

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0030

DECISION

STATEMENT OF THE CASE.

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA Headquarters in Silver Spring, Maryland, and maintains an office in NMFS Alaska Region. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with deciding appeals that were filed with the Office of Administrative Appeals, Alaska Region. NAO decides these appeals pursuant to the procedure established in federal regulation 50 C.F.R. § 679.43.

On February 9, 2011, [REDACTED] dba [REDACTED] (Appellant) filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on December 26, 2010.¹ RAM is the administrative unit within the NMFS Alaska Region that implements limited access programs.

In the IAD, RAM evaluated Appellant's application for charter halibut permits under the Charter Halibut Limited Access Program (CHLAP).² RAM determined that Appellant submitted a timely application and met the participation requirements for one transferable and two non-transferable charter halibut permits for use in International Pacific Halibut Commission (IPHC) Regulatory Area 3A,³ each permit with an angler endorsement of six. The angler endorsement is not at issue in this appeal.

Appellant contends that he should receive a second transferable charter halibut permit. Appellant bases this contention on his history with the [REDACTED]. Appellant sold [REDACTED] (VESSEL 1) to [REDACTED] (Lessor) in 2005. From 2005 to 2008, Appellant hired Lessor to act as captain on VESSEL 1 for numerous charters, arranged for clients for the charters and paid trip expenses for

¹ Appellant's Appeal Letter (dated Feb. 8, 2011, received Feb. 9, 2011).

² The Charter Halibut Limited Access Program is codified at 50 C.F.R. §§ 300.61, 300.66, 300.67. These regulations, and the appeal regulation at 50 C.F.R. § 679.43, are available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/regs/summary.htm>.

³ IPHC Regulatory Area 3A is roughly Southcentral Alaska. For the coordinates of Area 3A, see 50 C.F.R. § 300.61.

VESSEL1: fuel, bait and launch fees. Appellant states that “[t]he Vessel never ran independently of Heavenly Sights Charters.”⁴

Appellant can file this appeal because the IAD directly and adversely affected its interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that he meets the requirements for a second transferable charter halibut permit.

I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue a second transferable charter halibut permit to Appellant.⁵ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision.

For the reasons that follow, I conclude that Appellant does not meet the requirements for a second transferable charter halibut permit. I affirm the IAD that Appellant should receive one transferable charter halibut permit and two non-transferable charter halibut permits, for use in IPHC Area 3A, each with an angler endorsement of six.

ISSUE

Did Appellant show that he meets the participation requirement in the recent period for a second transferable charter halibut permit?

FINDINGS OF FACT

1. Appellant has operated a charter fishing business that includes halibut charters since 1998.⁶
2. In 2004, Appellant took 183 bottomfish logbook fishing trips with three vessels under the ADF&G Business Owner License issued to Appellant for 2004: 79 trips by [REDACTED] (VESSEL 1), 39 trips by [REDACTED] (VESSEL 2), 65 trips by [REDACTED] (VESSEL 3).⁷
3. In 2005, Appellant took seventy bottomfish logbook fishing trips from VESSEL 2 under the ADF&G Business Owner License issued to Appellant for 2005.⁸
4. In 2008, Appellant took ninety-seven halibut logbook fishing trips to ADF&G under the ADF&G Business Owner License issued to Appellant for 2008: ninety-three trips by VESSEL 2 and four trips by VESSEL 3.⁹

⁴ Letter from Appellant to RAM (received July 15, 2010).

⁵ 50 C.F.R. § 679.43(g)(3)(iv).

⁶ Fax cover sheet comments section (dated Apr. 1, 2010, received Apr. 3, 2010).

⁷ Official Record List of Trips by Appellant (Nov. 8, 2011). When I say that Appellant took a bottomfish or halibut logbook fishing trip, I also mean that the Appellant timely reported the trip to ADF&G in its Saltwater Charter Logbook, because the definition of logbook fishing trip includes that the trip was reported to ADF&G in accord with the time limit for reporting the trip. 50 C.F.R. § 300.67(f)(4).

⁸ Official Record List of Trips by Appellant (Nov. 8, 2011).

5. In 2005, Appellant sold VESSEL 1 to Lessor.¹⁰
6. From 1999 through 2009, Lessor had a State of Alaska Business License under the Business Name, [REDACTED].¹¹
7. From 2005 through 2008, Appellant hired Lessor to act as a charter captain of VESSEL 1 on numerous charter trips and leased VESSEL 1 from Lessor.¹²
8. From 2005 to 2008, for the trips where Lessor acted as charter captain, Appellant arranged for clients for those trips, was paid directly by the clients for those trips, paid sales tax to the Kenai Borough on those trips, paid certain trip expenses: fuel, bait and launch fees.¹³
9. Appellant also advertised for charter trips on VESSEL 1 and when anglers took trips on VESSEL, many believed they were taking charter trips with [REDACTED].¹⁴
10. Lessor sometimes did business under the name [REDACTED].¹⁵
11. From 2005 through 2008, Lessor owned the vessel, maintained the VESSEL and leased it to Appellant.¹⁶
12. From 2005 through 2008, Lessor obtained an ADF&G Business Owner License and ADF&G Sport Fish Guide License and obtained logbook for VESSEL and recorded trips for VESSEL.¹⁷
13. To receive an ADF&G Business Owner License in 2008, an applicant had to apply for that year, pay an annual license fee, show they had a current State of Alaska business license to provide services to sport fishermen and present proof of an

⁹ Official Record List of Trips by Appellant (Nov. 8, 2011).

¹⁰ Statement by Appellant (faxed, Apr. 2, 2010).

¹¹ State of Alaska, Division of Corporations, Business and Professional Licensing: <http://commerce.alaska.gov/CBP/Main/CBPLSearch.aspx?mode=BL>. Lessor had a Business License from January 8, 1999 to December 31, 2006 and August 12, 2007 to December 31, 2009 (latter date is expiration date of license)

¹² Statement by Appellant (faxed, Apr. 2, 2010); Appellant's Appeal (Feb. 8, 2011).

¹³ Appellant's Appeal (Feb. 8, 2011).

¹⁴ Attachment 4- 40 to Appellant's Appeal (Feb. 8, 2011). Appellant sent letters to clients from ninety-seven trips taken with VESSEL and asked them: "We need you to verify the name of the Halibut Charter Business you used during 2008." It gave them three options: [1] [REDACTED] [2] [REDACTED] and [3] Other. It was a fair questionnaire. Thirty-seven persons returned the survey and checked [REDACTED]

¹⁵ Appellant submitted a document that Lessor submitted to the State of Alaska Department of Transportation for a permit that identifies the "legal name" of Lessor as "Midnight Sun Halibut Charters," and the "DBA Name" as [REDACTED] Attachment 2 to Appellant's Appeal (Feb. 8, 2011).

¹⁶ Statement by Appellant (faxed, Apr. 2, 2010); Appellant's Appeal (Feb. 8, 2011). This is implicit in Appellant's contention that Lessor's business received a permit based on trips that he took with VESSEL.

¹⁷ Statement by Appellant (faxed, Apr. 2, 2010).

insurance policy with coverage of at least \$100,000 per incident and \$300,000 for all incidents in a year.¹⁸

14. To receive an ADF&G Sport Fishing Guide License, an applicant had to pay an annual fee, be certified in first aid, hold a United States Coast Guard License authorizing the applicant to operate a vessel to carry passengers for hire and hold a current sport fishing license from the State of Alaska.¹⁹

15. In December 2008, Lessor passed away and Appellant purchased back VESSEL in 2009.²⁰

PRINCIPLES OF LAW

In March 2007, pursuant to section 773c(c), the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.²¹ In January 2010, pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).²² The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67.

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.²³ NMFS based the official charter halibut record on participation data in saltwater charter logbooks submitted to the Alaska Department of Fish and Game (ADF&G).²⁴ If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.²⁵ A person can be an individual, a corporation, firm or association.²⁶

NMFS may credit a logbook fishing trip only to the person that held the ADF&G Business Owner License that authorized the trip.²⁷

¹⁸ AS (Alaska Statutes) 16.40.260(a).

¹⁹ AS 16.40.270(a).

²⁰ Statement by Appellant (faxed, Apr. 2, 2010).

²¹ Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

²² Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

²³ 50 C.F.R. § 300.67(f)(5).

²⁴ Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

²⁵ 50 C.F.R. § 300.67(b)(1)(ii).

²⁶ 50 C.F.R. § 300.61 (definitions).

²⁷ 50 C.F.R. § 300.67(b)(1)(ii).

An applicant must prove participation in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,²⁸ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁹

An applicant must prove different levels of participation to receive a non-transferable and a transferable permit. To receive a non-transferable permit, an applicant must have taken at least five bottomfish logbook fishing trips in the applicant-selected year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).³⁰

To receive a transferable charter halibut permit, an applicant must have taken at least fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).³¹ The number of transferable charter halibut permits issued to an applicant will be equal to the number of vessels that met these qualifications.³²

If an applicant does not meet the requirements for a permit, or an endorsement on a permit, in the applicable regulations, NMFS does not have authority to award the applicant the permit or the endorsement on the permit.

In deciding an appeal of the denial of a charter halibut permit, the function of an appellate officer is to interpret and apply the regulations that the Secretary of Commerce, acting through NMFS, adopted to establish the requirements for a permit.

ANALYSIS

Did Appellant show that he meets the participation requirement in the recent period for a second transferable charter halibut permit?

I initially examine how RAM came to the conclusion that Appellant met the requirements for one transferable permit and two non-transferable permits with an angler endorsement of six. Then I examine Appellant's arguments as to why one of those non-transferable permits should be a transferable permit.

A. RAM's determination: one transferable and two non-transferable permits.

Under the charter halibut regulation, RAM first determines if an applicant submitted a timely application.³³ Appellant submitted a timely application. In that application,

²⁸ 50 C.F.R. § 300.67(f)(6).

²⁹ 50 C.F.R. § 300.67(f)(7).

³⁰ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B). A bottomfish logbook fishing trip is defined at 50 C.F.R. § 300.67(f)(2). A halibut logbook fishing trip is defined at 50 C.F.R. § 300.67(f)(3).

³¹ 50 C.F.R. § 300.67(d)(1)(i)-(ii).

³² 50 C.F.R. § 300.67(d)(2).

³³ 50 C.F.R. § 300.67(b)(1)(i).

Appellant chose 2004 as the year NMFS should use to determine the number and type of permits that he would receive.³⁴

RAM takes the following steps to evaluate the application:

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

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

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

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

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

Step 1: RAM determined that Appellant met the participation requirements for a non-transferable permit in 50 C.F.R. § 300.67(b): Appellant took at least five bottomfish logbook fishing trips in 2004 and at least five halibut logbook fishing trips in 2008.³⁵

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

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

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

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

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

The applicant-selected year: 2004.

The total number of bottomfish logbook fishing trips in 2004: 183.

³⁴ Application at 2; 50 C.F.R. § 300.67(f).

³⁵ These requirements are specifically at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

The total number of bottomfish logbook fishing trips in 2004 divided by five, rounded to nearest whole number: $183 \div 5 = 36.6$, rounded to 37.

The number of vessels that made those trips: 3.

Applicant receives the lesser of 3 or 37. Appellant receives 3 permits.

Although this regulation may seem confusing, the underlying rule is fairly straightforward. If an applicant only used one vessel in the applicant-selected year (2004 or 2005), the applicant receives one permit. Appellant used three vessels in 2004. Therefore, Appellant receives three permits, no matter how many total trips it took with its vessels in 2004, 2008 or any other year.

Step 3: RAM determined that Appellant met the requirement in 50 C.F.R. § 300.67(d) for one of its permit to be transferable. Appellant took fifteen or more bottomfish logbook fishing trips with three vessels in its applicant-selected year, which is 2004, but Appellant only took fifteen or more halibut logbook fishing trips with one vessel in the recent period, which is 2008. Appellant did not meet the requirement for a second or third transferable permit because it did not take fifteen trips with a second or third vessel in 2008.

Step 4: RAM determined that each of Appellant's three permits will have an angler endorsement of six, in accord with 50 C.F.R. § 300.67(e). Each of Appellant's three vessels took six anglers on at least one bottomfish logbook fishing trip in the qualifying period. Therefore, each of Appellant's permits has an angler endorsement of six.

B. Appellant's argument for a second transferable permit.

Appellant's primary argument is that his second permit should be transferable because NMFS should credit him, and not Lessor, with charter trips by VESSEL 1 in 2008 because of the facts surrounding the trips. Appellant believes that should get credit for these trips because he advertised for the clients, handled bookings for the clients, was paid directly by the clients, paid sales tax on that revenue and paid for trip expenses.

The following statements reflect Appellant's perspective: "When we . . . examine the relationship between [REDACTED] and [REDACTED] one cannot conclude that [REDACTED] was truly in the halibut charter business." "The only thing that [REDACTED] performed in 2005 thru 2008 related to the licensed charter fishing business was maintaining a log book, and leasing a boat to [REDACTED]."

"³⁶

Appellant does not allege that RAM denied Appellant credit for any trips that were taken in 2008 under Appellant's ADF&G Business Owner License. Appellant seeks credit for trips that Lessor took, and reported under Lessor's ADF&G Business Owner License, because Appellant believes that, based on the facts of the trips, it is fair that Appellant gets credit for these trips toward a charter halibut permit. I conclude that the charter halibut regulation does not authorize NMFS to award Appellant credit for trips by VESSEL 1 based on examining facts about individual trips. I reach this conclusion by

³⁶ Appellant's Appeal at 2 (Feb. 8, 2011).

examining the language of the charter halibut regulation in light of the purpose of the regulation. I rely on four points.

First, the charter halibut regulation at 50 C.F.R. § 300.67(b) begins by describing who receives charter halibut permits. The language of the regulation is clear:

NMFS will issue a charter halibut permit to a person who . . . [is the] individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued **the ADF&G Business Owner License** that authorized logbook fishing trips that meet the minimum participation requirements described in paragraphs (b)(1)(A) and (b)(1)(ii)(B) of this section for one or more charter halibut permits, unless the person is applying as a successor-in-interest.³⁷

The language of the regulation, standing alone, does not suggest that NMFS could issue a charter halibut permit to the person who was *not* the individual who held the ADF&G Business Owner License that authorized the trips in question.

Second, the regulatory history makes clear that the Council and Secretary made a policy decision to award permits to business owners as determined by who held the ADF&G Business Owner Licenses pursuant to which a trip was taken and reported. In the proposed rule, NMFS explained the purpose of this provision:

Licensed business owner. Charter halibut permits would be issued to the ADF&G licensed business owner. The Council's moratorium recommendation and this action propose eligibility for a charter halibut permit to be limited to the holder of an ADF&G business owner license because information on participation in the charter vessel fishery for halibut is organized by this license. Hence, a person would not meet this standard and qualify for a charter halibut permit if he or she held only a guide license or owned a charter vessel but did not hold an ADF&G business owner license during the qualifying and recent participation years.

Issuing charter halibut permits only to qualified holders of ADF&G business owner licenses is appropriate for several reasons. First, the owner of the charter vessel fishing business had to obtain a business owner license from ADF&G. Second, the business owner was required to register with ADF&G the vessel to be used as a charter vessel. Third, the ADF&G business owner license number was required to be recorded on each sheet of the logbook because this license authorized the guide to provide fishing guide services to the charter vessel anglers. Finally, the business owner was responsible for submitting the logbook sheets to ADF&G within the required time limits. **In summary, every charter vessel fishing trip was authorized by, and made pursuant to, an ADF&G business owner license.** This license has been variously

³⁷ 50 C.F.R. § 300.67(b)(1)(ii)(emphasis added).

referred to as a sport fishing operator license, a sport fish business owner license, an ADF&G sport fish business license, or simply an ADF&G business license. This action proposes the term “ADF&G business owner license” exclusively to refer to this license issued by ADF&G.³⁸

Third, if NMFS had authority to determine on a trip-by-trip basis who should get credit for a trip, the regulation would likely specify that authority and might spell out factors to make that determination. The absence of language on either score is significant. Appellant believes the facts in its favor should determine who gets credit for a particular trip. He advertised for the clients. He booked the clients. The clients paid him directly for the trip. He paid the sales tax. He paid the trip expenses.

Lessor might argue the facts in his favor are more important. He obtained the ADF&G Business Owner License. He obtained the insurance required by the State of Alaska for an ADF&G Business Owner License. He reported the trips pursuant to that license. He had the United States Coast Guard license that authorized him to carry passengers for hire. He owned the vessel. He maintained the vessel. Without some guidance from a regulation, I would have no basis to decide between these two competing positions.

Fourth, if NMFS had authority to credit trips to Appellant that are currently credited to Lessor, I would have to take those trips away from Lessor because the same trip or trips cannot be credited to two applicants.³⁹ To do this, I would have to join Lessor, or more accurately his successor-in-interest, as a party to this appeal. Appellant and Lessor’s successor-in-interest would then each present evidence as to who should get credit for these trips. The regulation prevents this type of dispute, and the lengthy appeal process it could entail, by establishing a bright line that determines who gets credit for a trip: the person who held the ADF&G Business Owner License pursuant to which the trip was taken and reported.

Appellant states that, if he had known in 2008 that NMFS would require fifteen trips by a second vessel in 2008 to receive a transferable permit, he would have done that. Many, if not most, applicants who took fifteen trips with two vessels in the qualifying period but did not take fifteen trips with two vessels in the recent period would say that.

NMFS is not under an obligation to give advance notice of a participation requirement so persons can maximize their participation in order to meet that requirement. In fact, that is considered “speculative participation” and NMFS generally seeks to discourage it.⁴⁰ There are many reasons why an applicant might *not* have participated at the required level with a second or third vessel. The regulation recognizes none of them as a basis to for a second or third permit.

Appellant states that it is not fair or equitable that a person that took 183 trips in 2004 with three vessels and 97 trips with two vessels in 2008 should not receive at least two transferable permits. There are different ways that the Council, NMFS and the Secretary

³⁸ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009)(emphasis added).

³⁹ 50 C.F.R. § 300.67(b)(2)(i) & (ii).

⁴⁰ Final Rule, 75 Fed. Reg. 554, 571 (Jan. 5, 2010)(Comment 40)(publication of a control date of December 9, 2005, was intended to discourage speculative participation in the fishery).

of Commerce, acting under The Halibut Act, could have structured a program of limited access for the charter halibut fisheries. I interpret and apply the program that the Secretary, acting through NMFS, did adopt.

Under that program, the sole basis for award of two transferable permits is documented participation at the fifteen-trip level by two vessels in one year of the qualifying period and the recent period. Appellant does not meet that requirement in the recent period and therefore may not receive a second transferable charter permit through initial issuance.

CONCLUSIONS OF LAW

1. RAM correctly determined that Appellant met the requirements in the charter halibut regulation for two non-transferable and one transferable permit with an angler endorsement of six.
2. Appellant has not shown he meets the participation requirement in the recent period in 50 C.F.R. § 300.67(d)(1)(ii) for a second or third transferable charter halibut permit. Appellant did not take fifteen or more halibut logbook fishing trips with a second or third vessel in the recent participation period (2008) pursuant to an ADF&G Business Owner License issued to him.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on January 5, 2012, unless by that date the Regional Administrator stays, reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43 (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 December 16, 2011, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

[REDACTED]
Mary Alice McKeen
Administrative Judge

Date issued: December 6, 2011