

the charter fishing industry. In Appellant's case, the Official Record showed one of Appellant's vessels did not report at least fifteen logbook fishing trips in 2005.

RAM provided Appellant thirty days to submit additional information in support of its application to establish its eligibility for a twenty-fifth transferable CHP. In response to the Notice, on September 3, 2010, Appellant provided RAM with a letter and two affidavits of clients.⁵ In the letter Appellant acknowledged Vessel's logbook did not reflect at least fifteen bottomfish logbooks fishing trips for 2005. Appellant explained the logbook instructions were not clear, but that Vessel really did take at least fifteen charter halibut trips in 2005.

On December 15, 2010, RAM issued the IAD at issue in this appeal.⁶ In the IAD, RAM denied Appellant's application for a twenty-fifth transferable permit based on Vessel's historic participation. RAM reasoned the Official Record indicated Vessel took less than fifteen bottomfish logbook fishing trips in 2005. Since one of the regulatory requirements for a transferable permit is a minimum of fifteen bottomfish logbook trips, RAM found Appellant ineligible for a twenty-fifth transferable permit.⁷

On February 14, 2011, Appellants timely appealed the IAD to OAA.⁸ In the appeal, Appellant's attorney makes two basic arguments:

[1.] [Appellant] should be awarded a 25th transferable permit because 25 of its vessels reported 15 or more trips during one year of the two-year qualifying period [2005]; [and]

[2.] NMFS revised its preliminary regulations referencing the applicant-selected year to clarify that both years of the qualifying period count for designations of transferability.⁹

Appellant's counsel requested an oral hearing because he believes the following are genuine and substantial issues of adjudicative fact:

[1.] Whether the Official Charter Halibut Record reflects that [Vessel] reported 15 or more bottomfish logbook fishing trips in 2004?

....

⁵ Original File Tab, executed Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, dated September 3, 2010, with attachments.

⁶ Original File Tab, IAD.

⁷ Original File Tab, IAD.

⁸ Pleadings File Tab, Appellant's appeal dated received by OAA on February 14, 2011. Appellant subsequently withdrew the argument made on Pages 13 to 15 of the original appeal. Pleadings tab, Appellant's letter dated March 4, 2011. Appellants' submission includes electronic Excel files of Vessel's logbook history for 2004, 2005, and 2008 as provided by ADF&G.

⁹ Pleadings File Tab, Appellant's appeal dated received by OAA on February 14, 2011, pages 7 and 9.

[2.] Whether the Official Charter Halibut Record reflects that 27 vessels of [Appellants] reported 15 or more halibut logbook fishing trips during the recent participation period of 2008?¹⁰

On April 21, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until May 23, 2011 to supplement the record.¹¹ NAO did not receive additional materials from Appellant.

Upon review of Appellant's appeal and case record, I have determined the record contains sufficient information on which to reach a final judgment. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.¹²

In considering whether to hold an oral hearing, I carefully considered Appellant's request. The first issue concerning Vessel's logbook trips in 2004 is resolved by an issue of law, namely whether the trips in 2004 are relevant to the issue before me. Further, counsel did not identify potential witnesses or proffer a summary of what the purported testimony would be and how that was material to the issue. As to the second issue cited by counsel, it is not relevant to the narrow issue before me. Counsel states: "The number of vessels of [Appellants] that reported at least 15 halibut logbook fishing trips during the recent participation period of 2008 does not appear to be at issue in the IAD."¹³ I agree with Counsel about the issue needed to examine the sustainability of the IAD: whether RAM erred in denying Appellant another transferable permit.¹⁴ RAM does not dispute that Appellant has sufficient logbook trips for 2008 for a twenty-fifth permit. The fatal weakness in Appellant's record, according to RAM, is the absence of at least fifteen trips for 2005.

ISSUES

At issue in this appeal is whether Appellant is eligible for a twenty-fifth (or additional) transferable CHP based on the participation history of Vessel in the charter halibut industry. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence that it properly reported to the Alaska Department of Fish and Game (ADF&G) fifteen or more bottomfish logbook fishing trips taken on Vessel in 2005?

¹⁰ Pleadings File Tab, Appellant's appeal dated received by OAA on February 14, 2011, page 16. Appellant's appeal identified three issues that indicated the need for an oral hearing. I have only referenced two, because the other issue concerns an argument withdrawn by counsel.

¹¹ Appeals Correspondence Tab, NAO letter dated November 29, 2010.

¹² See 50 C.F.R. § 679.43 (g) and (k).

¹³ Pleadings File Tab, Declaration ¶ 9, attached to appeal dated February 14, 2011.

¹⁴ Pleadings File Tab, Declaration ¶ 5, attached to appeal dated February 14, 2011.

If the answer to the question is “no,” I must uphold the IAD and conclude Appellant does not qualify for a transferable CHP.

FINDINGS OF FACT

For 2005, Appellant reported to ADF&G that Vessel took fourteen bottomfish logbook fishing trips.¹⁵

On March 9, 2010, Appellant applied to RAM for twenty-five transferable CHPS.¹⁶

On December 15, 2010, in an IAD, RAM denied Appellant’s application to the extent it relied on the logbook history of Vessel for a transferable permit. RAM granted Appellant twenty-four transferable permits and one nontransferable permit.

On February 14, 2011, Appellant timely appealed to OAA the IAD.¹⁷

PRINCIPLES OF LAW

Under the CHLAP regulations, NMFS will issue a CHP if an applicant meets certain requirements. One requirement is that the applicant is an individual, or entity, to which ADF&G issued an ADF&G Business Owner License. That license authorized logbook fishing trips that could be used to meet minimum participation requirements to qualify for a CHP¹⁸ Minimum participation requirements to qualify for a transferable CHP are: at least fifteen bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and at least fifteen halibut logbook fishing trips during the recent participation period, namely 2008.¹⁹

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 Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.²⁰ The time limit to submit data about logbook fishing trips was within eight to fourteen days of a qualifying trip, as delineated in the logbooks.²¹

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to ADF&G in a Saltwater Charter Logbook with one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the

¹⁵ Original File Tab, IAD; Original File Tab, Print Summary created January 27, 2010; Pleadings File Tab, Exhibit E attached to Appellant’s appeal dated received by OAA on February 14, 2011.

¹⁶ Original File Tab, Applicaton.

¹⁷ Pleadings File Tab, Appellant’s appeal dated February 14, 2011.

¹⁸ See 50 C.F.R. § 300.67(b)(1)(ii).

¹⁹ See 50 C.F.R. § 300.67(d); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

²⁰ See 50 C.F.R. § 300.67(f)(4).

²¹ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²²

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to ADF&G 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.²³

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS used the Official Record to implement the CHLAP, including evaluating applications for charter halibut permits.²⁴

ANALYSIS

Did Appellant establish by a preponderance of the evidence that it properly reported to ADF&G fifteen or more bottomfish logbook fishing trips taken on Vessel in 2005?

As indicated in the Findings of Fact, Appellant reported fourteen qualifying trips to ADF&G in 2005 for Vessel. Since the CHLAP regulations require a minimum of fifteen bottomfish logbook trips from 2005²⁵ to meet the participation requirements for a transferable permit and Appellants only have fourteen such trips, RAM correctly decided Appellant was ineligible for a twenty-fifth transferable permit based on the 2005 bottomfish trips recorded in Vessel’s logbook.

On appeal, Appellant’s attorney makes two basic arguments:

[1.] [Appellant] should be awarded a 25th transferable permit because 25 of its vessels reported 15 or more trips during one year of the two-year qualifying period [2005]; [and]

....

[2.] NMFS revised its preliminary regulations referencing the applicant-selected year to clarify that both years of the qualifying period count for designations of transferability.²⁶

²² See 50 C.F.R. § 300.67(f)(2).

²³ See 50 C.F.R. § 300.67(f)(3).

²⁴ See 50 C.F.R. § 300.67(f)(5).

²⁵ The CHALP regulations require a minimum of fifteen bottomfish logbook trips in the qualifying period of 2005 or 2005. Whether RAM considers the records from 2004 or 2005 depends on Appellant’s choice in “applicant’s selected year.” In this appeal, Appellant chose 2005 as his applicant selected year.

²⁶ Pleadings File Tab, Appellant’s appeal dated received by OAA on February 14, 2011, pages 7 and 9.

Appellant's First Contention Regarding the Number of Logbook Trips for 2005

The first argument hinges on Appellant proving by a preponderance of the evidence that Vessel properly reported fifteen or more bottomfish logbook fishing trips to ADF&G for 2005. Appellant argues that the plain language of the regulation at 50 C.F.R. § 300.67(f)(1) supports its theory about how to interpret the regulatory phrase “applicant selected-year.”²⁷ Further, Appellant cites legislative history in support of its interpretation of the phrase “applicant-selected year.” Appellants quote from the preamble of the Final Rule:

In § 300.67(d), paragraph (d)(2) is added for consistency with the qualifications for a transferable permit described in the preceding paragraph (d)(1)(previously paragraph (b)(2) in the proposed rule), the preamble to the proposed rule, and [NMFS's Environmental] Analysis. The proposed rule language suggested that the number of transferable permits would be equal to the number of vessels that met the minimum logbook trip criterion of 15 during only the applicant-selected year of the qualifying period. NMFS found several inconsistencies between this language and other statements in the proposed rule and in the Analysis. First, a permit designation of transferable requires that the 15-trip minimum criteria be met in one year of the qualifying period and in the recent participation year. Second, the preamble to the proposed rule at page 17183 states that the minimum participation criteria in both years would not be taken into account in designating a charter halibut permit as transferable. Finally, the Analysis section 2.5.5 makes clear that the Council intended that the number of permits designated transferable would be controlled by the lesser of the number of vessels that met the 15-trip minimum criteria in one year of the qualifying period or the number of vessels that met the 15-trip minimum criteria in the recent participation year.²⁸

Appellant's first argument is without merit. The Official Record shows Vessel made only fourteen bottomfish logbook trips, and Appellant has not presented sufficient evidence to show the Official Record is wrong. Instructions explaining how to complete 2005 logbooks²⁹ were provided in the logbooks. With respect to recording halibut those instructions provided in pertinent part:

²⁷ Pleadings File Tab, Appellant's appeal dated received by OAA on February 14, 2011, page 8.

²⁸ Pleadings File Tab, Appellant's appeal dated received by OAA on February 14, 2011, page 11.

²⁹ ADF&G Saltwater Logbooks for the years 2001 through 2011 are displayed on the NMFS, Alaska Region, web site at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

BOTTOMFISH	
Primary Stat Area (Incl. Halibut)	The 6-digit area code where you caught most of the bottomfish on this trip. If you fished for bottomfish, but caught none, write the 6-digit code for the location fished the most time on this date and trip.
Maximum Rods Fished	The maximum number of rods/lines fished when targeting bottomfish (incl. halibut) and targeting salmon and halibut simultaneously. . . .
No. Boat Hours Fished	The number of boat hours that at least one line was targeting bottomfish (incl. halibut) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew . . . Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected. Halibut kept and released data is collected through established survey programs.
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted? Example 3: Two Targets Salmon <u>and</u> Bottomfish (including halibut) Simultaneously (i.e., mooching)	. . . record the maximum number of rods and boat hours spent fishing simultaneously for salmon and bottomfish in the appropriate columns in BOTH the salmon and bottomfish sections.
Example 4: A combination of any of the above	. . . record the maximum number of rods and boat hours spent targeting salmon AND targeting both salmon and bottomfish (including halibut) simultaneously in the appropriate columns in the salmon section, and the maximum number of rod and boat hours spent bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.
SPECIAL NOTES AND INSTRUCTIONS	
“Halibut”	The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to record your effort .

If Appellants' captain of Vessel had followed the written instructions supplied with the 2005 ADF&G Saltwater Charter Vessel Logbooks, his charter halibut fishing business activity would have been properly recorded and reported.

Based on the record before me, Appellant's captain did not notate the pieces of information listed in the regulations to establish he took at least one more (than Appellants had received credit for by ADF&G and then RAM) bottomfish logbook fishing trip in 2005. I have looked through Vessel's logbook sheets for 2005. The sheets show fourteen bottomfish trips.³⁰ Thus, the Official Record is accurate.

I understand Appellant believes it actually took more bottomfish trips, they just erred in filling out Vessel's logbook. But just taking a trip is not what CHLAP regulations require. CHLAP regulations not only require that in point of fact a fishing trip occurred, but that it was properly reported to ADF&G. Properly reporting includes a timely report with certain information, as outline above, in a logbook or on a logbook page. Thus, even if Appellant's Vessel took at least fifteen trips, that does not mean they meet the regulatory requirements of a "bottomfish logbook fishing trip" within the meaning of 50 C.F.R. § 300.67(f)(1), as more fully explained above.

Appellant's Second Contention Concerning the Meaning of "Applicant-Selected Year"

Appellant also argues RAM erred because it should have considered the number of qualifying trips taken in 2004, not just in the applicant-selected year of 2005. Appellant explains the "applicant-selected year" only determines "the total number of permits—transferable and non-transferable together—and not for purposes of determining how many of those permits should be designated as transferable."³¹

Appellant's second argument is without merit. In essence, Appellant thinks the regulatory requirement for an applicant-selected year, cannot be used so that logbook data from only one year of the qualifying period (2004 or 2005) is considered in determining whether an applicant has fifteen or more logbook fishing trips. RAM's position on this issue, as gleaned from the IAD. RAM relies on 50 C.F.R. § 300.67(f)(1) as support for the proposition that only the applicant-selected year data is consulted in determining transferability.³²

The key to evaluating Appellant's argument on this point is the language of the regulatory provision, section 300.67(f)(1): "*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 nontransferable permits." NAO will defer to the agency's reasonable interpretation of its regulations. To determine the number of transferable or nontransferable permits, RAM uses section 300.67(d), the

³⁰ Pleadings File Tab, Exhibit E attached to Appellant's appeal dated received by OAA on February 14, 2011.

³¹ Pleadings File Tab, Appellant's appeal dated received by OAA on February 14, 2011, page 8.

³² Original File Tab, IAD, page 3.

provision requiring fifteen or more logbook trips in each participation period to be eligible for a transferable permit. RAM's interpretation of section 300.67(f)(1) and 300.67(d) do not require a leap of faith or conjecture – they are based on a straightforward reading of the regulatory language. Therefore, RAM's interpretation is reasonable and is not a basis to overturn the IAD.

Further, the legislative history to the CHLAP rule supports RAM's interpretation. In the Preamble to the Proposed Rule, NMFS explained:

'applicant-selected year' means the year in the qualifying period—2004 or 2005—that the applicant selects for NMFS to use in determining how many permits the applicant will receive and whether the permits will be transferable or non-transferable. NMFS proposes that the applicant select the applicant's best year because applying the rules for the number of permits and transferable permits could have different results. For example, an applicant may receive a greater number of permits using the applicant's participation in one year but a greater number of transferable permits using the applicant's participation in another year. Because the year selected could make a difference, the applicant should choose which outcome is more important to the applicant.³³

Similarly, in the Preamble to the Final Rule, NMFS stated: "NMFS determined that the applicant should chose between 2004 or 2005 for purposes of determining the applicant's number of transferable or non-transferable permits."³⁴

The section of the preamble cited by Appellants does not show that either year, 2004 or 2005, could be used for determining transferability. Rather, that section merely is stating that NMFS tried to clarify what 300.67(d) would mean, given the seemingly confusing statements made about that provision in the Proposed Rule.

In summary, Appellant has not met its burden of proving the Official Record, that shows Vessel properly reported fourteen bottomfish logbook trips for 2005, is wrong. Nor has Appellant convinced me that the applicant-selected year does not determine which year, 2004 or 2005, RAM looks to in determining the number of logbook trips for the purpose of deciding transferability. Accordingly, the IAD is consistent with applicable regulations.

³³ 74 Fed. Reg. 18178 , 18183 (April 21, 2009).

³⁴ 75 Fed. Reg. 554 , 575 (January 5, 2010).

