

reported under the applicant's ADF&G Business Owner License with the same vessel in 2008.⁵ RAM determined that Appellant met the participation requirement in the qualifying period for two transferable permits but did not meet the participation requirements in the recent period for any transferable permits.

On appeal, Appellant states that he should receive two transferable permits because, in 2008, [REDACTED] (VESSEL 1) took fifteen or more charter halibut trips under the authority of Appellant's ADF&G Business Owner License and [REDACTED] (VESSEL 2) took fifteen or more trips under the authority of Appellant's ADF&G Business Owner License.⁶ Appellant states that these trips occurred but an employee of Appellant's did not submit the trip reports for all these trips to ADF&G.⁷

In the IAD, RAM determined that it did not have authority to credit any trip toward Appellant's record of participation in 2008, unless the trip was reported to ADF&G.⁸ Appellant can appeal the IAD because the IAD directly and adversely affects him, 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 the transferable charter halibut permits he seeks.

I conclude that the record contains sufficient information upon which to decide this appeal.⁹ Although Appellant requested a hearing, I did not hold a hearing because Appellant has not alleged facts that, if true, authorize NMFS to issue a charter halibut permit. The appeal regulation does not authorize me to hold a hearing if the record is sufficient to decide the appeal and a hearing could not result in the action requested by the appellant.¹⁰ I therefore close the record and issue a decision.

ISSUE

May an applicant meet the participation requirement for a charter halibut permit through charter halibut trips that occurred but were not reported to ADF&G within the time limits for reporting the trips to ADF&G?

SUMMARY

The IAD is affirmed. Appellant meets the participation requirements for two non-transferable permits. Appellant does not meet the participation requirements for a transferable permit in the recent period in 50 C.F.R. § 300.67(d)(1)(ii): fifteen halibut logbook fishing trips with the same vessel in 2008. Although Appellant took fifteen or more charter halibut trips with each of two vessels in 2008, neither the Appellant, nor any employee of Appellant, reported fifteen trips with either vessel to ADF&G. A trip that is not reported to ADF&G within the time limits for

⁵ 50 C.F.R. § 300.67(d)(1)(ii).

⁶ Letter from Appellant to NMFS (Nov. 10, 2010); Statement by [REDACTED] Owner, [REDACTED] [REDACTED] (Dec. 20, 2010).

⁷ Letter from Appellant to NMFS (Nov. 10, 2010).

⁸ IAD at 3 – 4.

⁹ 50 C.F.R. § 679.43(g)(2).

¹⁰ 50 C.F.R. § 679.43(g)(3)(iv) states that an appellate officer may order a hearing only if “[r]esolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.”

reporting the trip does not meet the regulatory definition of a halibut logbook fishing trip in 50 C.F.R. § 300.67(f)(3) and cannot count toward the participation requirements for a charter halibut permit.

FINDINGS OF FACT

I find the following facts by a preponderance of evidence in the record:

1. Appellant reported thirty-two bottomfish logbook fishing trips to ADF&G in 2004 with two vessels. Each vessel took fifteen or more trips. These trips were taken under the authority of an ADF&G Business Owner License issued to Appellant.¹¹
2. In 2008, VESSEL 1 took seventeen or more charter halibut trips. On his application, Appellant stated that VESSEL 1 took sixteen trips in 2008.¹² With his appeal, Appellant submitted a written statement from Tour Company Owner which listed seventeen trips – by date, number of hours of the trip, type of trip (halibut), number of passengers and length of trip – that VESSEL 1 took based on reservations from the tour company.¹³
3. In 2008, VESSEL 2 took fifteen or more charter halibut trips. On his application, Appellant stated that VESSEL 2 took twenty-six trips in 2008.¹⁴ With his appeal, Appellant submitted a written statement from Tour Company Owner which listed fifteen trips – by date, number of hours of the trip, type of trip (halibut), number of passengers and length of trip – that VESSEL 2 took based on reservations from the tour company.
4. In 2008, Appellant reported to ADF&G a total of fourteen halibut logbook trips with VESSEL 1 and VESSEL 2, taken under the authority of an ADF&G Business Owner License issued to Appellant.¹⁵
5. In 2008, through a failure of Appellant's employee, Appellant did not submit to ADF&G the logbook trip reports for the trips by VESSEL 1 and VESSEL 2 that were over and above the fourteen trips that are contained in the official charter halibut record and that were reported to ADF&G.
6. Appellant submitted a timely application for a charter halibut permit on April 2, 2010.¹⁶

APPLICABLE REGULATIONS

The issuance of charter halibut permits is governed by regulations implementing the Charter Halibut Limited Access Program (CHLAP), which is codified at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67.

¹¹ Summary of Official Charter Halibut Record (Jan. 27, 2010); IAD at 3 note 1 (Sep. 20, 2010).

¹² Application at page 3 (received Apr. 2, 2010)

¹³ Statement by Tour Company Owner (Dec. 20, 2010)

¹⁴ Application at page 3 (received Apr. 2, 2010).

¹⁵ IAD at 3.

¹⁶ Application (received Apr. 2, 2010).

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.¹⁷

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁸ A person can be an individual, a corporation, firm or association.¹⁹

The relevant unit of participation is a logbook fishing trip. A logbook fishing trip is either a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip except that for multi-day trips, the number of trips will be equal to the number of days of the multi-day trip, e.g., a two-day trip will be counted as two trips.²⁰

An applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,²¹ and a recent participation period, which is the sport fishing season for halibut in 2008.²²

An applicant must prove different levels of participation to receive a non-transferable and a transferable permit. To receive a non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).²³ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.²⁴

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in one year in the qualifying period (2004, 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).²⁵ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.²⁶

The charter halibut regulation has an unavoidable circumstance provision for applicants who met the participation requirement in the qualifying period to receive a permit but did not meet the

¹⁷ 50 C.F.R. § 300.67(f)(5).

¹⁸ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁹ 50 C.F.R. § 300.61 (definitions).

²⁰ 50 C.F.R. § 300.67(f)(4).

²¹ 50 C.F.R. § 300.67(f)(6).

²² 50 C.F.R. § 300.67(f)(7).

²³ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B). In 2004 and 2005, ADF&G did not require participants in the charter halibut fishery to report halibut specifically but did require participants to report halibut effort as bottomfish effort. Therefore, for 2004 and 2005, the regulation evaluates an applicant's participation by bottomfish logbook fishing trips, not halibut logbook fishing trips. Beginning in 2006, ADF&G required participants to report halibut specifically. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

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

²⁵ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

²⁶ 50 C.F.R. § 300.67(d)(1), *incorporating* 50 C.F.R. § 300.67(c).

participation requirement in the recent period.²⁷ Appellant met the participation requirement in the recent period to receive a non-transferable permit and actually will receive two non-transferable permits. An applicant cannot make a claim under the unavoidable circumstance provision to receive a transferable permit instead of a non-transferable permit.²⁸ The unavoidable circumstance regulation is available only to persons who, due to an unavoidable circumstance, are excluded entirely from the charter halibut fishery.

ANALYSIS

I will first analyze whether Appellant meets the participation requirements for one non-transferable charter halibut permit, then whether Appellant meets the participation requirements for a second non-transferable charter halibut permit and then whether Appellant meets the participation requirements for any transferable charter halibut permits based on trips that Appellant took in 2008 but did not to report to ADF&G.

A. Applicant meets the participation requirements for one non-transferable charter halibut permit.

Appellant meets the participation requirements for one non-transferable charter halibut permit. Appellant took five or more bottomfish logbook fishing trips in one year in the qualifying period (2004, 2005)²⁹ and five or more halibut logbook fishing trips in the recent period (2008).³⁰ If an applicant meets the requirements for one non-transferable charter halibut permit, NMFS must then determine whether the applicants meets the requirements for any additional non-transferable charter halibut permits.

B. Appellant meets the participation requirements for a second non-transferable charter halibut permit.

To determine whether an applicant receives a second non-transferable charter halibut permit, the charter halibut regulation requires that NMFS examine three pieces of data: the applicant-selected year; the total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business Owner License in the applicant-selected year divided by five (rounded down to a whole number); the total number of vessels that made the bottomfish logbook fishing trips in the applicant-selected year.³¹

In this appeal, those numbers are:

- The applicant-selected year means the year in the qualifying period – 2004 or 2005 – that the applicant selects for NMFS to use in determining the number of applicant's permits.³² Appellant choose **2004**.³³

²⁷ 50 C.F.R. § 300.67(g)(1).

²⁸ 50 C.F.R. § 300.67(g).

²⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A).

³⁰ 50 C.F.R. § 300.67(b)(1)(ii)(B).

³¹ 50 C.F.R. § 300.67(c)(2).

³² 50 C.F.R. § 300.67(f)(1).

³³ Application at 2.

- The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business Owner License in 2004: **thirty-two**.³⁴
- The total number of vessels that made bottomfish logbook fishing trips in 2004 pursuant to the applicant's A DF&G Business Owner License in 2004: **two**.³⁵

Pursuant to 50 C.F.R. § 300.67(c), the applicant receives a number of permits equal to the **lesser** of the following two calculations:

- The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business Owner License in 2004 divided by five, and rounded down to a whole number: thirty-two divided by five = 6.33, rounded to **six**.
- The number of vessels that made the bottomfish logbook fishing trips in the applicant-selected year: **two**.

Thus, Appellant receives two permits. NMFS must then determine whether any of those permits will be transferable, which is the issue in dispute in this appeal.

C. Appellant does not meet the participation requirements for any transferable permits because an applicant cannot meet the participation requirement for a charter halibut permit based on charter halibut trips that occurred but were not reported to ADF&G within the time limits for reporting the trips to ADF&G.

To receive a transferable permit, an applicant must meet the participation requirement in the qualifying period (2004, 2005) and the recent participation period (2008).³⁶ Appellant meets the participation requirement in the qualifying period for two transferable permits.³⁷ Appellant took fifteen or more bottomfish logbook fishing trips with one vessel in 2004 and Appellant took fifteen or more bottomfish logbook fishing trips with a second vessel in 2004.³⁸

But Appellant does not meet the participation requirement for a transferable permit in the recent period, namely fifteen halibut logbook fishing trips with one vessel in 2008.³⁹ Although VESSEL 1 and VESSEL 2 each made fifteen or more charter halibut trips in 2008, neither VESSEL 1 or VESSEL 2 made fifteen or more "halibut logbook fishing trips" in 2008. The regulation expressly defines "halibut logbook fishing trip" as meaning

a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter 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

³⁴ Finding of Fact 1.

³⁵ Finding of Fact 1.

³⁶ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

³⁷ 50 C.F.R. § 300.67(d)(1)(i).

³⁸ Finding of Fact 1.

³⁹ 50 C.F.R. § 300.67(d)(1)(ii).

released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.⁴⁰

To be a halibut logbook fishing trip, the trip must not only have occurred but have been reported to ADF&G. Appellant did not report fifteen trips to ADF&G with either VESSEL 1 or VESSEL 2 in 2008 and therefore did not make fifteen halibut logbook fishing trips with VESSEL 1 or VESSEL 2 in 1008.

I acknowledge that Appellant has a history of reporting logbook fishing trips and that, in 2004, he reported more than fifteen trips each from two vessels. I have no reason to conclude that Appellant intentionally did not report all the trips that his vessels took in 2008, or instructed his employees not to report them, and I do not find that to be the case. Appellant attributes the underreporting of the trips by his vessels in 2008 to the careless act of an employee: “[T]he reason why the official record is flawed is because I had an employee that thought it was easier to throw away some of the logbook sheets, rather than submit it properly to ADF&G.”⁴¹

But the charter halibut regulations do not give me the authority to evaluate why an applicant did not report a trip to ADF&G, determine whether the reason was valid and credit some unreported trips and not others. The regulation specifically requires that NMFS award permits based on specified numbers of “halibut logbook fishing trips” in the recent period.⁴² The regulation specifically defines the term to mean that the trip was reported to ADF&G according to the time limits for reporting which, in 2008, was weekly.⁴³ The regulations simply do not give me the authority to add trips to the official record because an applicant’s employee was careless in reporting trips when they occurred.

The regulatory history reinforces this conclusion. In the proposed rule, NMFS addressed whether an applicant could add trips to the official charter halibut record if the applicant did not report them to ADF&G when the trips occurred:

A logbook fishing trip would be an event that was reported to ADF&G in a logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. The required time limit differed in minor ways in 2004, 2005, 2007 and 2008; and depended on when the trip occurred; however, the latest date for reporting a trip was January 15 of the year after it occurred. If a trip was not reported within those time limits, NMFS would not consider it a logbook fishing trip for purposes of this proposed rule, and it would not serve as the basis for NMFS to issue a charter halibut permit. *Hence, a permit applicant could*

⁴⁰ 50 C.F.R. § 300.67(f)(3).

⁴¹ Letter from Appellant to RAM (Nov. 10, 2010). Fortunately, Appellant, or his employees, did report enough trips for NMFS to issue him two non-transferable permits.

⁴² 50 C.F.R. § 300.67(b)(1)(ii)(B) (non-transferable permit); 50 C.F.R. § 300.67(d)(1)(ii)(transferable permit).

⁴³ 50 C.F.R. § 300.67(f)(3). The NMFS Alaska Region website has the 2008 ADF&G Saltwater Charter Logbook and Instructions. http://www.fakr.noaa.gov/appeals/adfg_logbooks/2008.pdf, and the Transmittal Letter for the ADF&G Logbooks (2002 to 2011) from ADF&G, http://www.fakr.noaa.gov/appeals/adfg_logbooks/transmittalltr.pdf.

*not add a trip to the official record years after the trip should have been reported to the State.*⁴⁴

In the commentary to the final rule, NMFS restated that proposition:

As stated above, the basic unit of participation for receiving a charter halibut permit will be a logbook fishing trip, which is a trip that was reported to ADF&G in a saltwater charter logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. *If a trip was not reported within those time limits, NMFS will not consider it a logbook fishing trip for purposes of a charter halibut permit application.*⁴⁵

In the final rule, NMFS responded to a public comment that applicants should be able to prove logbook fishing trips by documents other than logbook trip reports, when individual ADF&G staff misadvised charter operators of filing requirements. NMFS responded:

Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.⁴⁶

If misadvice from ADF&G personnel does not allow NMFS to accept documentation of trips, other than logbook trip reports, the failure of an applicant to submit logbook reports due to an error by the applicant's own employee would not allow NMFS to accept documentation of trips, other than logbook trip reports. The participation requirement in the recent period for a transferable charter halibut permit is not simply that an applicant took fifteen or more charter halibut fishing trips with the same vessel in 2008, but that the applicant took fifteen or more halibut *logbook* fishing trips with the same vessel, which means that the trips were reported to ADF&G in an ADF&G Logbook with ADF&G time limits.⁴⁷

I conclude that if an applicant did not report a trip to ADF&G, under an ADF&G Business Owner License issued to the applicant, within ADF&G time limits for reporting the trip, the trip is not a halibut logbook fishing trip, as defined by federal regulation, and the trip cannot count towards the participation requirement for a charter halibut permit. Since Appellant did not make fifteen halibut logbook fishing trips, as that term is defined by federal regulation, with either VESSEL #1 or VESSEL # 2 in 2008, I conclude that Appellant does not meet the participation requirement in the recent period for any transferable charter halibut permits.

CONCLUSIONS OF LAW

1. An applicant for a charter halibut permit may not meet the participation requirement for a charter halibut permit through charter halibut trips that occurred but were not reported to Alaska Department of Fish and Game (ADF&G) within the time limits for reporting the trips to ADF&G.

⁴⁴ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009)(emphasis added).

⁴⁵ Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010)(emphasis added).

⁴⁶ Final Rule, 75 Fed. Reg. 554, 592 (Jan. 5, 2010) (response to Comment 146).

⁴⁷ See 50 C.F.R. § 300.67(b)(1)(ii)(b); 50 C.F.R. § 300.67(d)(1)(ii); 50 C.F.R. § 300.67(f)(3).

2. A charter halibut trip that was not reported to ADF&G within the time limits for reporting the trip is not a halibut logbook fishing trip, within the meaning of 50 C.F.R. § 300.67(f)(3), and cannot count toward the participation requirements for a non-transferable charter halibut permit, 50 C.F.R. § 300.67(b)(1)(ii)(B), or a transferable permit, 50 C.F.R. § 300.67(d)(1)(ii).
3. The charter halibut regulations do not give NMFS the authority to evaluate why an applicant did not submit a logbook trip report to ADF&G within the time limits for reporting and, based on that evaluation, credit some trips that were not reported to ADF&G and deny credit for other trips.
4. Appellant does not meet the minimum participation requirement for a transferable permit in the recent period in 50 C.F.R. § 300.67 (d)(1)(ii), which is fifteen halibut logbook fishing trips with the same vessel in 2008.
5. Appellant does not qualify for any transferable charter halibut permits through initial issuance.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on July 11, 2011, unless by that date the Regional Administrator orders review of the Decision.

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, June 20, 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.



Mary Alice McKeen
Administrative Judge