

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

In re Application of )  
 )  
 ) Appeal No. 10-0096  
 )  
 ) DECISION  
 )  
 Appellant )

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STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) 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 were filed with OAA. The undersigned is the administrative judge assigned to review and decide this matter.<sup>1</sup>

On November 15, 2011, [REDACTED] doing business (dba) as [REDACTED] (Appellant), timely filed an appeal with OAA.<sup>2</sup> In his appeal Appellant challenges a Restricted Access Management program (RAM) Initial Administrative Determination (IAD) dated September 17, 2010.<sup>3</sup> In the IAD, RAM granted Appellant's application and awarded Appellant ten permits. Only one of those permits is at issue in this appeal, the one associated with the vessel [REDACTED] (Vessel) which RAM determined would be nontransferable. Appellant seeks in this appeal a ruling that the permit associated with Vessel will be transferable.

The procedural history of this appeal began when Appellant filed an application for a CHP on April 1, 2010.<sup>4</sup> In response to Appellant's application, on May 13, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice). In the Notice, RAM provided Appellant thirty days to submit additional information in support of his application that could establish his eligibility for a CHP. In response to the Notice, on June 8, 2010, Appellant's attorney provided RAM with a letter brief, and copies of

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<sup>1</sup> See 50 C.F.R. § 679.43.

<sup>2</sup> Pleadings Tab, appeal dated November 11, 2010 with attachments received by OAA on November 15, 2011.

<sup>3</sup> Original File Tab, IAD dated September 17, 2010. RAM is responsible for administering the Charter Halibut Limited Access Program (CHLAP).

<sup>4</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

Vessel's 2005 logbook as well as signed declarations from guests who fished from Vessel during the 2005 fishing season.<sup>5</sup>

On September 17, 2010, RAM issued the IAD at issue in this appeal.<sup>6</sup> In the IAD, RAM denied Appellant's application for a transferable permit based on Vessel's historic participation. However, RAM did grant Appellant's application for a nontransferable permit based on Vessel's history. RAM reasoned the Official Record, used by RAM to determine applicant eligibility, indicated Appellant took less than fifteen bottomfish fishing trips in 2005. Since one of the regulatory requirements for a transferable permit is a minimum of fifteen qualifying trips, RAM found Appellant ineligible for a transferable permit.<sup>7</sup>

On November 15, 2010, Appellant timely appealed the IAD to OAA.<sup>8</sup> In the appeal, Appellant's attorney states the captain of Vessel did not understand how to properly fill out his 2005 logbook. However, according to Appellant, his captain did take fifteen or more charter halibut trips during the 2005 fishing season. Appellant explains when his captain filled out the information for charter salmon trips in the logbook, he thought that was sufficient to cover the charter halibut trips taken the same day in the same statistical area. In support of that argument, Appellant submitted copies of Vessel's 2005 logbook as well as written declarations from anglers who were on charter trips on Vessel in 2005.

On November 29, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until December 20, 2010 to supplement the record.<sup>9</sup> On December 18, 2010, Appellant's attorney submitted another letter in which Appellant argues the 2005 logbook instructions did not include instructions for recording charter halibut trips.<sup>10</sup> Appellant submitted copies of a 2010 logbook to show how the Alaska Department of Fish and Game (ADF&G), the entity that issues logbooks, revised logbook instructions to include instructions for recording charter halibut trips.

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.<sup>11</sup>

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<sup>5</sup> Original File Tab, executed Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, dated June 8, 2010 with attachments.

<sup>6</sup> Original File Tab, IAD.

<sup>7</sup> Original File Tab, IAD.

<sup>8</sup> Pleadings File Tab, Appellant's appeal dated received by OAA on November 15, 2011.

<sup>9</sup> Appeals Correspondence Tab, NAO letter dated November 29, 2010.

<sup>10</sup> Pleadings Tab, Appellant's attorney's letter dated December 18, 2010.

<sup>11</sup> See 50 C.F.R. § 679.43 (g) and (k).

## ISSUES

At issue in this appeal is whether Appellant is eligible for a 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 he properly reported to the Alaska Department of Fish and Game (ADF&G) fifteen or more bottomfish logbook fishing trips taken on Vessel in 2005?

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

1. On April 1, 2010, Appellant applied to RAM for seven transferable CHPS and three nontransferable CHPs.<sup>12</sup>
2. One of the requested transferable permits was based on the charter trip history of Vessel.<sup>13</sup>
3. In 2005, ADF&G issued Appellant a license to operate his charter fishing business.<sup>14</sup>
4. Pursuant to Appellant’s license, Appellant was issued a logbook, number 51754, which was used to record Vessel’s logbook trips in 2005.<sup>15</sup>
5. In 2005, Appellant timely reported to ADF&G that Vessel made eight bottomfish logbook trips.<sup>16</sup>
6. On April 1, 2010, Appellant applied to RAM for seven transferable CHPS and three nontransferable CHPs.<sup>17</sup>
7. One of the requested transferable permits was based on the charter trip history of Vessel.<sup>18</sup>

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<sup>12</sup> Original File Tab, Application.

<sup>13</sup> Original File Tab, Application.

<sup>14</sup> Original File Tab, Application, page 3.

<sup>15</sup> Original File Tab, Application, page 3.

<sup>16</sup> Original File Tab, IAD; Original File Tab, executed Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, dated June 8, 2010, Attachment A, logbook 51754 pages 1-8, .

<sup>17</sup> Original File Tab, Application.

<sup>18</sup> Original File Tab, Application.

8. In September 2010, RAM denied Appellant's application for a transferable permit based on Vessel's charter fishing history for 2005 as reflected in logbook 51754 and the Official Record.<sup>19</sup>

## 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 CHP<sup>20</sup> 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.<sup>21</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>22</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>23</sup>

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 boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup>

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

<sup>20</sup> See 50 C.F.R. § 300.67(b)(1)(ii).

<sup>21</sup> 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).

<sup>22</sup> See 50 C.F.R. § 300.67(f)(4).

<sup>23</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

<sup>24</sup> See 50 C.F.R. § 300.67(f)(2).

<sup>25</sup> See 50 C.F.R. § 300.67(f)(3).

<sup>26</sup> See 50 C.F.R. § 300.67(f)(5).

## ANALYSIS

As an initial matter, I note neither RAM nor Appellant have indicated whether Appellant has sufficient proof of fifteen or more halibut logbook trips for 2008.<sup>27</sup> I therefore will not address that in this Decision. However, I also note that the issue I will address in this Decision, whether Appellant has at least fifteen logbook trips for 2005, is dispositive for deciding whether Appellant is eligible for a transferable permit.<sup>28</sup>

As indicated in the Findings of Fact, Appellant reported eight qualifying trips to ADF&G in 2005. That means that Appellant's captain was operating Vessel under Appellant's business license, that pursuant to that license, in logbook 51754, Appellant's captain filled out the spaces for eight bottomfish logbook trips, i.e., the statistical area, the hours bottomfish fishing, or number of rods used bottomfish fishing, and; properly provided said logbook sheets to ADF&G. Since the CHLAP regulations require a minimum of fifteen bottomfish logbook trips from 2005<sup>29</sup> to meet the participation requirements for a transferable permit and Appellant only has eight such trips, RAM correctly decided Appellant was ineligible for a transferable permit based on the 2005 bottomfish trips recorded in logbook 51754.

On appeal Appellant explains the captain of Vessel did not understand how to properly fill out his 2005 logbook. Appellant argues his captain took fifteen or more charter halibut trips during the 2005 fishing season. In support of that argument, Appellant submitted copies of Vessel's 2005 logbook as well as written declarations from anglers who were on charter trips on Vessel in 2005. Appellant explains when his captain filled out the information for charter salmon trips in the logbook, he thought that was sufficient to cover the charter halibut trips taken the same day in the same statistical area. Appellant contends: "In 2005, the ADF&G log book form had no place to show halibut caught or halibut released. There is a generic reference to bottom fish and the catch or release record refers to pelagic or non-pelagic rockfish, ling cod and salmon shark."<sup>30</sup> Appellant argues the 2005 logbook instructions did not include instructions for recording charter halibut trips.<sup>31</sup> Appellant submitted copies of a 2010 logbook to show how ADF&G revised logbook instructions to include instructions for recording charter halibut trips.

Instructions explaining how to complete 2005 logbooks<sup>32</sup> were provided in the logbooks. With respect to recording halibut those instructions provided in pertinent part:

<sup>27</sup> See 50 C.F.R. § 300.67(d)(1)(iii).

<sup>28</sup> See 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); 50 C.F.R. § 300.67(d)(1).

<sup>29</sup> The CHLAP 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.

<sup>30</sup> Pleadings Tab, Appeal received by OAA on November 17, 2011, Exhibit A – Vessel Factual Submission.

<sup>31</sup> Pleadings Tab, Appellant's attorney's letter dated December 18, 2010.

<sup>32</sup> 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 <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 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> Halibut kept and released data is collected through established survey programs.
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted?  <b>Example 3:</b> Two Targets Salmon <u>and</u> Bottomfish ( <b>including halibut</b> ) 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.
<b>Example 4:</b> 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 ( <b>including halibut</b> ) 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 <b>is no longer requested</b> in the logbook. However, we ask that you continue to <b>record your effort</b> .

If Appellant's 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.

Fifty C.F.R. § 300.67(f)(2) provides applicants will be given credit for "bottomfish logbook fishing trip" if they notate 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>33</sup> As explained by NMFS in the Final CHLAP rules:

The principle documentation necessary to prove qualifying participation in the charter halibut fishery will be limited to saltwater charter vessel logbooks issued by ADF&G...[T]he 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."<sup>34</sup>

Based on the record before me, Appellant's captain did not notate any of the pieces of information listed in the regulations to establish he took at least seven more (than Appellant had received credit for by ADF&G and then RAM) bottomfish logbook fishing trips in 2005. In reaching that conclusion, I understand Appellant's perspective – that when his captain entered information about salmon fishing, he thought that was sufficient to indicate he had also been bottomfishing in the same statistical area. However, that argument does not reflect the regulatory requirements as articulated above, and for that reason, is not a basis for me to overturn the IAD.

I have also reviewed and considered the written declarations of anglers from 2005 who believe they fished from Vessel. Even if I assume the written declarations are what they purport to be and that what those anglers say is accurate, Appellant nevertheless will not prevail. The 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 he meets the regulatory requirements of a "bottomfish logbook fishing trip" within the meaning of 50 C.F.R. § 300.67(f)(2), as more fully explained above.

## CONCLUSIONS OF LAW

Appellant has not established by a preponderance of the evidence that he properly reported to ADF&G at least fifteen bottomfish logbook fishing trips for 2005.

Appellant is not eligible for a transferable CHP based on Vessel's logbook record.

<sup>33</sup> See 50 C.F.R. § 300.67(f)(2).

<sup>34</sup> 75 Fed. Reg. 554, 556 (January 5, 2010).

The IAD is consistent with CHLAP regulations.

### ORDER

The IAD dated September 17, 2010 is upheld. This decision takes effect thirty days from the date issued, December 29, 2011,<sup>35</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 remands 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 December 9, 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.



Eileen G. Jones  
Chief Administrative Judge

Date Issued: November 29, 2011

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<sup>35</sup> 50 C.F.R. § 679.43(k) and (o).