American Mining Congress and Mobile Relay Associates. Although Plaintiffs may have forecasted returns that the Hired Master Rule has now foreclosed, the Rule has done so not by penalizing Fairweather's prior use of Quota Share or by undoing Fairweather's purchase of the Quota. Instead, NMFS has prospectively regulated the item of purchase, a revocable license over which Defendants retained near-plenary control before, during, and after the transfer. See 16 U.S.C. § 1853a(b). Any collateral effects to *present* value are a far cry from the "'quintessentially backward looking'" regulations that the Supreme Court and Ninth Circuit have nullified. Ditullio v. Boehm, 662 F.3d 1091, 1100 (9th Cir. 2011) (quoting Landgraf, 511 U.S. at 282-83).

The authority cited by Plaintiffs is not to the contrary. In Ditullio, for instance, the Ninth Circuit struck down a rule allowing victims to seek compensatory and punitive damages for sex trafficking that had occurred before the rule's enactment, reasoning that the rule impermissibly attached an "important new legal burden" *to the conduct*. 662 F.3d at 1101 (quotation omitted). Here, however, NMFS has not penalized Plaintiffs for the act of Quota Share purchase itself or

for the use of a hired master to fish Quota Share acquired between the February, 2010 control date and the December, 2014 effective date. It has merely placed a new condition on the use of Quota Share received by transfer after the control date.

Similarly, Camins v. Gonzales, 500 F.3d 872, 884 (9th Cir. 2007), invalided a rule that retroactively amended the *substance* of prior transactions. Specifically, the rule restricted permanent residents from entry into the United States if the resident was previously convicted of certain offenses. When striking down the rule as applied to residents who had received their convictions by way of a plea bargain, the Ninth Circuit emphasized that the "immigration consequences" of such bargains were an essential component of the bargain's *quid pro quo*. Id. For this reason, the rule disrupted "precisely the sort of settled reliance interests that, in the absence of a clear statement to the contrary, Landgraf presumes Congress intended to leave intact." Id.

Here, however, Fairweather could have no "settled reliance interest" in Quota Share. To the contrary, Congress has explained that Quota Share "may be revoked, limited, or modified at any time," and that Quota Share "shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested by the holder." 16 U.S.C. §§ 1853a(b)(2), (4). The Hired Master Rule's Amendment of Quota in no way disturbs Congress' intent, much less retroactively. See Fernandez-Vargas v. Gonzales, 548 U.S. 30, 45 (2006) (rejecting retroactivity challenge where plaintiff had "ample warning" of change in law); Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury, 638 F.3d 794, 799

(D.C. Cir. 2011) (same, where plaintiff claimed an interest in trademarks that Congress had provided could be "amended, modified, or revoked at any time").[10]

Finally, Sierra Forest Legacy v. Sherman does not assist Plaintiffs' case. 646 F.3d 1161, (9th Cir. 2011). There, Judge Reinhardt rejected the Forest Service's argument that Congress had explicitly authorized the *admittedly* retroactive application of certain regulations. Id. at 1192 (Reinhardt, J., concurring). In particular, Judge Reinhardt reasoned that the argument was foreclosed because a prior three judge panel of the Ninth Circuit had already decided the issue. Id. at 1189-90. Unlike in Sherman, the Hired Master Rule is neither retroactive nor governed by *stare decisis*. In any event, Judge Reinhardt's holding is not binding on this or any other court: as the full panel in Sherman explained, the two judge majority reached its conclusions for entirely independent reasons. Id. at 1169 n.1 (per curium). Accordingly, the decision lacks any "binding authority" or "precedential value" for future cases, and – like the remainder of Plaintiffs' argument – cannot transform the Hired Master Rule's prospective, incidental effects on Fairweather's investment into a retroactive strike on the company's purchase. Id. (quotation omitted).

[10] Courts sometimes frame this inquiry as determining whether rights are "vested," refusing to give effect to law which retroactively impairs "vested rights." See Ditullio, 662 F.3d at 1101; Landgraf, 511 U.S. at 269, 280; see generally Geoffrey C. Weien, Retroactive Rulemaking, 30 Harv. J.L. & Pub. Pol'y at 751-52 ("federal appeals courts analyzing challenges under Bowen have not done so in a uniform way, resulting in a confusing legal landscape for agencies, regulated parties, and the public"). However, the Ninth Circuit has not consistently adopted the "vested rights" analysis. Compare Ditullio, 662 F.3d at 1101 (classifying Gonzales as "vested rights" case) with Gonzales, 500 F.3d at 882-84 (resolving retroactivity challenge without reference to "vested rights"). Whatever the rubric, Fairweather has no rights which would sustain its retroactivity challenge. See 16 U.S.C. § 1853a(b)(2); Empresa Cubana Exportadora de Alimentos y Productos Varios, 638 F.3d at 799 (rejecting challenge to similar permits under "vested rights" analysis).

C. Plaintiffs' Due Process Claim Is Superfluous And Need Not Be Addressed By The Court.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." As Landgraf explains, a deprivation of property by operation of otherwise-permissible retroactive law may run afoul of the Due Process Clause by depriving persons of "fair notice and repose." 511 U.S. at 266.

The Court need not address this argument under any circumstance, since the Rule is either prospective or retroactive and barred *by statute*. Under Ninth Circuit law, courts should not permit retroactive application of regulations where the regulation has a retroactive effect but the agency has purported to issue a prospective rule. Elim Church of God, 722 F.3d at 1141. As noted, NMFS has purported to promulgate a prospective rule and contends that the rule has only prospective effect. If the Court finds that the Rule has such effects, there is plainly no need to consider whether the Rule's retroactive operation deprives persons of due process.

If the Court disagrees and finds that the Hired Master Rule has a retroactive effect, the agency's stated rationale precludes the Court from allowing the Rule's operation. Under this scenario, the Hired Master Rule would simply be invalid under the APA, the MSA, and the Halibut Act, nullifying the Rule (to the extent it is retroactive) and supplying Plaintiffs with their requested relief. Without retroactive application in the first place, the Rule cannot possibly operate to deprive persons of due process, and the Court therefore has no need, under any circumstance, to consider whether the Rule is congressionally-approved but constitutionally impermissible.

III. THE HIRED MASTER RULE COMPLIES WITH THE REHABILITATION ACT AND THE APA.

According to Plaintiff Ray Welsh, the Hired Master Rule violates the Rehabilitation Act because it discriminates against holders of Quota Share who, due to disability, are unable to remain onboard their vessels. As a threshold matter, this argument falters because disabled fishermen retain meaningful access to the Fishing Quota Program notwithstanding the Hired Master Rule. In any event, the Rule advances the critically important goal of an owner-onboard fleet – an objective that necessarily demands the physical ability to remain onboard a fishing vessel – and NMFS cannot further accommodate participants like Captain Welsh absent the virtual elimination of both the Hired Master Rule and the Fishing Quota Program itself. Accordingly, the Hired Master Rule complies with the Rehabilitation Act, and Defendants are entitled to summary judgment on Plaintiffs' first and second claims for relief. [11]

[11] Plaintiff's Rehabilitation Act claims are pled as two alternative causes of action in the Amended Complaint. In Count One, Plaintiff asserts a freestanding claim under Section 504 of the Rehabilitation Act, alleging that the Hired Master Rule unlawfully discriminates against disabled holders of Quota Share who are unable to remain onboard their vessels. See ECF No. 18 at ¶¶ 56-71. In Count Two, Plaintiff pleads an alternative cause of action under the APA, alleging that the Hired Master Rule is inconsistent with the Rehabilitation Act. Id. at ¶¶ 72-87. This Court does not have jurisdiction over Count One, because Section 504 of the Rehabilitation Act does not afford Plaintiff a private cause of action. See, e.g., Cousins v. Sec'y of the U.S. Dep't of Transp., 880 F.2d 603, 605–06 (1st Cir. 1989) (en banc) (Breyer, J.); Clark v. Skinner, 937 F.2d 123, 125–26 (4th Cir. 1991). While two Ninth Circuit cases have reached contrary conclusions – see J.L. v. Soc. Sec. Admin., 971 F.2d 260, 264 (9th Cir. 1992); Doe v. Attorney Gen., 941 F.2d 780, 794–95 (9th Cir. 1991) – those cases have been overruled by the Supreme Court's decision in Lane v. Pena. 518 U.S. 187, 197 (1996) (holding that the Rehabilitation Act "treat[s] federal Executive agencies differently from other § 504(a) defendants for purposes of remedies"). However, the Court need not reach the issue of whether Section 504 provides a private right of action in this particular case, because Plaintiffs have appropriately plead an alternative cause of action under the APA, the proper mechanism for reviewing claims of disability discrimination in federally-run programs.

A. The Hired Master Rule Provides Reasonable Accommodation To Disabled Participants In The Fishing Quota Program.

To demonstrate a Rehabilitation Act violation, a plaintiff must show that (1) he is an "individual with a disability;" (2) he is "otherwise qualified" to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance or is conducted by an Executive branch agency. See Weinreich v. Los Angeles Cnty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (citing 29 U.S.C. § 794).

At issue in this motion is whether the Hired Master Rule denies benefits of the Fishing Quota Program to disabled fishermen solely by reason of their disabilities. The focus of this inquiry is "whether disabled persons were denied 'meaningful access'" to government services or benefits. Mark H. v. Lemahieu, 513 F.3d 922, 937 (9th Cir. 2008) (citation omitted). "Meaningful access," in turn, requires only that executive agencies provide "reasonable accommodations" to disabled individuals. Alexander v. Choate, 469 U.S. 287, 301 (1985); Mark H. v. Hamamoto, 620 F.3d 1090, 1097 (9th Cir. 2010).

The Hired Master Rule passes muster under the Rehabilitation Act because it provides disabled persons with meaningful access to the Fishing Quota Program. The Hired Master Rule does not forbid disabled fishermen – including those who cannot remain onboard fishing vessels – from participation in the Program or from using hired masters altogether. Instead, the Rule simply curtails the use of hired masters for *some* Quota Share, leaving undisturbed all Quota Share transferred before the control date. According to Plaintiff, for instance, the Hired Master Rule affects *at most* 30% of his income from all Quota Share. ECF No. 25-2 ¶7. Assuming that Plaintiff's estimate is correct for purposes of this motion, this type of marginal effect does not deprive disabled participants from meaningful access to the Fishing Quota Program. Bird v.

Lewis & Clark Coll., 303 F.3d 1015, 1021 (9th Cir. 2002) (finding meaningful access where plaintiff "enjoyed many of the benefits offered by the program").

Other aspects of the Rule and the Fishing Quota Program further demonstrate that disabled fishermen are not denied meaningful access to the Program. In particular, the Rule permits all participants affected by the Rule, including disabled participants, to continue using hired masters for certain amounts of consolidated Quota Share purchased after the Control Date. 79 Fed. Reg. at 43682. See supra at 15. In addition, the Fishing Quota Program allows disabled fishermen to seek medical exceptions to Quota Share restrictions for two of every five calendar years. 50 C.F.R. § 679.42(d)(2). These accommodations are more than sufficient to provide meaningful access under the Rehabilitation Act. See Hoffman v. Contra Costa Coll., 21 F. App'x 748, 749 (9th Cir. 2001) (rejecting Rehabilitation Act claim where school provided accommodations to disabled student); Zukle v. Regents of Univ. of California, 166 F.3d 1041, 1048 (9th Cir. 1999) (same).

B. Meaningful Access To The Fishing Quota Program Does Not Require Exceptions To The Owner-Onboard Requirement, Which Is Essential To The Program.

Whatever the precise threshold for meaningful access to the Fishing Quota Program, that definition must exclude Plaintiff's demand that disabled fishermen be *completely* exempted from the Hired Master Rule's owner-onboard cut-off date. As an affirmative defense to Rehabilitation Act claims, an agency may demonstrate that a requested accommodation would disrupt some "essential," "fundamental," or "necessary" components of the agency's program." Se. Cmty. Coll. v. Davis, 442 U.S. 397, 407-09 (U.S. 1979). "Once an individual has admitted that he does not meet such a necessary—as opposed to a merely convenient—standard, the Rehabilitation Act

does not forbid the application to him of a general rule." Buck v. U.S. Dep't of Transp., 56 F.3d 1406, 1408 (D.C. Cir. 1995); Hamamoto, 620 F.3d at 1097.

Because the owner-onboard requirement is fundamental to the Hired Master Rule and the Fishing Quota Program, it need not be waived as part of any "reasonable accommodation. The owner-onboard requirement is essential to the Program's design because it helps stabilize otherwise volatile coastal economies and discourages speculation by distant, absentee holders of Quota Share. 79 Fed. Reg. at 3685. An exemption to the requirement for all disabled fishermen for all time would alter the Fishing Quota Program's fundamental purposes, and is not required under the Rehabilitation Act. See Davis, 442 U.S. at 413 (focus of nursing school on teaching "customary" techniques to the exclusion of the hearing disabled, "far from reflecting any animus against handicapped individuals[,] is shared by many . . . institutions that train persons"); Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 216-17 (2d Cir. 2012) (dismissing challenge to a regulation that "applie[d] to all students, regardless of disability"); Greater Los Angeles Council on Deafness, Inc. v. Cmty. Television of S. Calif., 719 F.2d 1017, 1023 (9th Cir. 1983) ("private defendants did not violate section 504 by failing to . . . caption or sign" television programs in part because "[t]elevision . . . by its nature is composed of . . . audible components"); Buck, 56 F.3d at 1408 ("Where the agency has established a certain safety standard . . . and there is no way in which an individual with a certain handicap can meet that standard, the law does not require the pointless exercise of allowing him to try.").

Plaintiff's arguments to the contrary only underscore the essential nature of the owner-onboard requirement. For example, Plaintiff contends that "preserving the business model of allowing the use of hired masters [is] more fundamental than any [owner-onboard] goal," Pls.' Br. at 12, but ignores the Council's explicit conclusion that hired masters were "*exceptions*" to

the essential, overriding goal of "avoid[ing] absentee ownership of quotas." AR 20260. And while Plaintiff is correct that "[t]here was no fixed or expected timetable for achieving" an owner-onboard fleet, he cites no law showing that a program component is "inessential" under the Rehabilitation Act merely because the program component is implemented without a specific timetable. To the contrary, NMFS promulgated the Fishing Quota Program with an understanding that benchmarks were in some sense incompatible with the owner-onboard transition, observing that "[h]arvesting privileges . . . would be subject to periodic change, including revocation." AR 20270. Thus, the Hired Master Rule explains that "the lack of a timetable" for a wholly owner-onboard fleet "does not prevent the Council and NMFS from taking action now to hasten progress" toward that goal. 79 Fed. Reg. at 43684.

Plaintiffs also gain no traction by noting that the Fishing Quota Program emphasizes a "family-owned and operated" fishery. Pls.' Br. at 13 (citing 48 Fed. Reg. 59375). As the word "operated" makes clear, this goal only underscores the importance of the owner-onboard requirement and Hired Master Rule. Indeed, NMFS has explained that family-owned and operated companies are important to the Fishing Quota Program not because they are "family owned," but because they are likely to include fishermen who personally harvest their Quota Share and provide long-term, stable building blocks for coastal communities. 48 Fed. Reg. 59375. The Program's embrace of family-owned corporations, the agency noted, "implements the policy of all catcher vessel [Quota Share] ultimately being in the hands of individuals . . . , and having those individuals *onboard vessel at all times when fishing for and landing [Individual Fishing Quota] species*." Id. (emphasis added).

Because the owner-onboard requirement has been an essential, fundamental component of the Fishing Quota Program for over two decades, the Rehabilitation Act does not mandate the

amendment sought by Plaintiffs. Equally important, the Hired Master Rule provides meaningful access to the Program and affects disabled participants no less than other absentee Quota holders and speculators, and therefore does not discriminate solely on the basis of disability. Accordingly, the Rule is entirely consistent with the Rehabilitation Act and its implementing regulations.

CONCLUSION

For the forgoing reasons, Federal Defendants respectfully request that the Court grant their motion for summary judgment and deny Plaintiffs' motion for summary judgment. Should the Court remand any portion of the Rule, however, Defendants respectfully request an opportunity to brief the appropriate remedy.

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Respectfully Submitted,

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