



According to RAM, the Official Record showed Appellant did not meet the minimum requirements of having reported at least five bottomfish logbook fishing trips to the State of Alaska Department of Fish and Game (ADF&G) during the qualifying period (2004 or 2005). However, RAM informed Appellant that he had until July 30, 2010 to submit evidence to demonstrate his eligibility for a permit. On August 2, 2010, Appellant responded to the Notice by requesting a thirty-day extension of the deadline to submit evidence.<sup>7</sup> Appellant submitted a letter further explaining his situation on September 30, 2010.<sup>8</sup> In the letter, Appellant explains that in 2005, his Company was newly formed and that he did not submit any logbook information to ADF&G.

On October 26, 2010, RAM sent Appellant the IAD at issue in this case.<sup>9</sup> In its IAD, RAM notified Appellant that according to information in the Official Record, Appellant did not meet the minimum participation requirements in the qualifying period (2004 or 2005). Generally, "minimum participation requirements" for 2004 or 2005 means that an applicant properly reported five or more bottomfish fishing trips to ADF&G. RAM noted there was no indication Appellant held an ADF&G Business Owner License to operate his business in 2004 or 2005. As well, no logbooks were issued to Appellant's business in 2004 or 2005, and no bottomfish logbook fishing trips were reported to ADF&G during those years.

On December 17, 2010, OAA received Appellant's timely appeal.<sup>10</sup> In his appeal, Appellant argues that ADF&G does not issue "ADF&G Business Owner Licenses," that ADF&G does not authorize trips, and that an individual's halibut fishing effort was not required to be reported in 2005. He further argues that the regulations do not define "Saltwater Charter Logbook" and that the ADF&G Saltwater Charter Logbook requests different information than the information required in the CHLAP regulations. Appellant argues that because of these issues, his recently submitted 2005 halibut fishing effort information should satisfy the requirements of the CHLAP regulations and that he is eligible for a permit.

On February 16, 2011, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by March 18, 2011.<sup>11</sup> Appellant submitted additional documents and evidence that were added to the case record. I have reviewed Appellant's appeal and the case record, and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing.<sup>12</sup>

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<sup>7</sup> Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated Aug. 2, 2010 (received by RAM on Aug. 3, 2010).

<sup>8</sup> Original File Tab, Letter from Appellant to RAM, "Additional Information for Halibut Charter Application," dated Sept. 30, 2010 (received by RAM on Oct. 6, 2010).

<sup>9</sup> Original File Tab, IAD dated Oct. 26, 2010.

<sup>10</sup> Pleadings Tab, Appellant's Letter of Appeal dated Dec. 17, 2010 (received by OAA on Dec. 21, 2010).

<sup>11</sup> Appeals Correspondence Tab, Letter from NAO to Appellant dated Feb. 16, 2011.

<sup>12</sup> See 50 C.F.R. § 679.43(g)(2), (k).

## ISSUE

The broad issue in this case is whether Appellant is eligible for a permit under the CHLAP rules. To resolve that issue, I must answer the following:

Did Appellant prove by a preponderance of the evidence that he timely and properly reported to ADF&G at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005)?

If the answer to the question is “no,” Appellant is not eligible for a permit, and I must uphold the IAD.

## FINDINGS OF FACT

1. In 2004 and 2005, Appellant did not timely or properly report any bottomfish logbook fishing trips to the State of Alaska.<sup>13</sup>
2. In 2008, Appellant reported nine halibut logbook fishing trips to the State of Alaska.<sup>14</sup>

## PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued the ADF&G Business Owner License. An ADF&G Business Owner License includes a business registration, a sport fish business owner license, a sport fish business license, and an ADF&G business license.<sup>15</sup> This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.<sup>16</sup>

Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent publication period, namely 2008.<sup>17</sup>

A “logbook fishing trip” means 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

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<sup>13</sup> Original File Tab, Letter from Appellant to RAM, “Additional Information for Halibut Charter Application,” dated Sept. 30, 2010 (received by RAM on Oct. 6, 2010); Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 23, 2010 (received by RAM on Mar. 1, 2010).

<sup>14</sup> Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Feb. 23, 2010 (received by RAM on Mar. 1, 2010).

<sup>15</sup> 50 C.F.R. § 300.67(b)(3).

<sup>16</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>17</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

Logbook within the time limits for reporting the trip in effect at the time of the trip.<sup>18</sup> The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.<sup>19</sup>

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska 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>20</sup>

A “halibut logbook fishing tip” means 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 released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.<sup>21</sup>

“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 non transferable permits.<sup>22</sup>

## ANALYSIS

The issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to be eligible for a CHP. Under the CHLAP regulation, minimum participation requirements for a CHP are five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and five or more halibut logbook fishing trips during the recent participation period, namely 2008.<sup>23</sup>

Appellant properly reported nine halibut logbook fishing trips to ADF&G for 2008. Thus, Appellant meets minimum participation requirements for 2008. However, Appellant reported no qualifying trips to ADF&G in 2004 or 2005. Appellant acknowledged this when he explained that his company was not in operation in 2004 and that “[i]n reviewing our records for 2005 we have reached the conclusion that no logbook information was formally submitted to the Alaska Department of Fish and Game. . . .”<sup>24</sup> Since the CHLAP regulations require minimum participation in both 2004 or 2005 and 2008, Appellant does not meet the minimum participation requirements for a CHP.

<sup>18</sup> 50 C.F.R. § 300.67(f)(4).

<sup>19</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

<sup>20</sup> 50 C.F.R. § 300.67(f)(2).

<sup>21</sup> 50 C.F.R. § 300.67(f)(3).

<sup>22</sup> 50 C.F.R. § 300.67(f)(1).

<sup>23</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>24</sup> Original File Tab, Letter from Appellant to RAM, “Additional Information for Halibut Charter Application,” dated Sept. 30, 2010 (received by RAM on Oct. 6, 2010).

Appellant makes a number of arguments on appeal. First, Appellant argues that ADF&G does not issue “ADF&G Business Owner Licenses” and claims that RAM makes an “illogical leap” when it noted that Appellant did not hold an Alaska State Sport Fishing Operator License in 2005.<sup>25</sup> “ADF&G Business Owner License” is a regulatory term. Its definition is included in the CHLAP regulation: “For the purposes of this section, the term ‘ADF&G Business Owner(s) License(s)’ includes a ‘business registration,’ ‘sport fish business owner license,’ ‘sport fish business license,’ and ‘ADF&G business license.’”<sup>26</sup> The preamble to the Proposed Rule for the CHLAP regulation explains that the term ADF&G Business Owner License was chosen to refer to a license issued by ADF&G.<sup>27</sup> This is the license that allows individuals to receive an ADF&G logbook to record their charter fishing trips.<sup>28</sup>

Appellant next argues the ADF&G does not authorize fishing trips.<sup>29</sup> Within the meaning of the CHLAP regulation, “authorized logbook fishing trips” are trips taken by a charter business that is authorized by ADF&G to conduct logbook fishing trips.<sup>30</sup> ADF&G’s authorization arises when a business fulfills the necessary requirements to receive, and does in fact receive, a logbook. Once ADF&G issues a logbook to a business for a vessel, the vessel may take “logbook fishing trips” as defined in the regulation.<sup>31</sup>

Appellant argues that the CHLAP regulations do not define “Saltwater Charter Logbook,” so CHP applicants need not have used the ADF&G Saltwater Charter Logbook to report their fishing trips. He argues that the information required for a bottomfish logbook fishing trip in the CHLAP regulation is different from what is required in the ADF&G logbooks, assuming that the number of halibut caught and released to be the relevant unit of participation during 2004 or 2005. Appellant also argues that the regulations do not require that logbooks be submitted by a State of Alaska licensed sport fishing guide. Because of this, Appellant believes that reporting his 2005 halibut fishing effort in his appeal meets the “letter and intent” of the CHLAP. I will discuss each of these arguments in turn.

The CHLAP regulations specifically state that the trips are reported to the “State of Alaska in a Saltwater Charter Logbook.”<sup>32</sup> Through ADF&G, the State of Alaska issues logbooks in which charter fishing trips are to be recorded and submitted to the state. The CHLAP regulation intended NMFS to use ADF&G logbooks when evaluating an applicant’s eligibility for a permit. “The [North Pacific Fishery Management] Council

<sup>25</sup> Pleadings Tab, Appellant’s Letter of Appeal dated Dec. 17, 2010 (received by OAA on Dec. 21, 2010); Pleadings Tab, Appellant’s Letter “Appeal No. 10-0117, Further Supplemental information and Restated Application” dated March 18, 2011.

<sup>26</sup> 50 C.F.R. § 300.67(b)(3).

<sup>27</sup> 74 Fed. Reg. 18185 (April 21, 2009).

<sup>28</sup> See ADF&G’s website “Sport Fishing Guides & Charter Requirements: Logbook” available at <http://www.adfg.alaska.gov/index.cfm?adfg=prolicenses.logbook>.

<sup>29</sup> Pleadings Tab, Appellant’s Letter of Appeal dated Dec. 17, 2010 (received by OAA on Dec. 21, 2010).

<sup>30</sup> See 75 Fed. Reg. 591 (Jan. 5, 2010).

<sup>31</sup> See 50 C.F.R. § 300.67(f)(4).

<sup>32</sup> See 50 C.F.R. § 300.67(f)(2)-(4).

chose to rely on the fishing trip data in ADF&G Saltwater Charter Logbooks as the best available source of information on participation in the charter fishery.”<sup>33</sup> In 2005, the relevant logbook was entitled “State of Alaska, Department of Fish & Game, Division of Sport Fish: 2005 Saltwater Charter Logbook and Vessel Registration.”<sup>34</sup>

Instructions explaining how to complete the 2005 Saltwater Charter Vessel Logbooks were provided in the logbooks.<sup>35</sup> With respect to recording bottomfish trips, those instructions provided as follows:

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> ). . . .
No. Boat Hours Fished	The number of boat hours that at least one rod/line was targeting bottomfish ( <b>incl. halibut</b> ) . . . .
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> . . . .
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 <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).

ADF&G required individuals to record all bottomfish trips, including those in which halibut was the target, in the logbooks. Also, even if no fish were caught, individuals were nonetheless instructed to record the trip: the date, the guide license number, the port of landing, the number of clients and crew fishing, the *location* fished, the *number of rods* fished, the *number of boat hours* fished, and the total number of fish kept and

<sup>33</sup> 75 Fed. Reg. 590 (Jan. 5, 2010). The Council is authorized to develop regulations under the Halibut Act § 733c(c).

<sup>34</sup> See State of Alaska, Department of Fish & Game, Division of Sport Fish: 2005 Saltwater Charter Logbook and Vessel Registration, available at [http://www.fakr.noaa.gov/appeals/adfg\\_logbooks/2005.pdf](http://www.fakr.noaa.gov/appeals/adfg_logbooks/2005.pdf).

<sup>35</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>.

released by clients and crew.<sup>36</sup> These instructions satisfy the reporting requirements for a bottomfish logbook fishing trip in the CHLAP regulations. The regulations require “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>37</sup>

Because bottomfish logbook fishing trips rely on information reported in ADF&G Saltwater Charter Logbooks, applicants must follow the logbook’s submission instructions. The owner or agent of a business holding an ADF&G Sport Fishing Business License must complete the logbook entries and the logbook data must be submitted in a timely manner.<sup>38</sup>

It is Appellant’s burden to show that he properly reported to ADF&G at least five bottomfish fishing trips in an ADF&G Saltwater Charter Logbook with the requisite information. Appellant did not report any of his bottomfish fishing trips to ADF&G in 2005.

Appellant also argues on appeal that NMFS has wrongfully relied on ADF&G logbook data to assist in its implementation of the CHLAP regulations. NMFS’s coordination with ADF&G was contemplated as a necessary part of developing the Official Record during the drafting of the CHLAP regulation. Again, the preamble to the Proposed Rule and to the Final Rule of the CHLAP explains why NMFS chose to rely on ADF&G data:

The official record would be based on data from ADF&G because the State of Alaska has regulated charter fishing in the past and has the data on past participation in the charter halibut fishery. . . . Thus, the official record would include information from ADF&G on the persons that obtained ADF&G Business Owner Licenses in the qualifying period and the recent participation period. . . .<sup>39</sup>

Only persons who apply for a CHP and are issued the ADF&G business owner license that authorized logbook fishing trips during the required periods are eligible to receive a permit.<sup>40</sup>

Appellant may believe that another process should be considered in determining CHP eligibility, and he may dislike NMFS’s coordination with ADF&G; however, Appellant has not shown that NMFS’s interpretation of the CHLAP regulation is unreasonable or

<sup>36</sup> See State of Alaska, Department of Fish & Game, Division of Sport Fish: 2005 Saltwater Charter Logbook and Vessel Registration, available at [http://www.fakr.noaa.gov/appeals/adfg\\_logbooks/2005.pdf](http://www.fakr.noaa.gov/appeals/adfg_logbooks/2005.pdf) (emphasis added).

<sup>37</sup> See 50 C.F.R. § 300.67(f)(2) (emphasis added).

<sup>38</sup> All 2005 fishing activity must have been reported to ADF&G by January 15, 2006. See State of Alaska, Department of Fish & Game, Division of Sport Fish: 2005 Saltwater Charter Logbook and Vessel Registration, available at [http://www.fakr.noaa.gov/appeals/adfg\\_logbooks/2005.pdf](http://www.fakr.noaa.gov/appeals/adfg_logbooks/2005.pdf).

<sup>39</sup> 74 Fed. Reg. 18186 (April 21, 2009).

<sup>40</sup> 50 C.F.R. § 300.67(b)(1)(i)-(ii).

NMFS's use of state data was unreasonable or inconsistent with the CHLAP regulations. NMFS appropriately relies on ADF&G's data as anticipated by the Council because of ADF&G's history of regulating the charter fishing industry and its responsibility to issue the licenses upon which logbooks are authorized.<sup>41</sup>

Finally, Appellant objects to the CHLAP's procedures. Appellant argues that RAM overreached its authority by using law enforcement personal to conduct a civil investigation on a CHP applicant. Appellant believes he is disadvantaged by being denied the right to conduct discovery and because he did not receive a recording of a conversation with law enforcement. Appellant argues that the CHLAP regulation is flawed because of its omission of a standard and burden of proof.

I have considered these arguments. However, the scope of this appeal does not extend to resolving these issues.<sup>42</sup> Law enforcement proceedings are governed by 15 C.F.R. § 904 over which NAO does not have jurisdiction. The issue on appeal is whether the CHLAP regulations were correctly applied to Appellant. Appellant has not established that the IAD issued to him was inconsistent with the CHLAP regulations. The burden of proof is on the Appellant to show by a preponderance of the evidence that the factual basis for the IAD is incorrect. Appellant did not meet that burden.

Given all of the evidence, I have concluded that Appellant did not properly report any bottomfish fishing trips to ADF&G in 2005; therefore, Appellant is not eligible for a permit. In reaching my decision, I have carefully reviewed the entire record. I recognize Appellant's fishing standards and his interest in continuing to fish for halibut as part of his small business. However, I am bound to follow the CHLAP regulations, and as such, Appellant does not qualify for a permit.

### CONCLUSIONS OF LAW

Appellant is not eligible for a CHP because he did not meet the minimum participation requirements in 2004 or 2005.

The IAD is consistent with the CHLAP regulations.

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<sup>41</sup> See 50 C.F.R. § 300.67(b)(1)(ii).

<sup>42</sup> I note, however, the following: NOAA, Office of Law Enforcement, is authorized to conduct both criminal and civil investigations. See <http://www.nmfs.noaa.gov/ole/investigations.html>. Appellant also received a copy of any materials submitted by RAM that were in the case record, including the IAD. Finally, Appellant was informed of the relevant burden of proof to prevail on appeal. See Pleadings Tab, Email from Steve Hinckle to Appellant dated Aug. 31, 2011.

ORDER

The IAD dated October 26, 2010 is upheld. This decision takes effect thirty days from the date issued, November 2, 2011, 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), (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 the tenth day after the date of this Decision, October 13, 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.

Steven Goodman  
Administrative Judge

Date Issued: October 3, 2011