

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

In re Application of	)	
	)	
[REDACTED]	)	Appeal No. 11-0066
	)	
	)	DECISION
	)	
Appellant	)	

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's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.

This appeal has been brought before NAO by [REDACTED] who operates a business known as [REDACTED] (collectively referred to herein as Appellant). The facts underlying the appeal begin with Appellant filing an application for a Charter Halibut Permit (CHP or permit). Appellant filed the application with NMFS's Restricted Access Management Program (RAM) in the Alaska Regional Office. RAM has been tasked by NMFS to review and process permit applications.

On January 26, 2010, RAM ran a report of the charter fishing logbook trips reported by Appellant in 2004, 2005, and 2008.<sup>1</sup> The report showed the following qualifying trips:

	Vessel Talon (V1)	Vessel Talon II (V2)	Vessel Lady May (V3)	Vessel Pig Fish (V4)
2004	----	11	4	3
2005	----	3	5	----
2008	15+	15+	15+	----

On April 1, 2010, Appellant applied for three transferable permits.<sup>2</sup> In response to the application, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>3</sup>

<sup>1</sup> Original File Tab, Print Summary created January 26, 2010.

Essentially, the Notice provided RAM's preliminary assessment of the likely outcome of Appellant's application and an opportunity to supply RAM with more information in support of Appellant's request for three transferable permits.

The Notice first summarized the applicable regulatory provisions. In short, to qualify for a transferable permit the key requirement is proof of fifteen or more logbook fishing trips reported to the Alaska Department of Fish and Game (ADF&G) in two time periods, 2004 or 2005 and 2008. RAM explained that although Appellant had proof of at least fifteen trips for three vessels in 2008, he was missing similar information for 2004 or 2005. Based on that rationale, RAM stated it was not likely Appellant could qualify for transferable permits, but he was given time to present evidence to show that he had met the fifteen-trip minimum.

On August 24, 2010, Appellant submitted a package of materials for RAM's consideration.<sup>4</sup> On January 18, 2011, RAM issued the Initial Administrative Determination (IAD) at issue in this appeal.<sup>5</sup> In the IAD, RAM noted it had reviewed both Appellant's application package as well as the materials he sent in response to the Notice. RAM concluded Appellant qualified for three, nontransferable permits. In denying Appellant transferable permits, RAM reasoned:

[T]he Official Record does not indicate that any of the vessels operating under the ADF&G Business Owner Licenses issued to [Appellant] in 2004 or 2005 reported 15 or more bottomfish logbook fishing trips...

...The Official Record shows the following bottomfish logbook fishing trips...for [Appellant's] vessels in 2004:

[V4] – 3...  
[V3] – 4...  
[V2] – 11...

[For 2005 the Official Record showed for Appellant's vessels]:

[V3] – 5...  
[V2] – 3...

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<sup>2</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with attachments.

<sup>3</sup> Original File Tab.

<sup>4</sup> Original File Tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, signed by Appellant on August 24, 2010 with attachments.

<sup>5</sup> The IAD is captioned "REVISED" IAD. NAO has been advised by RAM that the word revised has a typographical error, and that only one IAD was issued in this appeal. Appeals Correspondence Tab, Emails dated October 19, 2011.

RAM noted Appellant did not present evidence to show the Official Record was wrong, and also explained the instructions for how to report halibut in 2004 and 2005 logbooks. Lastly, RAM rejected Appellant's argument that he should be credited with trips made on a vessel known as ██████████ (V5): "[Appellant] was not the person issued the ADF&G Business Owner License that authorized the logbook fishing trips reported for [V5]. [Appellant] was not issued [an ADF&G logbook] for [V5] in 2004 or 2005."

Appellant, through counsel, filed an appeal of the IAD with OAA on March 21, 2011.<sup>6</sup> On April 13, 2011, Appellant filed a supplement to the appeal notice.<sup>7</sup> In his appeal paperwork, Appellant argues that he qualifies for three transferable permits. In support of that contention, Appellant conceded he did not record all his charter halibut fishing activity in ADF&G logbooks in 2004 or 2005. However, Appellant maintains he was not required to do so and has other proof that in fact he did take at least fifteen charter trips on three of his vessels. Appellant further took issue with RAM denying him credit for V5's logbook trips. Appellant explained the regulation relied on by RAM only requires RAM to not credit an applicant with another applicant's trips, but since the operator of V5 was not an applicant, Appellant should receive credit for V5's trips.

I have determined the information in the record is sufficient to render a decision.<sup>8</sup> Accordingly, I have closed the record and issue this Decision.

## ISSUES

At issue in this appeal is whether Appellant is eligible for three transferable CHPs. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence that he properly reported to ADF&G fifteen or more bottomfish logbook fishing trips taken on vessels associated with his business license in 2004 or 2005?

If the answer to the question is "no," I must uphold the IAD and conclude Appellant does not qualify for three transferable CHPs.

## FINDINGS OF FACT (FOF)

1. ██████████ In 2004, 2005 and 2008, Appellant operated under Business Owner License ██████████<sup>9</sup>

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<sup>6</sup> Pleadings Tab.

<sup>7</sup> Pleadings Tab.

<sup>8</sup> See 50 C.F.R. § 679.43(g)(2).

<sup>9</sup> Original File Tab, Summary of Official Charter Halibut Record.

2. In 2004 and 2005, the logbook in which V5's bottomfish trips were reported was not issued to Appellant pursuant to his Business Owners License.<sup>10</sup>
3. For 2004, Appellant reported three bottomfish logbook fishing trips taken on V4 to ADF&G.<sup>11</sup>
4. For 2004, Appellant reported eleven bottomfish logbook fishing trips taken on V2 to ADF&G.<sup>12</sup>
5. For 2005, Appellant reported five halibut logbook fishing trips taken on V3 to ADF&G.<sup>13</sup>
6. For 2005, Appellant reported five halibut logbook fishing trips taken on V2 to ADF&G.<sup>14</sup>
7. For 2008, Appellant reported more than fifteen halibut logbook fishing trips taken on V1 to ADF&G.<sup>15</sup>
8. For 2008, Appellant reported more than fifteen halibut logbook fishing trips taken on V2 to ADF&G.<sup>16</sup>
9. For 2008, Appellant reported more than fifteen halibut logbook fishing trips taken on V5 to ADF&G.<sup>17</sup>
10. On April 1, 2010, Appellant applied for three transferable permits.<sup>18</sup>
11. On January 18, 2011, RAM issued the IAD at issue in this appeal. In the IAD RAM notified Appellant it had denied his request for three transferable permits, but did grant him three nontransferable permits.<sup>19</sup>

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<sup>10</sup> Original File tab, Appellant's letter dated March 30, 2010, Page 3; Original file tab, IAD, Page 8.

<sup>11</sup> Original File Tab, Print Summary created January 26, 2010; Original File Tab, screen print for Appellant's vessel V4.

<sup>12</sup> Original File Tab, Print Summary created January 26, 2010; Original File Tab, screen print for Appellant's vessel V2.

<sup>13</sup> Original File Tab, Print Summary created January 26, 2010.

<sup>14</sup> Original File Tab, Print Summary created January 26, 2010.

<sup>15</sup> Original File Tab, Print Summary created January 26, 2010 with attached page.

<sup>16</sup> Original File Tab, Print Summary created January 26, 2010 with attached page.

<sup>17</sup> Original File Tab, Print Summary created January 26, 2010 with attached page.

<sup>18</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>19</sup> Original File Tab, IAD.

## PRINCIPLES OF LAW

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP, including evaluating applications for Charter Halibut Permits.<sup>20</sup>

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).<sup>21</sup>

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. That participation is defined as at least five logbook fishing trips properly reported to ADF&G in 2004 or 2005 and 2008.<sup>22</sup> To be eligible for a transferable permit, an applicant must have fifteen logbook fishing trips for 2004 or 2005 and 2008.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period (2004 or 2005) 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 boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.<sup>26</sup>

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period (2008) that was reported to ADF&G 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

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<sup>20</sup> See 50 C.F.R. § 300.67(f)(5); 75 Fed. Reg. 554, 556 (January 5, 2010).

<sup>21</sup> 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

<sup>22</sup> See 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed. Reg. 554, 554-555 (January 5, 2010).

<sup>23</sup> See 50 C.F.R. § 300.67(d).

<sup>24</sup> 50 C.F.R. § 300.67(f)(4).

<sup>25</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

<sup>26</sup> 50 C.F.R. § 300.67(f)(2).

was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.<sup>27</sup>

## ANALYSIS

### **Did Appellant establish by a preponderance of the evidence that he properly reported to ADF&G fifteen or more bottomfish logbook fishing trips taken on vessels associated with his business license in 2004 or 2005?**

I have carefully considered Appellant's appeal. I have reviewed the entire file before rendering this Decision. After that full and careful review, I have found Appellant has not met his burden of proving by a preponderance of the evidence that RAM erred in the IAD. My rationale follows.

The Official Record is based on data collected from ADF&G. The data is collected close to the time of the logbook fishing trips. ADF&G is a state agency, and NMFS explained in the preamble to the Proposed Rule why it thought ADF&G data was reliable and a good basis on which to base its analysis of CHP applications.<sup>28</sup> That said, the Official Record, based on the ADF&G data which shows the number of relevant trips, is presumed accurate. However, there are multiple opportunities for an applicant to challenge the Official Record and in fact prove that it is not accurate. That is what Appellant attempts in this appeal.

Appellant is confronted with an Official Record that shows his vessels took between three and eleven logbook trips, obviously not fifteen or more. Since Appellant needs fifteen for a transferable permit, without that amount and based on the Official Record, the IAD is sustainable.

In an attempt to meet his burden of proving the Official Record is in error, Appellant concedes he did not record all his charter halibut fishing activity in ADF&G logbooks in 2004 or 2005. However, Appellant maintains that he was not required to do so and has other proof that in fact he did take at least fifteen charter trips in three of his vessels. Appellant further takes issue with RAM denying him credit for V5's logbook trips. Appellant explains the regulation relied on by RAM only requires RAM to not credit an applicant with another applicant's trips, but since the operator of V5 was not an applicant, Appellant should receive credit for V5's trips.

I cannot accept Appellant's argument as a basis to change the Official Record. Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks

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<sup>27</sup> 50 C.F.R. § 300.67(f)(3).

<sup>28</sup> 74 Fed. Reg. 18186 (April 21, 2009).

were provided in the logbooks.<sup>29</sup> With respect to recording bottomfish trips, those instructions provided in pertinent part:

BOTTOMFISH	
Primary Stat Area <b>(Incl. Halibut)</b>	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 ( <b>incl. halibut</b> ) and targeting salmon and halibut simultaneously. . . .
No. Boat Hours Fished	The number of boat hours that at least one rod/line was targeting bottomfish ( <b>incl. halibut</b> ) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew. . . . <b>Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected.</b> . . .
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted? <b>Example 1:</b> One Target Salmon	. . . NOTE: If bottomfish are caught when targeting salmon only, record the number of bottomfish in the appropriate columns in the bottomfish section. . . .
<b>Example 3:</b> Two Targets Salmon <u>and</u> Bottomfish <b>(including halibut)</b> Simultaneously (i.e., mooching)	. . . [R]ecord 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.
<b>Example 4:</b> A combination of any of the above	. . . [R]ecord 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 targeting bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate

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

	columns in the bottomfish section.
<b>SPECIAL NOTES AND INSTRUCTIONS</b>	
“Halibut”	The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to <b>record your effort</b> . Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (state area, no. rods, and boat hrs).

There were similar instructions for 2005 logbooks. If Appellant had followed the written instructions supplied with Saltwater Charter Vessel Logbooks, he would have properly recorded and reported his charter halibut fishing business activity.

Further, to be a “logbook fishing trip” within the meaning of the CHLAP regulations, it is not enough simply to take the trip. Rather, the regulations require the bottomfish fishing trip was a) timely reported, b) in a logbook assigned to Appellant based on his business license, and c) with appropriate information. Appellant has not shown that he submitted logbook pages to ADF&G reporting at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005). Further, the instructions are clear that for the purposes of logbook recordation, a halibut was to be considered a bottomfish. Thus, even if I accept the spreadsheets and photographs attached to Appellant’s application at face value, they nevertheless are insufficient to prove that Appellant made at least five bottomfish logbook trips as those trips were not properly reported to ADF&G.

With respect to Appellant’s argument that he should be credited with the logbook trips properly reported by V5, I am not persuaded that provides a basis for me to overturn the IAD. RAM rejected Appellant’s argument based on two regulatory provisions: one, because Appellant did not hold the business license associated with the logbook used by V5, and two, because more than one applicant cannot be credited with the same logbook trips. I do not reach the latter basis as the first is dispositive. Pursuant to 50 C.F.R. § 300.67(b)(1)(i)-(ii), “NMFS will issue a charter halibut permit to a person who meets the following requirements:...The person 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 Licenses that authorized logbook fishing trips that meet the minimum participation requirements described in paragraphs (b)(1)(ii)(A) and (B)(1)(ii)(B)...for one or more charter halibut permits...” Appellant was not that type of person. The logbook used for V5’s logbook fishing trips in 2004 and 2005 was not issued pursuant to Appellant’s Business Owner License. Therefore, when RAM did not credit Appellant with V5’s logbook trips, it acted consistent with applicable regulations.

## CONCLUSIONS OF LAW

Did Appellant did not establish by a preponderance of the evidence that he properly reported to the Alaska Department of Fish and Game (ADF&G) fifteen or more bottomfish logbook fishing trips taken on vessels associated with his business license in 2004 or 2005; therefore, Appellant is not eligible for three transferable permits.

The IAD is consistent with CHLAP regulations.

## ORDER

The IAD dated January 18, 2011 is upheld. This decision takes effect (30) days from the date issued, December 16, 2011,<sup>30</sup> 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 reverses, modifies, or reverses this decision pursuant to 50 C.F.R. § 679.43(k) and (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 Time on November 28, 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 in support of the motion.



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Eileen G. Jones  
Chief Administrative Judge

Date Issued: November 16, 2011

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<sup>30</sup> 50 C.F.R. § 679.43(k) and (o).