NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0084
	)	
PROWLER PARTNERSHIP,	)	
Appellant	)	DECISION ON
	)	RECONSIDERATION
and	)	(PART II)
	)	
GAINHART SAMUELSON,	)	
Respondent	)	September 29, 1997
_____	)	

STATEMENT OF THE CASE

A Decision was issued in this appeal on November 8, 1995. The Decision concluded, among other things, that IFQ credit for certain sablefish landings from the F/V PROWLER in 1987 and 1988, involving fish harvested during research conducted under NMFS contracts, was properly denied to both parties by the Restricted Access Management Division [Division]. The Decision also concluded that one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER in 1989, were properly allocated by the Division to Gainhart Samuelson and denied to the Prowler Partnership.

After the Decision was issued, but before it took effect, the Appellant filed a motion to reconsider the Decision. That motion was granted by this office in an order dated March 5, 1996. The Appellant's Points and Authorities in support of its motion were divided into two parts, which correspond to the two issues decided in the Decision. Because these two issues are distinct and severable, I severed them and issued a Decision on Reconsideration
(Part I), on March 12, 1996, pertaining only to the allocation of 1989 qualifying pounds between Mr. Samuelson and the Prowler Partnership. This Decision on Reconsideration (Part II) deals with the other issue — the landings that resulted from fish harvested during the NMFS surveys.

ISSUE

Whether the Appellant and Respondent were properly denied credit under the IFQ program because the activities of the F/V PROWLER under the 1987 and 1988 NMFS charters for Gulf of Alaska longline surveys constituted "scientific research activity conducted by a scientific research vessel" rather than "fishing" under § 3 of the Magnuson-Stevens Fishery Conservation and Management Act. [16 U.S.C. §§ 1801-1883 (1996)]

SUMMARY

The commercial fishing vessel F/V PROWLER was a *scientific research vessel* while under charter to NMFS in 1987 and 1988. All the harvesting of sablefish aboard the vessel during the charters was done by or on behalf of the U.S. Government in connection with the NMFS surveys and constituted *scientific research activity conducted by a scientific research vessel*. None of the harvesting of fish during the charters constituted commercial fishing. Therefore, the landings of these fish were not *legal landings* for purposes of the IFQ program and cannot form the basis for an issuance of quota shares. The landings in question were properly denied credit by the Division.

DOCUMENTARY EVIDENCE CONSIDERED

In deciding this part of the reconsideration, I have reviewed all relevant documents from the record, including (among others) the following documents:

Received	Identification of document
06 Jun 95	NOAA Technical Memorandum NMFS-AFSC-39, "Assessment of Gulf of Alaska Sablefish and Other Groundfish Species Based on the 1988 National Marine Fisheries Service Longline Survey," H. H. Zenger, Jr., M. F. Sigler, and E. R. Varosi ("Exhibit 5" accompanying Appellant's Appeal) [June 1994]
13 Nov 95	Appellant's Request for Reconsideration [10 Nov 95]
20 Dec 95	Appellant's Points & Authorities in Support of Motion to Reconsider [19 Dec 95]
	Memorandum from Douglas M. Ancona and Michael H. Bancroft to Ben F. Jones ("Exhibit 1") [07 Mar 86]
	Memorandum from Jay S. Johnson to Daniel W. McGovern ("Exhibit 2") [01 Jul 86]
	Affidavit of John Winther ("Exhibit 3") [19 Dec 95]
23 Oct 96	Appellant's Supplemental Memorandum of Authorities [20 Oct 96]
	Solicitation, Offer and Award for Sablefish/Groundfish Vessel Charter OMB No. 0505-0005 ("Exhibit A") [Issued 14 Apr 87]
	Memorandum from Evan Haynes to Dr. George R. Snyder ("Exhibit D") [28 May 85]

Memorandum from T. E. Kruse to William Aron, I. Barrett, and E. C. Fullerton ("Exhibit E") [07 Dec 84]

Also the following documents from NOAA/NMFS sources were made part of the record and considered:

Solicitation, Offer and Award for 70-Day Charter of a Commercial Fishing Vessel OMB No. 0605-0010 [Issued 20 Apr 88]

F/V Prowler Cruise Report PR-88-01, Longline survey of the Gulf of Alaska, July 6 to September 17, 1988, pages 1-4 [12 Jan 89]

Mr. Samuelson states that he agrees with the information and arguments in Part Two of Prowler Partnership's Points and Authorities in Support of Motion for Reconsideration, and he adopts them by reference. (Respondent's Response to Appellant's Points and Authorities in Support of Motion for Reconsideration, at 6.) [21 December 1995; received 8 January 1996]

APPLICABLE LAWS AND REGULATIONS

Sec. 3 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802, as amended through October 11, 1996 (in relevant part):

(4) The term "commercial fishing" means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade.

(15) The term "fishing" means —

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity which is conducted by a scientific research vessel.

(17) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for —

(A) fishing; or

(B) aiding or assisting one or more vessels at sea in the performance of any activity

relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

50 C.F.R. § 600.10 Definitions. (effective July 1, 1996) [61 Fed. Reg. 32543 (1996)] (in relevant part):

Unless defined otherwise in other parts of Chapter VI, the terms in this chapter have the following meanings:

> ***Scientific research activity*** **is, for the purposes of this part, an activity in furtherance of a scientific fishery investigation or study that would meet the definition of fishing under the Magnuson Act, but for the exemption applicable to scientific research activity conducted from a scientific research vessel. Scientific research activity includes, but is not limited to, sampling, collecting, observing, or surveying the fish or fishery resources within the EEZ, at sea, on board scientific research vessels, to increase scientific knowledge of the fishery resources or their environment, or to test a hypothesis as part of a planned, directed investigation or study conducted according to methodologies generally accepted as appropriate for scientific research**. At-sea scientific fishery investigations address one or more issues involving taxonomy, biology, physiology, behavior, disease, aging, growth, mortality, migration, recruitment, distribution, abundance, ecology, stock structure, bycatch, and catch estimation of finfish and shellfish (invertebrate) species considered to be a component of the fishery resources within the EEZ. **Scientific research activity does not include the collection and retention of fish outside the scope of the applicable research plan, or the testing of fishing gear.** . . .
>
> ***Scientific research vessel*** **means a vessel owned or chartered by, and controlled by, a** foreign government agency, **U.S. Government agency (including NOAA** or institutions designated as federally funded research and development centers), U.S. state or territorial agency, university (or other educational institution accredited by a recognized national or international accreditation body), international treaty organization, or scientific institution. . . .

50 C.F.R. § 679.40(a)(2) [formerly 50 C.F.R. § 676.20(a)(1)] (in relevant part):

> (2) Qualified person.
>
> (i) As used in this section, a "qualified person" means a "person," as defined in § 679.2:
>
> (A) That owned a vessel that made **legal landings** of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year; . . ..

* * *

(v) Legal landing of halibut or sablefish —

(A) Definition. As used in this section, a "legal landing of halibut or sablefish" means halibut or **sablefish harvested with fixed gear and landed in compliance with state and Federal regulations in effect at the time of the landing.**

BACKGROUND

On April 14, 1987, NMFS chartered the F/V PROWLER from the Appellant[1] in a contract entitled "Sablefish / Groundfish Vessel Charter." The stated term of the charter was 65 days, to begin on or about July 15, 1987, in Kodiak, Alaska, and end on or about September 20, 1987, in Juneau, Alaska.[2] [1987 Charter, § F.1, at 9; Attachment J.1, at 1] The stated purpose of the charter was "for an assessment survey that is designed to perform scientific research necessary to acquire information to determine the status of sablefish and other groundfish stocks" in the Gulf of Alaska. [1987 Charter, at 5]

Under the terms of the charter, Mr. Winther was to provide the vessel F/V PROWLER, as well as the captain, crew, fuel, and equipment, "except for those items specifically identified as being provided by the Government." [1987 Charter, at 5] NMFS was to provide the bait; all scientific sampling equipment and supplies; and all groundlines, tubs, anchors, chain, gangions, hooks, and related repair materials.[3] [1987 Charter, Attachment J.1, at 5, §H]

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[1]For purposes of discussion only, I will presume that the Appellant was the contractor. Nowhere in either charter does the name "Prowler Partnership" appear, although "John Winther Partner" is listed as the principal for whom John Winther has been authorized to act as agent. [§ K, at 19] "John Winther" is specified as the Offeror. [Charters, at 2] In the Decision on Reconsideration (Part I), I found that the Prowler Partnership never owned the F/V PROWLER, so it is unclear whether the Appellant was actually the Contractor.

[2]Mr. Winther stated that his crew began gearing up for the charter work on June 24, 1987, and took until October 12, 1987, to gear down after the charter work was completed. [Second Affidavit of John R. Winther, 02 Jun 95, at 2].

[3]On page 5 of the 1987 contract, the following sentence appears in handwriting: "In addition we will pay for all bait used." It is not clear who inserted the sentence or to whom "we" refers. Mr. Winther stated that the Prowler Partnership provided fuel, crew, provisions, labor, and bait; much of the fishing gear, including anchors, anchorline, buoyline, buoys, lights, and flags; and employed a captain, engineer, cook, fishermen, and processors. [Second Affidavit of John R. Winther, 02 Jun 95, at 3].

The charter provided that, in lieu of monetary compensation, the contractor would be "permitted to process and sell the catch after scientific observations and samples have been obtained." [1987 Charter, at 5] The charter further provided that the "scientific mission of this survey is the paramount consideration of the charter" and that "the opportunity to sell the catch is included in this solicitation as an incentive to provide the Government as reasonable a charter price as possible." [*Id.*]

The longline survey was conducted on a cooperative basis by two components of the NMFS Northwest and Alaska Fisheries Center. Responsibility for acquiring and analyzing survey data was shared by staff from the Auke Bay Laboratory and the Resource Assessment and Conservation Engineering [RACE] Division. [1987 Charter, Attachment J.1, at 1, §A] The charter specified 19 requirements relating to the size, configuration, capacity, gear, and capabilities of the vessel; eight requirements concerning electronic equipment for the vessel; and six requirements pertaining to the composition and experience of the crew. [*Id.*, at 2-3, §§B-D] The charter provided for a scientific field party of up to five persons, headed by a government employee designated as Chief Scientist, who was to be responsible for implementation of a Scientific Operation Outline and supervision of the other government employees. [*Id.*, at 3, §E]

The vessel captain was to be responsible for all matters relating to safety of personnel, the vessel, and equipment operation. Work-day length and hours were to be determined by the Chief Scientist, in consultation with the vessel captain, but the Chief Scientist was given final authority "in all matters except those relating to safety of the vessel and personnel." When not engaged in vessel operations, processing of the catch, or gear repair, the crew was to assist the field party with obtaining biological data. [1987 Charter, Attachment J.1, at 5, ¶G.1, and at 4, ¶F.3]

The Chief Scientist was responsible for the initial disposition of the catch. The catch was the property of the United States government until the Chief Scientist relinquished responsibility and turned the catch over to the contractor. Components of the catch were to be turned over to the contractor after being examined by the scientific party and after scientific samples had been obtained. Only then did the catch become the property of the contractor. [1987 Charter, Attachment J.1, at 4, ¶F.6]

The Scientific Operation Outline specified the details of survey operations in 14 paragraphs, including the locations and depths where "fishing"[4] would occur, amounts and types of gear to be used, and methods of setting gear. [1987 Charter, Attachment J.1, at 5-7, §I]

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[4]Although the Scientific Operation Outline includes various forms of the word *fishing*, such as "[**f]ishing** will occur at 47 stations" and "depths **fished** at each station," I do not attach any legal significance to the use of this language in deciding whether the Contractor was engaged in *fishing* under the Magnuson-Stevens Act because it does not appear that the drafter intended a precise legal use of the terms in this instance.

NMFS again chartered the F/V PROWLER on April 20, 1988, in a contract entitled "70-day Charter of a Commercial Fishing Vessel." The charter provided for a period of performance commencing on or about July 6, 1988, and ending on or about September 16, 1988.[5] [1988 Charter, at 9, §F.1] The charter also provided, in a hand-written notation, that "the Prowler will pay all costs of getting the fishing gear to and from the vessel before and after the charter." [1988 Charter, at 5] In all other material respects, the 1988 Charter is very similar to the 1987 Charter.

On July 5, 1994, Mr. Winther filed an Application for Quota Share under the Individual Fishing Quota program for Pacific halibut and sablefish, on behalf of the Prowler Partnership. In the application, Mr. Winther claimed a total of 2,246,292 pounds of sablefish landings from the F/V PROWLER for the years 1987 and 1988. All of these sablefish had been given to the Contractor as compensation under the 1987 and 1988 Charters.

The Division, in its Initial Administrative Determination [IAD] dated April 5, 1995, denied the claim of the Prowler Partnership (and its former partner, Gainhart Samuelson) to IFQ credit for these sablefish landings. The primary basis for the Division's denial was that the landings in question resulted from noncommercial harvests. The Division reasoned that because (1) the harvesting was done in areas otherwise closed to groundfish fishing; (2) the pounds harvested were not deducted from the Total Allowable Catch [TAC]; and (3) the activities of the F/V PROWLER were governed by the charters, not by the provisions of commercial fishing regulations, the harvests were not made in compliance with NMFS regulations (50 C.F.R. Part 672) that govern the commercial harvest of groundfish in the Gulf of Alaska. Therefore, the Division concluded, these were not *legal landings* of sablefish as defined in, 50 C.F.R. § 679.40(a)(2)(v),[6] and they could not form the basis for an award of QS or IFQ. The Division concluded that during the 1987 and 1988 Charters, the F/V PROWLER was engaged in scientific research, not commercial fishing.

On Appeal, I agreed with the Division that the activities of the F/V PROWLER under the charters constituted scientific research, not commercial fishing. I based the appeal Decision on my conclusion that the activities were not even *fishing*, as defined in the Magnuson Act, because that definition excludes "scientific research activity which is conducted by a scientific research vessel." I stated that, although the terms *scientific research activity* and *scientific research vessel* were not defined in the Magnuson Act, the Gulf of Alaska longline surveys are clearly *scientific research activity*, and the

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[5]Mr. Winther stated that the dates of the 1988 Charter were July 6 to September 17, and that with "gear-up and gear-down time, the vessel was removed from the commercial fisheries between June 16 and October 8. [Second Affidavit of John R. Winther, 02 Jun 95, at 2]

[6]Formerly 50 C.F.R. § 676.20(a)(1)(v). All IFQ regulations were renumbered, effective July 1, 1996. *See,* 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

F/V PROWLER acted as a *scientific research vessel* while serving as a NMFS charter vessel during the survey activities. I further concluded that activities that are not *fishing*, let alone *commercial fishing*, cannot serve as the basis for the allocation of qualifying pounds or the award of Quota Shares under the IFQ program.

In its Motion for Reconsideration, the Appellant argues that (1) the appellate officer erred in determining that the vessel's fishing was not *fishing* under the regulations; (2) because the terms *scientific research vessel* and *scientific research activity* are not defined by statute, the hearing officer erred in determining that the vessel's fishing was scientific research; and (3) because NMFS compensated the Appellant by allowing it to sell the fish it caught during the NMFS charters, the vessel was engaged in commercial fishing.

In support of the motion, the Appellant submitted Points and Authorities and a Supplemental Memorandum of Authorities, which contained additional and expanded arguments.[7] I had granted the motion as to the survey fish claim primarily because the parties were not given advance notice that the Decision would be based on the Magnuson Act definition of *fishing* and they were not given an opportunity to brief these issues before the Decision was rendered.

DISCUSSION

Was the F/V PROWLER a *scientific research vessel* while under charter to NMFS in 1987 and 1988?

The Appellant on reconsideration argues that the F/V PROWLER was at all times a fishing vessel, and never a scientific research vessel. It argues that the vessel fits squarely within the definition of a *fishing vessel* in the Magnuson-Stevens Act (16 U.S.C. § 1802(17)) because it is a "vessel . . . which is used for, equipped to be used for, or of a type which is normally used for fishing." Additionally, Appellant argues, "other indicia as a fishing vessel remained intact during the surveys." These "indicia" include that (1) the vessel was documented as a fishing vessel; (2) no research endorsement was sought or required; (3) it was insured and remained liable as a fishing vessel; and (4) significant capital was invested and substantial risk was assumed in converting the vessel to longlining. Appellant argues that, given the vessel's configuration, commercial fishing is the only use to which it could be put.

Conversely, Appellant argues, the F/V PROWLER does not fit neatly into a definition of "scientific

[7]The Points and Authorities were submitted by Alan K. Foe of the Seattle law firm Mullavey, Prout, Grenley, Foe, Lawless, & Lawless. The Supplemental Memorandum of Authorities was submitted by Jeffery D. Troutt of the Juneau law firm Baxter, Bruce, Brand & Douglas.

research vessel," in part because the term is vague and undefined by statute or regulation.[8] The Decision [at 9] said it was a reasonable reading of the statute to conclude that the F/V PROWLER acted as a scientific research vessel while serving as a NMFS charter vessel. The Appellant maintains that the vessel cannot be both a commercial fishing vessel and a scientific research vessel, and that it would defeat the purposes of the Magnuson-Stevens Act if a vessel could fit the definitions of both types of vessels. Furthermore, Appellant asserts, NMFS itself was uncertain at the time of the charters whether a commercial fishing vessel that intended to sell its catch could qualify as a scientific research vessel under the Act.

While it is true that the F/V PROWLER fits the definition of a fishing vessel under the Magnuson-Stevens Act, there is nothing in the Act or regulations that suggests that a fishing vessel cannot serve as a scientific research vessel. In fact, all of the vessels chartered for the Gulf of Alaska longline surveys from 1987 to the present have been fishing vessels. Although the Appellant argues that commercial fishing is the only use to which the vessel could be put, NMFS obviously thought that the F/V PROWLER was suitable for conducting the longline surveys. Given that the Appellant actively sought the government contracts, one may reasonably infer that it, too, believed and asserted to NMFS that the F/V PROWLER would be suitable for use in the surveys.

The Appellant in one place argues that a vessel cannot be both a fishing vessel and a scientific research vessel [Points & Authorities, at 22-23], yet elsewhere Appellant acknowledges that "there is no reason that the PROWLER did not possess dual characteristics during the NMFS surveys." [Supplemental Memorandum of Authorities, at 20] Contrary to Appellant's assertion, I do not find any purposes of the Magnuson-Stevens Act that would be defeated by classifying a fishing vessel as a scientific research vessel while under charter to perform scientific research, nor does the Appellant specify any purposes that would be defeated.[9]

The Appellant surmises that NMFS would not "wish to take the position that the F/V PROWLER is a scientific research vessel, and not subject to the regulations applicable to fishing vessels." [Points & Authorities, at 22] Appellant states that the F/V PROWLER is subject to "specific and extensive" fishing vessel regulations under 46 C.F.R. Part 28 (1996).[10] Appellant also notes that the F/V PROWLER was not required by NMFS to conform to U.S. Coast Guard regulations pertaining to oceanographic research vessels. 46 C.F.R. Part 188 (1996). But characterizing the F/V PROWLER

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[8]More particularly, Appellant asserts that the term "scientific research vessel" is "clearly vague." [Points & Authorities, at 24]

[9]The purposes of the Act are spelled out in § 2(b) of the Act, codified at 16 U.S.C. § 1801(b).

[10]Appellant actually cited to the *United States Code* (U.S.C.), instead of to the *Code of Federal Regulations* (C.F.R.).

as a scientific research vessel *while conducting scientific research activity* means only that the vessel is not considered to be fishing for purposes of the Magnuson-Stevens Act. That does not necessarily exempt a vessel from vessel safety regulations of the U.S. Coast Guard.

The Appellant's contention that the term *scientific research vessel* is undefined by statute or regulation is now incorrect, although it was true when the Points and Authorities were submitted. After the Decision in this Appeal was issued (November 8, 1995), and after the Points and Authorities were submitted, but before Appellant's Supplemental Memorandum of Authorities was submitted (October 23, 1996), NMFS adopted regulations that, among other things, define the terms *scientific research vessel* and *scientific research activity* for purposes of the exemption from the definition of *fishing* in the Magnuson-Stevens Act. These regulations were proposed in the *Federal Register* on May 1, 1996, were published as part of a final rule on June 24, 1996, and took effect July 1, 1996.[11] Appellant has made no mention of these definitions, but I take judicial notice of them.

Under the definition of *scientific research vessel*, it is clear that **any** vessel that is "chartered by, and controlled by, a . . . U.S. Government agency (including NOAA)" can be a *scientific research vessel* for purposes of the Magnuson-Stevens Act exemption. There is no reason that a commercial fishing vessel cannot meet this definition. The F/V PROWLER was clearly chartered by a U.S. Government agency. Was it also "controlled by" a U.S. Government agency? The meaning of the term "controlled" is not immediately apparent, and I have not found any regulatory history that directly explains its meaning. One possible meaning is that every conceivable aspect of the vessel must be entirely under the control of the government agency. While that may be a permissible interpretation of the word "controlled," such a reading is neither required nor appropriate. I do not believe, for example, that in drafting this definition NMFS intended to limit itself to the use of bareboat charters in order to obtain the use of private vessels for scientific research purposes. Nor do I believe that by this definition NMFS meant to compel itself to provide its own captain and crew for every vessel it charters. Neither of these requirements would further any purpose for having the scientific research exemption.

A more reasonable reading — and the one I believe was intended — is that "controlled" means merely that the activities of the vessel, as opposed to the mechanical operation of the vessel, must be under the direction and control of the government agency. This definition, while not drafted as artfully as it might have been, appears to have been aimed at helping to ensure that vessels chartered to perform scientific research would be under government supervision and would not be afforded the opportunity to engage in illegal commercial fishing during the term of the charter. This interpretation of the word "controlled" is consistent with the preamble to the proposed rule, which stated that "because 'scientific research activity' and 'scientific research vessel' have never been precisely defined, the potential exists for abuse by using the exemption to obtain marketable fish outside of established fishing seasons or areas, or to

[11]The proposed rule was published at 61 Fed. Reg. 10,712-10,719 (1996). The definitions in the final rule appear at 61 Fed. Reg. 32,543 (1996).

otherwise avoid applicable regulations." [61 Fed. Reg. 10,712 (1996)]

Mr. Winther has stated that under the 1987 and 1988 charters,

> NMFS only controlled where fishing occurred. All other aspects of the vessel's operation remained under the control of PP [Prowler Partnership]. PP's skipper retained ultimate control of the vessel. He had authority to overrule NMFS' choice of fishing location if in his judgment weather or other factors jeopardized the safety of the vessel or crew, and at all times controlled the course and speed of the vessel. [Second Affidavit of John R. Winther, 3 June 95, at 2]

This statement shows that the Appellant controlled the navigation and mechanical operation of the vessel, and that the captain, an employee of the Appellant, was responsible for the safety of personnel, the vessel, and equipment operation, as provided in the charters. But Mr. Winther understates the degree of control that NMFS had over the activities of the vessel. The charters gave the Chief Scientist, who was aboard the vessel, "final authority in all matters except those relating to safety of the vessel and personnel." [Charters, Attachment J.1, ¶ F.2] The statement of work, or Scientific Operation Outline, specified in considerable detail how the survey was to be conducted and who would do what. Taken as a whole, the terms of the charter make clear that the activities of the vessel relating to the survey were entirely under the control of and at the direction of NMFS. And because there are no modifications to the charters, I must presume that the vessel was operated, and the survey was conducted, in accordance with the terms of the charters. I find that in 1987 and 1988 the F/V PROWLER was chartered by NMFS and that the activities of the vessel during those charters were under the control of NMFS. Therefore, I conclude that the F/V PROWLER meets the definition of *scientific research vessel* in 50 C.F.R. § 600.10 (1996).

Because the terms *scientific research vessel* and *scientific research activity* were not defined in statute or regulation at the time the charters were in effect, or even at the time the Decision in this appeal was issued, there is a question whether these definitions can be applied in this case.

Under United States Supreme Court decisions, a regulation may not be applied retroactively if doing so would attach new legal consequences to events completed before the regulation was adopted, unless such retroactive application is expressly authorized by the Congress. Landgraf v. USI Film Prods., 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).[12] If a new regulation does not substantively change the law, but merely clarifies an unsettled or confusing area of the law, applying it to past events is not

[12]Landgraf dealt with the possible retroactive application of a statute, rather than a rule, but jurisprudence on the retroactivity of statutes seems to apply equally to rules. [1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 3.77, at 79 & n.11 (Supp. 1997)]

retroactive and is permissible. Pope v. Shalala, 998 F.2d 473, 483 (7th Cir. 1993). Likewise, merely articulating what has been an agency's interpretation all along would not be an impermissible retroactive application of a regulation. In determining whether a rule is a clarification or a change in the law, courts look to whether the regulation in question is consistent with the agency's prior interpretations and administrative practices. *Id.*

The preamble to the 1996 NMFS proposed rule notes that the Magnuson Act did not define the terms *scientific research vessel* or *scientific research activity,* and that the legislative history provides little guidance on Congress' intent in exempting scientific research conducted from a scientific research vessel from the Act's requirements. The preamble further states that because these terms had never been precisely defined, the potential exists for abuse by using the exemption to obtain marketable fish outside of established fishing seasons or areas, or to otherwise avoid applicable regulations. [61 Fed. Reg. 10,712 (1996)] It is quite clear that in proposing definitions for these terms, NMFS was concerned about the problem of vessels engaged in illegal commercial fishing activities disguised as scientific research. In the present appeal, we are dealing with the reverse situation: an Appellant who wishes to avoid characterizing its activities as scientific research even though the fish Appellant obtained were harvested during closed seasons and even though, without the scientific research exemption, Appellant would have been in violation of commercial fishing laws and regulations. *See, e.g.*, former 50 C.F.R. § 620.7(a) and § 672.7(c) (1988).[13]

The best evidence that the definitions in question are consistent with NMFS's prior interpretations and administrative practices is that the agency has chartered U.S. commercial fishing vessels (usually Mr. Winther's vessels) to conduct the Gulf of Alaska surveys for each of the past 11 years and has allowed the vessel owners to retain and sell the catch every year without bringing any enforcement actions for possessing or selling prohibited species of fish taken during closures. Thus, NMFS has obviously considered these vessels to be *scientific research vessels* covered by the exception to the definition of *fishing* under the Magnuson-Stevens Act. Appellant provides no evidence that NMFS has ever treated the vessels under these charters as anything other than exempted scientific research vessels and their activities pursuant to the charters as anything other than scientific research activity.

Appellant does point to two internal memoranda by NOAA attorneys as evidence that in 1986 NMFS was uncertain whether the F/V PROWLER could legally be considered a scientific research vessel engaged in scientific research activity. The first of these memoranda, dated March 7, 1986, was written by two attorneys in the Northwest Region of the NOAA General Counsel's office [GCNW] and was addressed to a NMFS employee involved in fishing gear research. The subject of the five-page memorandum was "Sale of Catch by 'Contract' Research Vessels." The memorandum dealt

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[13]These regulations, in effect at the time of the 1988 survey, made it unlawful to conduct any fishing contrary to a notice of inseason adjustment or to possess, transport, or sell any fish taken in violation of the Magnuson Act or regulations thereunder.

mainly with a proposed charter of two commercial fishing vessels for a groundfish resource assessment in the Aleutian Islands in the summer of 1986. The memorandum states that in discussions about this contract with NWAFC,[14] two other research charter ideas arose. One of these involved "longline fishing by domestic vessels during closed seasons and subsequent sale of the catch." [GCNW Memo, at 1] The memorandum refers to a December 17, 1985 memorandum by the NOAA General Counsel [not in the record] on the subject of Scientific Research Fishing. The GCNW attorneys wrote [at 4-5]:

> Option 2 of the [GC] memorandum, which was not adopted, would have denied contract vessels the status of "scientific research vessels" by regulatory clarification. Consideration of such a proscriptive regulation should not be read to imply that without it, contract vessels can or should be categorized as scientific research vessels. To our knowledge, no legal research has ever been done to support such a conclusion. Furthermore, the memorandum does not suggest that contract vessels by the terms of their contracts can or should be exempted from otherwise applicable regulations.
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> The primary legal question which remains unanswered is whether a United States commercial fishing vessel operating in a fishery covered by a fishery management plan, which vessel is under contract to catch fish to be used for scientific experiments, is engaged in "fishing" as that term is defined by the Magnuson Act when the vessel sells or otherwise disposes of the catch and retains the proceeds and when the harvest is inconsistent with regulations applicable to commercial fishing vessels participating in the fishery. 2/
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> 2/ Under certain conditions, existing NMFS policy in the Northwest and Southwest regions might construe such activity to qualify as "scientific research."
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> The answer to this question raises a number of legal and policy considerations:
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> 1. If contract vessels qualify as scientific research vessels, what are the dangers of abuse of the research exception by mixing research with the contractor's quasi-commercial activities and sale;
>
> 2. Is there an apparent conflict of interest between NMFS' research program and the contractor's interest in the size, composition, and value of the catch;
>
> 3. Are potentially unacceptable enforcement problems created by introducing into the marketplace research catch which would not be legal, but for the contract

[14]NWAFC was the acronym for what was then called the Northwest and Alaska Fisheries Center.

vessel research exception;

4. Whether contract vessel access to a fishery for research purposes is a form of limited entry to a fishery, the right of access to which is granted to the lowest bidder[s]; and

5. Whether there is or should be a biological concern over not counting the catch against applicable quotas.

The GCNW attorneys concluded that these questions were of national significance and that it would be inappropriate to address them solely on a regional basis, so they recommended referring the questions to NOAA General Counsel. As a result, the attorneys in the Northwest Region refrained from resolving the question of whether a private commercial fishing vessel under charter with NMFS to perform research surveys constituted "scientific research activity by a scientific research vessel" under the Magnuson-Stevens Act.

The second memorandum cited by the Appellant was written by Jay S. Johnson, the Assistant General Counsel for Fisheries, to the NOAA General Counsel Daniel W. McGovern on July 1, 1986. In that memorandum, Mr. Johnson had the F/V PROWLER particularly in mind when he stated [at 3]:

> If contract research survey work were conducted by a vessel from a recognized scientific institute or a university, the Magnuson Act's exemption of "scientific research activity conducted by a scientific research vessel" would apply. [Citation omitted.] It is less certain that a commercial fishing vessel that intends to sell its catch can fit within this exemption simply by contracting with NOAA or another research institute or by offering to donate its services to the agency.

It appears that Mr. Johnson's concern was not that a commercial fishing vessel was inherently unsuitable or incapable of performing legitimate scientific research; rather, he wondered whether the profit-making aspect of the vessel's participation might be incompatible with a scientific research exemption under the Magnuson-Stevens Act and in violation of the prohibition on augmenting NOAA appropriations.[15] Mr. Johnson concurred in a proposal by Northwest Regional Counsel that these problems be side-stepped by amending fishery management regulations to exempt chartered private commercial fishing vessels from certain prohibited activities, such as fishing prohibited species and during closed seasons. Mr. Johnson pointed out that the Secretary of Commerce already had such authority under regulations governing certain fisheries [Johnson memorandum, at 3], but no such action was ever taken, at least with respect to the Fishery Management Plan for Groundfish of the Gulf of

[15]Mr. Johnson stated [at 2] that "an agency generally cannot sell government property to perform functions for which it has received appropriations." *See,* 16 Comp. Gen. 241 (1936).

Alaska (50 C.F.R. Part 672). Mr. Johnson concluded that "there is no need for new statutory authority to allow private vessels operating under agency contract to sell their catch."[16]

These memoranda were written in the year before the first contract was awarded for the F/V PROWLER. Given that these were the first such charters involving domestic commercial fishing vessels, it should not be surprising that at the outset legal questions were being raised and addressed in advance of making the contract awards. The memoranda do not show what the NMFS interpretations and administrative practices were during the time the charters were in effect. It may be that initially there was no articulated agency-wide policy, or that the policy differed from region to region. One cannot tell from these two memoranda alone. At most, they tend to show only that this was an unclear area of the law. That lack of clarity, no doubt, is one reason the terms *scientific research vessel* and *scientific research activity* were ultimately defined by regulation. A lack of clarity in the law is also a legitimate and permissible reason to apply these regulatory definitions to the charters that are the subject of this appeal.

Regardless of any initial uncertainty NMFS (or NOAA lawyers) may have had about the legality of allowing a chartered commercial fishing vessel to retain and sell the catch from research surveys, it is clear that the agency has consistently treated the F/V PROWLER as a scientific research vessel conducting scientific research activity. It must also have been clear to the Appellant that NMFS has always considered the Appellant's activities under the charters to be exempted scientific research; that Appellant's participation in harvesting prohibited species during closed seasons was lawful; and that the Appellant did not have to fear that it would be subject to any enforcement actions for possessing or selling the fish it received in compensation for its survey work. Application of these definitions here would not adversely affect Appellant's reasonable expectations at the time of the charters, nor would it attach new legal consequences to Appellant's activities under the charters or produce unjust results.

I find that NMFS's policy — at least since the F/V PROWLER was first chartered for the Gulf of Alaska longline surveys — has been consistent with the definitions of *scientific research vessel* and *scientific research activity* that now appear in the regulations. For this reason, I conclude that it is permissible and appropriate to apply these definitions in this appeal reconsideration. Even if I did not apply the definition of *scientific research vessel* as controlling authority in this case, it would still be

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[16]Ten years after Mr. Johnson's memorandum, the Congress, in an amendment to the Magnuson Act, implicitly recognized NMFS's practice of compensating survey contractors with fish harvested during the survey. If that is not adequate compensation, the amendment also authorizes the Secretary of Commerce to permit survey contractors to harvest additional fish from the surveyed fishery on a subsequent voyage, and to retain and sell a portion of the allowable catch from that fishery. *See,* 16 U.S.C. § 1881a(e)(2) [P.L. 104-297, Title II, § 203, Oct. 11, 1996].

reasonable and proper to conclude that the F/V PROWLER was a *scientific research vessel* while under charter to NMFS. The Appellant has failed to produce any evidence or arguments that persuade me that the appeal Decision was in error in this regard.

Did the activities of the F/V PROWLER under the NMFS charters constitute *scientific research activity*?

The Appellant argues that the activities of the F/V PROWLER and the Appellant under the NMFS charters do not constitute *scientific research activity.* Appellant even questions whether the NMFS scientists on board the vessel were engaged in scientific research activity during the charters, although Appellant appears to acknowledge that they were.[17] The crux of Appellant's argument is that, while NMFS may have been conducting scientific research, the Appellant was engaged in commercial fishing.[18]

Appellant points out that *fishing* under the Magnuson-Stevens Act means, among other things, the **harvesting** of fish, "in other words, that act of bringing the fish on board a vessel." Appellant argues that because harvesting of sablefish occurred during the stock assessment surveys, the F/V PROWLER

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[17]Appellant submitted a NMFS memorandum on "Criteria for Defining Scientific Research" as evidence that the agency had "some question whether stock assessment surveys constituted 'scientific research activity.'" The Appellant argues that the stock assessment surveys may not meet all these criteria. [Supplemental Memorandum of Authorities, at 24] The memorandum, dated December 7, 1984, is from T. E. Kruse, then-Deputy Regional Director of the NMFS Northwest Region, to the NMFS Southwest Regional Director and the Directors of Northwest and Southwest Fisheries Centers. (Exhibit E) The criteria in the memorandum pertained to scientific research under the Pacific Coast Groundfish or Ocean Salmon Fishery Management Plans [50 C.F.R. Parts 661 and 663]. These criteria applied to independent research proposals, not NMFS's own research projects. Nevertheless, Appellant appears to recognize that NMFS activities under the surveys constituted *scientific research activity*: "Perhaps, from the perspective of some, that [scientific research activity] was all that occurred on the vessel. However, to the owners of the vessel, the activity was not undertaken to increase scientific knowledge, but in order to make money by selling the fish that the vessel caught." [Points & Authorities, at 24] "[W]hile NMFS may have been engaging in scientific research, PROWLER was commercial fishing to make money." [*Id.*, at 20]

[18]The Appellant takes exception to my observation in the Decision [at 8-9 and f.n.4] that Appellant had acknowledged that the F/V PROWLER was not engaged in commercial fishing when it stated in its appeal that the vessel "was removed from the commercial fisheries" during the dates of the charters. On reconsideration, Appellant asserts that it was removed only from "the *standard* commercial fishery, *i.e.*, what other vessels in the fleet were doing." [Points & Authorities, at 19]

was engaged in *fishing*. Appellant says it always had title to the fish; it acted with commercial intent; and it was allowed to sell the fish. In addition, Appellant asserts that NOAA attorneys agreed from the beginning that the F/V PROWLER would be commercial fishing during the charters. Therefore, Appellant argues, F/V PROWLER was engaged in *commercial fishing* and should receive IFQ credit for the landings that resulted.

The Appellant states: "There is nothing inherently contradictory about commercial fishing and scientific research occurring on the same vessel. . . . [I]n this case, scientific research occurred and fish were caught and commercially landed at the same time." [Supplemental Memorandum of Authorities, at 19] Appellant's theory is that it was allowed by NMFS to engage in special, out-of-season fishing in exchange for letting NMFS scientists perform research on the fish that the F/V PROWLER harvested.

As mentioned earlier in this Decision on Reconsideration, the term *scientific research activity* has been defined in NMFS regulations. [50 C.F.R. § 600.10 (1996)] The definition states, in part, that *scientific research activity* is:

> an activity in furtherance of a scientific fishery investigation or study that **would meet the definition of fishing under the Magnuson[-Stevens] Act, but for the exemption** applicable to scientific research activity conducted from a scientific research vessel. Scientific research activity includes, but is not limited to, sampling, collecting, observing, or surveying the fish or fishery resources within the EEZ, at sea, on board scientific research vessels, to increase scientific knowledge of the fishery resources or their environment, or to test a hypothesis as part of a planned, directed investigation or study conducted according to methodologies generally accepted as appropriate for scientific research.

The 1987 and 1988 NMFS charters both provide, in relevant part:

> The above-specified charter is for an assessment survey that is designed to perform scientific research necessary to acquire information to determine the status of sablefish and other groundfish stocks. The scientific mission of this survey is the paramount consideration of the charter . . .. These observations and samples will be acquired in accordance with the Scientific Operation Outline [Plan] described in Attachment 1 [2] of this solicitation. [Charters, at 5]

The Scientific Operation Outline for the 1987 charter [Attachment J.1, § I] makes clear that the surveys will be conducted at sea, in the EEZ, on board the chartered vessel. Paragraph 9 states that "[c]atch and biological information will be obtained for all species captured during this survey." Paragraph 11

specifies that the sex of all captured fish must be determined. Paragraph 12 states that each fish will be measured and weighed, and up to 300 fish per day may be retained for "other scientific purposes." The Scientific Operations Plan for the 1988 charter [Attachment J.2] states that the survey, as in 1987, will involve sampling, data acquisition and analysis.

The objectives were to determine the abundance and size composition of commercially important longline-caught species along the upper continental slope of the Gulf of Alaska, especially sablefish, Pacific cod, shortspine thornyhead, and rougheye and shortraker rockfishes, as well as other groundfish species caught during the survey, such as Pacific halibut, arrowtooth flounder, Greenland turbot, and grenadiers. The results of the 1988 survey were analyzed and published in NOAA Technical Memorandum NMFS-AFSC-39, "Assessment of Gulf of Alaska Sablefish and Other Groundfish Species Based on the 1988 National Marine Fisheries Service Longline Survey" (June 1994).

It is clear from a review of the charters and the NOAA Technical Memorandum that the longline surveys in question in this appeal involved "sampling, collecting, observing, or surveying the fish or fishery resources within the EEZ, at sea, on board scientific research vessels, to increase scientific knowledge of the fishery resources" and that the surveys were "conducted according to methodologies generally accepted as appropriate for scientific research." Therefore, I conclude that these surveys meet the definition of *scientific research activity.*

The Appellant argues that even if NMFS was engaged in *scientific research activity,* the F/V PROWLER was nonetheless engaged in *commercial fishing*. Having already obtained and sold out-of-season sablefish under the scientific research exemption, Appellant now wants to divorce its activities from those of the NMFS scientists and re-characterize its own activities under the charters as a special kind of *commercial fishing* so that it can obtain additional quota shares. Appellant wants to have it both ways.

The Appellant was as actively involved in conducting the surveys as the NMFS scientists were. The vessel, and the crew to operate it, were essential to conducting the surveys. The language of the charters makes clear that the Appellant was to be actively engaged in the surveys and under the control of the NMFS Chief Scientist: The crew, when not required for vessel operations, processing of the catch, or gear repairs, was required to assist the field party with obtaining biological data. The Chief Scientist had final authority over the activities of the crew, except those activities related solely to vessel and personnel safety. [1987 & 1988 Charters, Attachment J.1, at 4, ¶¶ F.2-3] The Appellant's activities under the charters were an integral part of the scientific research. Thus, the activities of the Appellant with respect to the surveys cannot be separated or distinguished from the NMFS activities.

It is conceivable that legitimate commercial fishing could take place on a vessel that is engaged in

scientific research, but only if the charter allowed for it and if the harvesting were done in compliance with applicable commercial fishing regulations. In this case, the NMFS charters did not authorize any harvesting apart from that necessary to conduct the surveys. The evidence in the record is that the fish were harvested only as part of the surveys, i.e., in connection with the scientific research.

It is clear that the harvesting of fish during the surveys "would meet the definition of fishing under the Magnuson Act, but for the exemption applicable to scientific research activity conducted from a scientific research vessel." [50 C.F.R. § 600.10] This language means that harvesting is not *fishing* when it is done in connection with scientific research. Since *commercial fishing* is a subset of *fishing*, an activity that is not *fishing* cannot be *commercial fishing*. Therefore, the harvesting done in connection with the scientific research was not *commercial fishing*.

The Appellant argues that it must have been engaged in commercial fishing because it entered into the charters with commercial intent. The Appellant stated that "NMFS's motivation may have been to increase scientific knowledge. However, profit was PROWLER's sole modification (sic) in undertaking the NMFS contracts. In other words, while NMFS may have been engaging in scientific research, PROWLER was commercial fishing to make money." [Points & Authorities, at 20] Mr. Winther also stated, "the PROWLER partnership treated the NMFS contract as another commercial fishing opportunity." [Affidavit of John Winther, 19 Dec 95, at 1]

It is true that the sablefish harvested as part of the surveys were sold by the Appellant during the charters, but that fact did not convert scientific research harvesting into commercial fishing. Nor does Appellant's profit motive for entering into the charters, or its intent to sell the fish, change the nature of the harvesting from scientific research to commercial fishing. A recent amendment to the Magnuson Act defines *commercial fishing* as "**fishing** in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade." [16 U.S.C. § 1802(4) (1996)] This new definition of *commercial fishing* does not change or conflict with the definition of *fishing* and its exclusion of *scientific research activity.* The harvesting of fish during *scientific research activity conducted by a scientific research vessel* still does not constitute *commercial fishing*, even if the fish were intended for sale or were actually sold.[19] In this case the sablefish that

[19]Another 1996 amendment to the Act authorizes the Secretary of Commerce, in consultation with the appropriate Council and the fishing industry, to permit fish harvested during NMFS surveys to be counted toward a vessel's catch history under a fishery management plan if, by participating in the survey, the vessel was precluded from participating in a fishery that counted under the plan for purposes of determining catch history. [16 U.S.C. § 1881a(e)(2)(C) (1996)] This provision does not apply to the charters in this appeal because the Congress did not make the provision retroactive and the Secretary has taken no action under it.

were harvested during the NMFS surveys were intended to enter commerce and did enter commerce, but because the harvesting was done during *scientific research activity conducted by a scientific research vessel* the Appellant was not engaged in commercial fishing.

In fact, the sale of the sablefish by the Appellant was actually a resale of fish that were purchased from the United States Government, and not a sale resulting from Appellant's own fishing. Although the Appellant's employees were physically involved in harvesting the sablefish, they did so as contracted agents of, and on behalf of, NMFS. All the harvesting during the charters was done at the direction of, and under the control of, the NMFS Chief Scientist. Contrary to the Appellant's assertion,[20] title to the sablefish at the time of harvest was in the United States Government, not in the Appellant. This is confirmed by the language of the charters themselves, which state:

> The catch will remain property of the Government until the Chief Scientist [Field Party Chief] relinquishes his/her responsibility and turns over the catch to the Contractor. Components of the catch will be turned over as soon as they have been examined by the scientific party and scientific samples have been obtained. At that time the catch becomes the property of the Contractor. [1987 Charter, Attachment J.1, at 4, § F.6; 1988 Charter, Attachment J.1, at 5, § F.6]

Title to the fish was transferred from the government to the Appellant after harvesting as compensation for Appellant's participation in the surveys. The Appellant received the fish in exchange for the value of its services and the value of the use of the vessel. In essence, the Appellant bartered for the fish. The fish had not been commercially harvested, by NMFS or by the Appellant.

Even if, *arguendo*, the Appellant was engaged in commercial fishing, most of it would have been illegal because it was done out of season.[21] The exemption from the prohibition on fishing out of season only applies to scientific research, not to *fishing* or *commercial fishing*. The Appellant argues that NMFS is estopped from prosecuting (or even asserting illegality) because the agency "induced PROWLER to participate in good faith in an illegal activity. . .." [Supplemental Memorandum of Authorities, at 15] The argument is absurd and beside the point. Regardless of whether the Appellant was or ever will be prosecuted for harvesting out of season, such harvesting is illegal *per se* and could not result in a "legal landing" on which an issuance of QS could be based. The Appellant's argument merely illustrates why

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[20]Appellant incorrectly asserts that "pursuant to practice and specific contract provisions, . . . title to the 'harvested' fish was with the vessel owners." [Supplemental Memorandum of Authorities, at 20]

[21]The overwhelming majority of the sablefish was harvested during directed fishing closures. The only open period during the approximately 135 days of surveying over two years was in the Western Gulf of Alaska statistical area during the first two and one-half days of the 1988 survey, July 6-8, 1988.

its activities under the charters were not commercial fishing.

Appellant argues that the definition of *legal landing* does not require the harvesting to be in compliance with commercial fishing regulations. The definition states that a legal landing of sablefish means "sablefish harvested with fixed gear and landed in compliance with state and Federal regulations in effect at the time of the landing." [50 C.F.R. § 679.40(a)(2)(v) (1996)] The Appellant reasons that the phrase "all Federal and state regulations in effect at the time of the landing" applies only to the landing, and not to the harvesting. Thus, in Appellant's view, it does not matter whether the sablefish was harvested in compliance with state and federal regulations or, more particularly, in compliance with commercial fishing regulations. Appellant asserts that because its sablefish were harvested with fixed gear (hook-and-line gear), and the landings (offloading) did not violate any state or federal landing regulations, then these were *legal landings* for IFQ purposes and Appellant should receive credit for them. [Supplemental Memorandum of Authorities, at 11-15]

This argument is without merit. The language of the definition does not require such a result, and common sense will not allow it. The issuance of quota shares cannot be based on a "legal landing" of illegally harvested fish. The definition of *legal landing* can and should be read to mean that both the harvesting and the landing must be in compliance with applicable regulations.[22] In Weber v. Kochuten,[23] this Office stated that the applicable regulations are those that govern "commercial fishing in the federal Pacific halibut and sablefish fisheries in and off Alaska, and the landing of fish harvested from those fisheries. These include regulations specific to those fisheries, as well as general commercial fishing regulations applicable to participation in those fisheries." Indeed, **all** IFQ regulations pertain only to the *commercial fishing* of sablefish and Pacific halibut. [50 C.F.R. § 679.1(d)] Thus, a *legal landing* **for IFQ purposes** requires that the harvesting and the landing be in compliance with such commercial fishing regulations.

Appellant further argues that "PROWLER did not violate any fishing regulations, thus, it must have acted 'in compliance with' them." [Supplemental Memorandum of Authorities, at 17] This argument fails because the phrase "not in violation of" is not the equivalent of the phrase "in compliance with." If I were sitting at home watching television, I would not be in violation of any commercial fishing regulations, but I could not seriously contend that I was in compliance with commercial fishing regulations. Compliance requires more than merely avoiding violation. One must be engaged in the regulated activity

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[22]As it happens, the harvesting of fish during a closure and the landing of such fish would both have been in violation of commercial fishing regulations, but for the exemption for scientific research activity. *See, e.g.*, former 50 C.F.R. §§ 620.7(a) and 672.7(c) (1988).

[23]Appeal No. 95-0122, June 18, 1996, at 7.

(and lawfully so) to be considered in compliance with the applicable regulations. The Appellant was exempted from commercial fishing regulations **because** it was engaged in scientific research activity and not engaged in commercial fishing. Although the sablefish in this case were legally harvested (by NMFS, during scientific research), they were not legally landed **for IFQ purposes** because neither NMFS nor the Appellant was engaged in commercial fishing when the fish were harvested and, thus, the harvesting was not done in compliance with commercial fishing regulations.

The Appellant argues that NMFS (or NOAA) has, in essence, already conceded that the Appellant was engaged in commercial fishing under the charters. Appellant asserts that in a 1986 memorandum [GCNW Memo, 7 Mar 86, at 2] NOAA attorneys stated:

> the contractor [PROWLER] would be commercially fishing for itself and merely allowing for the onboard presence of the scientific part, NOAA's constraints on where to fish, and NOAA's evaluation and sampling of the catch. This would present no legal problem so long as the contract required adherence to the regulations imposed upon other vessels participating in the fishery such as obtaining a permit, discarding prohibited species, and observing quota closures.

In quoting from this memorandum, the Appellant has misrepresented its actual content and meaning. First, by inserting the name "PROWLER" in brackets, Appellant represents that the NOAA attorneys are expressing an opinion about the Appellant's charters with NMFS. In fact, the attorneys were discussing "the terms of the **proposed contract**," i.e., a draft solicitation for the requisitioning of two private commercial trawlers for a groundfish resource assessment in the Aleutian Islands in 1986, which had been submitted to the attorneys for legal review. The NMFS charters for the Gulf of Alaska surveys were, at that time, only an "idea" that had surfaced during discussions concerning the draft contract being reviewed.

Second, and more important, the Appellant omits critical qualifying language that immediately precedes the passage quoted. The entire paragraph from the NOAA attorneys' memorandum reads:

> GCNW advised NWAFC and WASC that **if the contractor's catch were harvested and disposed of consistent with applicable commercial fishing regulations, i.e., if the catch could be lawfully taken, retained, and sold absent the NOAA participation and research operation, then retention and sale of the catch by the contractor would be proper.** In such a case, the contractor would be commercially fishing for itself and merely allowing for the onboard presence of the scientific party, NOAA's constraints on where to fish, and NOAA's evaluation and sampling of the catch. This approach would present no legal problem so long as the contract required

adherence to the regulations imposed upon other vessels participating in the fishery such as obtaining a permit, discarding prohibited species, and observing quota closures.

Of course, the NMFS charters with the Appellant did not provide for harvesting that was consistent with applicable commercial fishing regulations — the harvesting done under these charters would not have been lawful without "the NOAA participation and research operation." The terms of the NMFS charters make clear that the purpose of the charters — "the paramount consideration" — was the scientific research. [Charters, at 5] The terms of the charters also make clear that these were not instances of the Appellant being engaged in normal, in-season commercial fishing and merely allowing NMFS scientists to be aboard to conduct research on the Appellant's catch. Both surveys were NMFS scientific research operations, planned, directed, and controlled by NMFS, and using the F/V PROWLER and its crew for the exclusive purpose of conducting the surveys. Thus, the Appellant's reliance on this NOAA memorandum in support of its position is misplaced. NMFS did not concede that the Appellant was engaged in commercial fishing under the charters.

Remaining issues

In its Supplemental Memorandum of Authorities, submitted eleven months after the Motion for Reconsideration, the Appellant raises three other issues: (1) that the F/V PROWLER was not leased by NMFS during the surveys; (2) that the IAD and the Decision violate National Standard IV of the Magnuson-Stevens Act [16 U.S.C. § 1851(a)(4)]; and (3) that the Decision is strained, arbitrary, capricious, and an abuse of discretion. Because these issues are beyond the scope of the matters listed in the Motion for Reconsideration, I do not decide them here. [24]

FINDINGS OF FACT

1. In 1987 and 1988 the F/V PROWLER was chartered by NMFS and the activities of the vessel during those charters were under the control of NMFS.

2. NMFS's policy — at least since the F/V PROWLER was first chartered for the Gulf of Alaska longline surveys — has been consistent with the definitions of *scientific research vessel* and *scientific research activity* that now appear in 50 C.F.R. § 600.10 (1996).

3. Title to the fish harvested during the 1987 and 1988 NMFS Gulf of Alaska longline surveys was

[24]I note, however, that although the IAD found a "clear inference" from the record that the vessel had been leased to NMFS, the Decision on appeal was based on other grounds.

transferred from the United States Government to the Appellant after harvesting as compensation for Appellant's participation in the surveys.

CONCLUSIONS OF LAW

1. The definitions of *scientific research vessel* and *scientific research activity* in 50 C.F.R. § 600.10 (1996) are applicable in this appeal.

2. The harvesting of fish during *scientific research activity conducted by a scientific research vessel* does not constitute *commercial fishing*, even if the fish were intended for sale or were actually sold.

3. A *legal landing* for IFQ purposes requires that the harvesting and the landing be in compliance with applicable commercial fishing regulations.

4. The F/V PROWLER was a *scientific research vessel*, as defined in 50 C.F.R. § 600.10, while under charter to NMFS in 1987 and 1988.

5. The NMFS Gulf of Alaska longline surveys are *scientific research activity* as defined in 50 C.F.R. § 600.10

6. The activities of the F/V PROWLER during the 1987 and 1988 NMFS charters constituted *scientific research activity* as defined in 50 C.F.R. § 600.10.

7. The F/V PROWLER was not engaged in fishing or commercial fishing during the 1987 and 1988 NMFS charters.

8. The sablefish landings at issue in this appeal do not constitute *legal landings* under 50 C.F.R § 679.40(a)(2)(v).

9. The Restricted Access Management Division properly denied IFQ credit to the Appellant and the Respondent for landings of sablefish harvested aboard the F/V PROWLER under the 1987 and 1988 NMFS charters for Gulf of Alaska longline surveys.

DISPOSITION

That portion of the Decision in this appeal, dated November 8, 1995, relating to issue #2, the issue in this Decision on Reconsideration (Part II), is AFFIRMED. That Decision, including the conclusions of law #4-7, and the disposition to the extent that it pertains to issue #2, are incorporated by reference and

made a part of this Decision on Reconsideration (Part II). This Decision on Reconsideration (Part II) takes effect on October 29, 1997, unless by that date the Regional Administrator orders review of it.

Edward H. Hein
Chief Appeals Officer