

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0039

DECISION

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 Headquarters in Silver Spring, Maryland, and maintains an office in the NMFS Alaska Region. NAO is the successor to the Office of Administrative Appeals, Alaska Region (OAA), and is charged with deciding appeals that were filed with OAA.¹

On February 15, 2011, [REDACTED] on behalf of [REDACTED] (Appellant) filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on December 17, 2010.² In the IAD, RAM evaluated Appellant's application for permits under the Charter Halibut Limited Access Program.³

In the IAD, RAM determined that Appellant met the participation requirements for three non-transferable permits for use in International Pacific Halibut Commission Area 3A.⁴ RAM determined that Appellant did not meet the minimum participation requirements for any of those permits to be a transferable permit.

The minimum participation requirement in the qualifying period (2004, 2005) for a transferable permit is fifteen bottomfish logbook fishing trips reported under the applicant's Alaska Department of Fish and Game (ADF&G) Business Owner License in

¹ See 50 C.F.R. § 679.43 (appeal procedure regulation).

² Letter from Appellant to OAA (Feb.14, 2011). This letter is from [REDACTED] who is a member of [REDACTED]. The record also contains a letter from [REDACTED] another member of [REDACTED] [REDACTED] is the applicant and Appellant. In the decision, I refer to the individual members of [REDACTED] as well as [REDACTED] as Appellant.

The Charter Halibut Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67. These regulations, and the appeal regulation at 50 C.F.R. § 679.43, are available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/regs/summary.htm>.

⁴ The number of permits is determined by 50 C.F.R. § 300.67(c). Appellant received three permits because it took at least fifteen trips with three vessels in its applicant-selected year (2004). IPHC Area 3A is roughly South Central Alaska. For the coordinates, see 50 C.F.R. § 300.61.

2004 or 2005 with one vessel.⁵ The minimum participation requirement in the recent participation period is fifteen halibut logbook fishing trips reported under the applicant's ADF&G Business Owner License with one vessel in 2008.⁶

RAM determined that Appellant met the participation requirement in the qualifying period for two of its permits to be transferable permits but did not meet the participation requirement in the recent period for any of its permits to be transferable permits. In 2004 and 2005, Appellant had two vessels that each reported fifteen or more bottomfish logbook fishing trips. But in the recent period (2008), according to the official charter halibut record, Appellant only reported thirteen halibut logbook fishing trips with the same vessel, less than the fifteen required for a transferable permit.⁷

Appellant argues that it should receive a transferable permit because it did take the requisite fifteen trips in 2008 but the trips were not properly reported by its hired skipper. Appellant also asserts that it would have taken more trips but for severe engine problems. Appellant also asserts that 2008 was not the proper year to measure recency because the CHLAP was not implemented until 2011.

Appellant can file this appeal because it is directly and adversely affected by the IAD, 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 a transferable charter halibut permit. I did not hold a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue a transferable charter halibut permit.⁸ I conclude that the record contains sufficient information upon which to decide the merits of this appeal.⁹ I therefore close the record.

For the reasons that follow, I conclude that RAM correctly determined that Appellant should receive three non-transferable charter halibut permits and no transferable charter halibut permits.

ISSUES

1. May an applicant meet the participation requirement for a charter halibut permit in the recent period (2008) through charter halibut trips that occurred but were not reported to ADF&G within the time limits for reporting the trips to ADF&G?
2. May an applicant who will receive a non-transferable charter halibut permit receive a transferable charter halibut permit under the unavoidable circumstance regulation?

⁵ 50 C.F.R. § 300.67(d)(1)(i). The applicant selects which year – 2004 or 2005 – NMFS should use to determine the applicant's number of permits and whether any of the permits will be transferable. 50 C.F.R. § 300.67(f)(1). Appellant selected 2004. The result would be the same with 2005. Summary of Official Charter Halibut Record (Jan. 28, 2010).

⁶ 50 C.F.R. § 300.67(d)(1)(ii).

⁷ IAD at 3 (Oct. 8, 2010).

⁸ 50 C.F.R. § 679.43(g)(3)(iv).

⁹ 50 C.F.R. § 679.43(g)(2).

FINDINGS OF FACT

1. Appellant has operated a charter halibut business since 2003.¹⁰
2. In 2004, Appellant reported 163 bottomfish logbook fishing trips with three vessels to ADF&G under its ADF&G Business Owner License.¹¹
3. In 2005, Appellant took 167 bottomfish logbook fishing trips with three vessels to ADF&G under its ADF&G Business Owner License.¹² Appellant took fifteen or more trips with two vessels in 2005.¹³
4. The deadline for reporting logbook fishing trips to ADF&G for any charter halibut fishing activity between January 1, 2008, and April 6, 2008, was April 14, 2008. The deadline for reporting logbook fishing trips to ADF&G for any charter halibut fishing activity between October 7, 2008 and December 31, 2008, was eight days after the last day of the week.¹⁴
5. In 2008, Appellant hired a skipper who was in charge of properly reporting Appellant's logbook trips to ADF & G.¹⁵
6. In 2008, Appellant took fifteen or more charter halibut fishing trips with [REDACTED] (VESSEL) but the skipper only reported thirteen halibut logbook fishing trips to ADF&G with VESSEL.¹⁶ ADF&G received thirteen halibut logbook trip reports in Logbook 80503 showing trips with VESSEL on the following dates: June 22, June 23, June 27, June 29, June 30, July 5, July 6, July 7, July 9, July 10, July 11, July 12.¹⁷
7. Appellant submitted a timely application for a charter halibut permit on April 1, 2010.¹⁸
8. With the application, Appellant submitted additional pages from Logbook 80503 for seven trips with VESSEL on the following dates in 2008: June 7, June 8, June 13,

¹⁰ Letter from Appellant to NMFS (May 22, 2011).

¹¹ See Official Record Print Summary (date created, Jan. 27, 2010).

¹² See Official Record Print Summary (date created, Jan. 27, 2010).

¹³ IAD at 3.

¹⁴ The 2008 Saltwater Charter Logbook is on the NMFS Alaska Region website, Administrative Appeals: http://www.fakr.noaa.gov/appeals/adfg_logbooks/2008.pdf.

¹⁵ Letter submitted by Appellant with Application (Mar. 31, 2010).

¹⁶ Letter submitted by Appellant with Application (Mar. 31, 2010).

¹⁷ RAM Original File has copies of logbook trip reports on these dates with date-stamped as "Received ADFG – SF/RTS." RTS stands for Research and Technical Services.

¹⁸ Application (received Apr. 1, 2010).

June 14, June 15, June 21, and July 13. Appellant did not submit these trips reports to ADF&G in 2008.¹⁹

9. A member of Appellant LLC went to the Anchorage office of ADF&G after 2008 and tried to submit these logbook pages but was told that ADF&G closes its databases at the end of every year and does not receive any supplemental data for that year.²⁰

PRINCIPLES OF LAW

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. The Secretary of Commerce adopted these regulations pursuant to section 773 of The Halibut Act.²¹

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.²²

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.²³ A person can be an individual, a corporation, firm or association.²⁴

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.²⁵

The charter halibut regulation specifically defines a bottomfish logbook fishing trip and a halibut logbook fishing trip to mean that the trip was reported to the State of Alaska within the time limit for reporting the trip in effect at the time of the trip.²⁶

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 2005,²⁷ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁸

¹⁹ Attachment to Letter from Appellant with Application (Mar. 31, 2010).

²⁰ Letter from Appellant to NMFS (Feb. 14, 2011).

²¹ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

²² 50 C.F.R. § 300.67(f)(5).

²³ 50 C.F.R. § 300.67(b)(1)(ii).

²⁴ 50 C.F.R. § 300.61 (definitions).

²⁵ 50 C.F.R. § 300.67(f)(4).

²⁶ 50 C.F.R. § 300.67(f)(2); 50 C.F.R. § 300.67(f)(3).

²⁷ 50 C.F.R. § 300.67(f)(6).

²⁸ 50 C.F.R. § 300.67(f)(7).

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).²⁹ The trips must have been reported under the applicant's ADF&G Business Owner License.³⁰

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).³¹ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.³²

The charter halibut regulation has an unavoidable circumstance provision which provides an alternate way for an applicant to meet the participation requirement in one, but not both, participation periods.³³ If an applicant meets a minimum participation requirement in the qualifying period (2004, 2005), but not the recent participation period (2008), the applicant may meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).³⁴

Similarly, if the applicant meets a minimum participation trip level in the recent participation period (2008), but not the qualifying period (2004, 2005), the applicant may meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period (2004, 2005).³⁵

ANALYSIS

1. 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 under the applicant's ADF&G Business Owner License within the time limits for reporting the trips to ADF&G?

NMFS credited Appellant with thirteen halibut logbook fishing trips with VESSEL in 2008. Appellant seeks credit for additional trips so it would meet the fifteen-trip requirement for a transferable permit.

²⁹ 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).

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

³¹ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

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

³³ 50 C.F.R. § 300.67(g).

³⁴ 50 C.F.R. § 300.67(g)(1).

³⁵ 50 C.F.R. § 300.67(g)(2).

A. Appellant took additional trips.

Appellant submitted extensive documentation that it took seventeen more charter halibut trips with VESSEL in 2008: logbook pages for seven additional trips recorded in Logbook 80503, which are signed by the captain and are fully filled out with the angler's name, license numbers;³⁶ receipts for payment from clients and booking documents for those seven trips plus ten additional trips.³⁷ Appellant also stated that its skipper took and wrote down additional trips in Logbook 80484. Appellant was unable to locate the actual logbook. I have found that Appellant did take fifteen or more charter halibut trips with VESSEL in 2008.³⁸

B. Appellant did not report additional trips.

In its appeal, Appellant acknowledges that it only reported thirteen charter halibut trips to ADF&G in 2008.³⁹ Appellant tried to submit the reports of seven additional trips in 2008 after the submission deadline but ADF&G did not accept them because it had closed its database collection for the year.⁴⁰

C. Appellant may not report these trips now.

Appellant argues that since it can prove that it took the trips, NMFS should credit these trips toward its application for a charter halibut permit.⁴¹ However, the regulations do not allow Appellant, or any other applicant, to report logbook trips during the application process for a charter halibut permit.

To receive a transferable permit, an applicant must show that, in 2008, it reported fifteen or more "halibut logbook fishing trips" to ADF&G under the applicant's ADF&G Business Owner License.⁴² A "halibut logbook fishing trip" is a regulatory term that 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.⁴³

In the proposed rule, NMFS addressed whether an applicant could add trips to the official charter halibut record if the applicant did not them to ADF&G when the trips occurred:

³⁶ Logbook pages submitted with Appellant's Application (Mar. 31, 2010).

³⁷ Letter from Appellant to NMFS with attachments (Feb. 14, 2011)

³⁸ Finding of Fact 6.

³⁹ Letter from Appellant to NMFS (May 22, 2011) ("Unfortunately, there was a severe lack of oversight on our part of keeping track of which Saltwater Charter Logbooks had been submitted to ADF&G.").

⁴⁰ Finding of Fact 9.

⁴¹ Letter from Appellant to NMFS (Dec. 1, 2010)

⁴² 50 C.F.R. § 300.67(b)(1)(i).

⁴³ 50 C.F.R. § 300.67(f)(3)(emphasis added).

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 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

Thus, the participation requirement for a transferable charter halibut permit is not simply that an applicant took fifteen or more charter halibut fishing trips in 2008 but that the applicant took fifteen or more halibut *logbook* fishing trips, which means that the trip was reported in a logbook to ADF&G in accord with ADF&G time limits.⁴⁶

I conclude that Appellant's additional trips are not halibut logbook fishing trips and NMFS cannot count these trips toward a participation requirement for a charter halibut permit. I conclude that Appellant does not meet the participation requirement in the recent period for a transferable charter halibut permit because it did not report fifteen trips with one vessel in the recent period.

2. May an applicant who will receive a non-transferable charter halibut permit make a claim for a transferable charter halibut permit under the unavoidable circumstance regulation?

Appellant states that it took far less trips in 2008 than it otherwise would have because of catastrophic engine problems which resulted in its vessel being out of commission for

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 50 C.F.R. § 300.67(b)(1)(i).

substantial parts of the season.⁴⁷ Appellant states that the engine problems, combined with difficulties with its captain, constitute unavoidable circumstances.⁴⁸

Only applicants who will be excluded entirely from the charter halibut fishery may make a claim under the unavoidable circumstance regulation. The unavoidable circumstance regulation explicitly states: “This unavoidable circumstance provision cannot be used to upgrade the number of permits issued or to change a non-transferable permit to a transferable permit.”⁴⁹ Appellant meets the requirements for three non-transferable permits. Therefore, it cannot make a claim under the unavoidable circumstance regulation for a transferable permit.

Appellant states that when the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a charter halibut limited access program, the Council stated that an applicant should have fifteen trips in the “year prior to implementation,” that 2008 is not the year prior to implementation of the CHLAP, that NMFS should also look at an applicant’s participation in the more recent years of 2009 and 2010.⁵⁰

To describe briefly the background of the selection of that year, Appellant is correct that the Council motion does refer to the “year prior to implementation.”⁵¹ The Council motion stated that the year prior to implementation would be either 2007 or 2008.⁵² In the proposed rule, NMFS used the term “recent participation period” and stated that NMFS would specify which year was the recent participation period in the final rule, taking into account the most recent year for which ADF&G logbook data was available.⁵³ In the final rule, NMFS specified 2008 as the recent participation period because 2008 was the most recent year for which ADF&G logbook data was available.⁵⁴

Whatever the origin of this regulatory provision, the final regulation, as adopted, specifies 2008 as the recent participation period. I therefore must apply that regulation in deciding an appeal. RAM correctly determined that Appellant did not meet the participation requirement in the recent period to receive a transferable permit. I therefore affirm the IAD that is the subject of this appeal.

⁴⁷ Letter from Appellant to NMFS (May 22, 2011); Letter from Appellant to NMFS (Feb. 14, 2011)

⁴⁸ Letter from Appellant to NMFS (Feb. 24, 2011).

⁴⁹ 50 C.F.R. § 300.67(g).

⁵⁰ Letter from Appellant to NMFS (May 22, 2011).

⁵¹ North Pacific Fishery Management Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007), Issue 10 & note 9, available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf

⁵² Council Motion, note 9.

⁵³ Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009).

⁵⁴ Final Rule, 75 Fed. Reg. 554, 596 (Jan. 5, 2010).

CONCLUSIONS OF LAW

1. An applicant may not meet the participation requirement for a charter halibut permit through charter halibut trips that occurred but were not reported to ADF&G under the applicant's ADF&G Business Owner License within the time limits for reporting the trips to ADF&G.
2. Appellant's additional trips are not halibut logbook fishing trips as defined by 50 C.F.R. § 300.67(f)(3).
3. Appellant does not meet the minimum participation requirement in the recent period for a transferable charter halibut permit, 50 C.F.R. § 300.67(d)(1)(ii).
4. An applicant who will receive a non-transferable permit may not make a claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), for a transferable permit.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on November 11, 2011, unless by that date the Regional Administrator reverses, remands, or modifies 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 24, 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.

[REDACTED]

v

Mary Alice McKeen
Administrative Judge

Date issued: October 12, 2011

[REDACTED]
Appeal 11-0039