

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0017

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'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.¹

The appeal under review was filed by [REDACTED] doing business as [REDACTED] [REDACTED] (Appellant). Appellant is appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (permit or CHP).

On March 5, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).² The application was filed with RAM, who is responsible for reviewing and determining whether an applicant will receive a permit or permits.

In response to Appellant's application, on July 27, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).³ In the Notice, RAM advised Appellant that the Official Record showed he met the CHLAP participation requirements for 2008, but that he did not meet the CHLAP requirements for 2004 or 2005. RAM set an August 26, 2010, deadline for Appellant to submit evidence to show he met participation requirements in 2004 or 2005. On August 23, 2010, Appellant responded to the Notice.⁴ Appellant stated that he submitted pages from his logbook number 50854 to

¹ 50 C.F.R. § 679.43.

² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 2, 2010, and received March 5, 2010.

³ Original File Tab, Notice of Opportunity to Submit Evidence.

⁴ Original File tab, type-written letter, received August 23, 2010.

ADF&G late and that is why they are not part of the official record. Appellant submitted copies of his untimely reported logbook entries.⁵

On November 24, 2010, RAM sent Appellant the IAD at issue in this case.⁶ In its IAD, RAM denied Appellant a permit because he lacked the requisite logbook trips as explained in the Notice. RAM notified Appellant that according to information in the Official Record, Appellant met the participation requirements for 2008. However, RAM also stated that Appellant did not meet the minimum participation requirements in the qualifying period (2004 or 2005). RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by January 25, 2011.

On January 25, 2011, Appellant appealed the IAD.⁷ In his appeal, Appellant argues that his company operated over twenty-five halibut charter vessel trips in 2005, that he was not provided with instructions regarding how to properly report charter vessel trips to ADF&G, and that the Code of Federal Regulations (CFR) does not go into detail regarding how to properly and timely report such trips so that they will be included in the Official Record. Appellant stated a denial of a CHP would result in his and his company's bankruptcy.

On April 21, 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 May 23, 2011.⁸ NAO did not receive any additional material from Appellant supporting his claim.

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.⁹

ISSUES

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.

⁵ Original File tab, copies of logbook pages, received August 23, 2010.

⁶ Original File Tab, IAD dated November 24, 2010.

⁷ Pleadings Tab, type-written letter received January 25, 2011.

⁸ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

⁹ 50 C.F.R. § 679.43 (g)(2), (k).

FINDINGS OF FACT

1. In 2004, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.¹⁰
2. In 2005, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.¹¹
3. In 2008, Appellant timely and properly reported forty-seven halibut logbook fishing trips to ADF&G.¹²

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.¹³ This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.¹⁴

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 2008.¹⁵

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 Logbook within the time limits for reporting the trip in effect at the time of the trip.¹⁶ The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.¹⁷

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.¹⁸

¹⁰ Original File Tab, IAD dated November 24, 2010; printed summary.

¹¹ Original File Tab, IAD dated November 24, 2010; printed summary.

¹² Original File Tab, IAD dated November 24, 2010; printed summary.

¹³ 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. 50 C.F.R. § 300.67(b)(3).

¹⁴ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁵ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

¹⁶ 50 C.F.R. § 300.67(f)(4).

¹⁷ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

¹⁸ 50 C.F.R. § 300.67(f)(2).

A “halibut logbook fishing trip” 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.¹⁹

“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.²⁰

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits.²¹

ANALYSIS

The issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to be eligible for a CHP. Under CHLAP regulations, 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 2008.²²

Appellant properly reported forty-seven 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. 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.

On appeal, Appellant argues his company operated over twenty-five halibut charter vessel trips in 2005, that he was not provided with instructions regarding how to properly report charter vessel trips to ADF&G, and that the Code of Federal Regulations (CFR) does not go into detail regarding how to properly and timely report such trips so that they will be included in the Official Record.

Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.²³ With respect to recording bottomfish trips, those instructions provided as follows:

¹⁹ 50 C.F.R § 300.67(f)(3).

²⁰ 50 C.F.R. § 300.67(f)(1).

²¹ 50 C.F.R. § 300.67(f)(5).

²² 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).

²³ 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>.

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 rod/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. . . .
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted? Example 1: 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. . . .
Example 3: Two Targets Salmon <u>and</u> Bottomfish (including halibut) 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.
Example 4: 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 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 . 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).
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There were similar instructions for 2005 logbooks. If Appellant had followed the written instructions supplied with the Saltwater Charter Vessel Logbook, he would have properly recorded and reported his charter halibut fishing business activity.

Appellant argues the Code of Federal Regulations (CFR) does not go into detail regarding how to properly and timely report charter vessel trips so that they will be included in the Official Record. The 2005 Saltwater Charter Logbook states “All fishing activity that occurs between January 1, 2005 through September 30, 2005, must be received by ADF&G offices or postmarked by October 15, 2005. Fishing activity that occurs between October 1, 2005 and December 31, 2005 must be received by ADF&G offices or postmarked by January 15, 2006.”²⁴ The CFR specifies that a logbook fishing trip means a bottomfish logbook fishing trip reported to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip...²⁵ The regulations and instructions are clear. As Appellant did not comply with the ADF&G reporting requirements when he untimely reported his 2005 trips, he is not eligible for a permit under the CHLAP provisions.

Merely taking trips is not sufficient to meet participation requirements. The regulations require that 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). At best, Appellant’s evidence shows he took charter trips, but not that he reported them by the deadline established by law. Given all of the evidence, I have concluded Appellant did not properly report any bottomfish fishing trips to ADF&G in 2004 or 2005; therefore, Appellant is not eligible for a permit.

In reaching my decision, I have carefully reviewed the entire record. I recognize Appellant’s interest in continuing to fish for halibut. 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 permit under the CHLAP rules as he did not prove by a preponderance of the evidence that he reported at least five bottomfish logbook fishing trips during either 2004 or 2005. The IAD is consistent with CHLAP regulations.

²⁴ http://alaskafisheries.noaa.gov/appeals/adfg_logbooks/2005.pdf

²⁵ 50 C.F.R. § 300.67(f)(4).

ORDER

The IAD dated November 24, 2010, is upheld. This decision takes effect thirty days from the date issued, November 14, 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 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.

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Steven Goodman
Administrative Judge

Date Issued: October 13, 2011