

(2004 or 2005). However, RAM informed Appellant that he could submit evidence to demonstrate his eligibility for a permit. The record does not show Appellant responded to the Notice.

On January 4, 2011, RAM sent Appellant the IAD at issue in this case. In its IAD, RAM notified Appellant that according to information in the Official Record, Appellant did not meet the minimum participation requirements in the qualifying period (2004 or 2005). Generally, "minimum participation requirements" for 2004 or 2005 means that an applicant properly reported to ADF&G five or more charter fishing trips. Appellant did not claim to have operated in 2004 or 2005, and RAM noted there was no indication that Appellant held an ADF&G Business Owner License to operate his business in 2004 or 2005.⁶

On February 17, 2011, OAA received Appellant's timely appeal.⁷ In his appeal, Appellant argues that when he entered the charter halibut fishing industry in 2007, he was unaware that future access to the fishery was not assured. On April 21, 2011, NAO sent Appellant a letter acknowledging his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by May 23, 2011.⁸ The record does not show that Appellant responded with additional evidence or information.

I have reviewed Appellant's appeal and the case record, and I have determined that the record contains sufficient information on which to reach a decision. Accordingly, I close the record and issue this decision.⁹

ISSUE

The broad issue in this case is whether Appellant is eligible for a permit under CHLAP rules. To resolve that issue, I must answer the following:

Did Appellant prove by preponderance of the evidence that he timely reported to ADF&G at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005)?

If the answer to the question is "no," Appellant is not eligible for a permit, and I must uphold the IAD.

⁶ An ADF&G Business Owner License includes a business registration, a sport fish business owner license, a sport fish business license, and an ADF&G business license. 50 C.F.R. § 300.67(b)(3).

⁷ Pleadings Tab, Appellant's Letter of Appeal received by OAA on Feb. 17, 2011.

⁸ Appeals Correspondence Tab, NAO's letter to Appellant dated April 21, 2011.

⁹ See 50 C.F.R. § 679.43(g)(2), (k).

FINDINGS OF FACT

1. In 2004 and 2005, Appellant did not hold an ADF&G Business Owner License.¹⁰
2. In 2004 and 2005, Appellant did not report any logbook fishing trips to ADF&G.¹¹
3. Appellant entered the charter fishing business in 2007.¹²
4. In 2008, Appellant timely and properly reported thirty-five halibut logbook fishing trips to ADF&G.¹³
5. On February 1, 2010, Appellant signed a completed application for a CHP.¹⁴

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued an ADF&G Business Owner License. This license authorized the logbook fishing trips used to meet minimum participation requirements to qualify for a CHP.¹⁵

Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005) and must have reported five or more halibut logbook fishing trips during the recent participation period (2008).¹⁶

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to ADF&G in a logbook within the time limits for reporting the trip in effect at the time of the trip.¹⁷

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to ADF&G in a logbook with one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.¹⁸

¹⁰ Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 1, 2010.

¹¹ Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 1, 2010.

¹² Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 1, 2010.

¹³ Original File Tab, IAD dated Jan. 4, 2011.

¹⁴ Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 1, 2010.

¹⁵ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁶ 50 C.F.R. § 300.67(b)(1)(ii) (A)-(B); 50 C.F.R. § 300.67(f)(6)-(7).

¹⁷ 50 C.F.R. § 300.67(f)(4).

¹⁸ 50 C.F.R. § 300.67(f)(2).

A “halibut logbook fishing tip” means a logbook fishing trip in the recent participation period that was reported to ADF&G in a logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.¹⁹

“Applicant selected year” means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and non-transferable permits.²⁰

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS uses the Official Record to implement the CHLAP, including evaluating applications for charter halibut permits.²¹

ANALYSIS

To determine whether the IAD is consistent with the CHLAP regulations, I must consider whether Appellant has shown by a preponderance of the evidence that he is eligible for a CHP. The CHLAP’s general participation requirements mandate a minimal level of participation in the industry in certain areas of waters off the Alaska coast. More precisely, an applicant must prove his charter halibut fishing participation in two periods: the qualifying period (2004 or 2005) and the recent participation period (2008). To establish that he met those participation requirements, an applicant must show he timely reported at least five bottomfish logbook fishing trips during 2004 or 2005 and at least five halibut logbook fishing trips in 2008.

Appellant meets the participation requirements for 2008, as RAM noted in the IAD. However, Appellant did not report five or more qualifying trips in 2004 or 2005. Appellant did not operate a charter fishing business in 2004 or 2005. In fact, Appellant did not operate a charter fishing business until 2007. Therefore, Appellant cannot qualify for a permit under 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

In deciding that Appellant is not eligible for a permit, I have considered his arguments raised in this appeal. Appellant argues he did not receive actual notice that the CHLAP was in development before he made significant financial investments in the charter fishing industry. Appellant also states in his appeal that ADF&G commented that NOAA’s regulation of the charter halibut industry was “nothing to worry about.” Appellant states that NOAA’s regulation of the charter halibut industry was not “highly public.” I do not have authority to order that an applicant receive a permit because of an alleged discussion an applicant had with ADF&G or because of a claim that the applicant had no actual notice of the development of a regulation. I am bound to decide CHLAP appeals based on the CHLAP regulations. The regulations do not have a provision that allows me to base a decision on alleged statements made by ADF&G

¹⁹ 50 C.F.R. § 300.67(f)(3).

²⁰ 50 C.F.R. § 300.67(f)(1).

²¹ 50 C.F.R. § 300.67(f)(5).

employees or based on an applicant's alleged lack of notice about regulatory requirements. I also note that in December 2005, the North Pacific Fishery Management Council (Council) adopted a control date of December 9, 2005, and NMFS published notice of the control date in February 2006.²² In the control date notice, NMFS explained that

anyone entering the charter sport fishery for Pacific halibut in and off Alaska after December 9, 2005 (control date) will not be assured of future access to that fishery. . . . This notice is intended to promote public awareness. . . and to discourage new entrants into the charter halibut fishery while the Council discusses whether and how access to the halibut resource by the charter sport fishery should be controlled.²³

Appellant entered the charter fishing industry in 2007, well after the publicized control date. Though Appellant's investment is noteworthy, it does not make him eligible to receive a permit under the regulations.

Appellant claims that the CHLAP fails to take into account provisions of the Magnuson-Stevens Act. However, CHLAP is not governed by the Magnuson-Stevens Act.²⁴ Appellant further argues that CHLAP violates the Halibut Act, the Takings Clause of the Fifth Amendment to the U.S. Constitution, and federal antitrust laws. These arguments are beyond the scope of this appeal. My responsibility is to interpret the regulations adopted by the Secretary of Commerce to determine whether they were correctly applied in Appellant's case.²⁵ As explained above, Appellant's failure to operate during the qualifying period, as required by the regulations, means he is ineligible to receive a CHP.

Appellant also claims that RAM uses "corrupt data" when issuing permits; however, Appellant provides no evidence to support this claim. As well, Appellant did not rely on RAM's data when he admitted he did not operate a charter fishing business until 2007. Thus, he did not report five bottomfish logbook fishing trips during at least one year of the qualifying period (2004 or 2005) as required by the CHLAP regulations.

²² Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 61 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>.

²³ Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 71 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>. See also Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 563-64 (Jan. 5, 2010) (codified at 50 C.F.R. §300.61, .66-.67) (explaining the Council's reasoning for selecting 2004 and 2005 as the qualifying period and how industry participants were notified of the control date).

²⁴ See Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 559 (Jan. 5, 2010) (codified at 50 C.F.R. §300.61, .66-.67) ("[T]he halibut fisheries are governed under the authority of the Halibut Act, not the Magnuson-Stevens Act.").

²⁵ While these items are beyond the scope of this appeal, some of them were addressed when NMFS issued the Final Rule for CHLAP. See Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 562-63 (Jan. 5, 2010) (codified at 50 C.F.R. §300.61, .66-.67) (explaining how CHLAP is consistent with the requirements of the Halibut Act and later stating "[t]his rule is not illegal or contrary to the U.S. Constitution").

Appellant claims that regulations are constantly changing and thus difficult to take "seriously." He also states that the economy has changed in a way that applying the regulations to his business would be contrary to the purposes of the CHLAP. However, I am bound by the current regulations while reviewing this appeal and must determine whether Appellant is eligible for a CHP based on the facts of his case. Based on the evidence provided and applicable regulatory provisions, Appellant does not qualify for a CHP.

In reaching my decision in this case, I carefully reviewed the entire record. I have read Appellant's concerns about losing business without a CHP and the expense of purchasing a transferable permit. However, under the CHLAP regulations, as analyzed above and as applied to this case, Appellant does not qualify for a CHP.

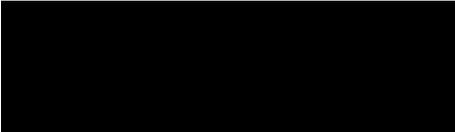
CONCLUSIONS OF LAW

Appellant is not eligible for a permit under the CHLAP rules as he did not prove by a preponderance of the evidence that he reported at least five bottomfish logbook fishing trips during either 2004 or 2005. The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated January 4, 2011 is upheld. This decision takes effect thirty days from the date issued, September 6, 2011, and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k), (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, August 15, 2011. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.


Eileen G. Jones
Chief Administrative Judge

Date Issued: August 4, 2011