

State of Alaska Department of Fish and Game (ADF&G).⁴ Appellant contends that if he is not awarded a transferable permit, when he wishes to sell his business, it will be difficult to sell because he will not be able to sell the business with a permit.⁵

Appellant can file this appeal because the IAD directly and adversely affects his interests, 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 one transferable charter halibut permit. I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue Appellant a transferable charter halibut permit.⁶ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision.

For the reasons that follow, I conclude that RAM correctly determined that Appellant meets the requirements for two non-transferable permits, the first with an angler endorsement of six and the second with an angler endorsement of four, and that Appellant does not meet the requirements for a transferable permit.

ISSUES

1. Did RAM correctly determine that Appellant met the requirements for two non-transferable charter halibut permits?
2. May Appellant receive a transferable charter halibut permit based on the claim that he took fifteen or more charter halibut trips in 2004 and 2005 but did not report them because his captain did not understand the reporting instructions from ADF&G?

FINDINGS OF FACT

1. Appellant has operated a charter fishing business that includes halibut charters since 1991.⁷
2. In 2004, Appellant reported fourteen bottomfish logbook fishing trips with two vessels.⁸
3. In 2005, Appellant reported nineteen bottomfish logbook fishing trips with two vessels.⁹

⁴ Statement of Appellant submitted with application (Mar. 25, 2010).

⁵ Letter from Appellant to NMFS (Apr. 8, 2011).

⁶ 50 C.F.R. § 679.43(g)(3)(iv).

⁷ Letter from Appellant to NMFS (Apr. 8, 2011).

⁸ Summary of Official Record (Jan. 27, 2010). When I say that Appellant took a bottomfish or halibut logbook fishing trip, I also mean that the Appellant timely reported the trip to ADF&G in its Saltwater Charter Logbook, because the definition of logbook fishing trip includes that the trip was reported to ADF&G in accord with the time limit for reporting the trip. 50 C.F.R. § 300.67(f)(4).

4. In 2008, Appellant reported nine halibut logbook fishing trips with one vessel.¹⁰
5. Appellant filed a timely application for a charter halibut permit on March 25, 2010.¹¹

PRINCIPLES OF LAW

In March 2007, the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.¹² In January 2010, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP) pursuant to section 773c of The Halibut Act.¹³

NMFS must issue charter halibut permits in accord with the regulations implementing the Charter Halibut Limited Access Program. These regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67.

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁴ A person can be an individual, a corporation, firm or association.¹⁵

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 limit for reporting the trip in effect at the time of the trip.¹⁶

A bottomfish logbook fishing trip is a logbook fishing trip that was reported in the qualifying period 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.¹⁷

⁹ Summary of Official Record for Appellant (Jan. 27, 2010).

¹⁰ Summary of Official Record for Appellant (Jan. 27, 2010).

¹¹ Application for Charter Halibut Permit(s) (received Mar. 25, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

¹² Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A, (Mar. 31, 2007), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

¹³ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

¹⁴ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁵ 50 C.F.R. § 300.61 (definitions).

¹⁶ 50 C.F.R. § 300.67(f)(4).

¹⁷ 50 C.F.R. § 300.67(f)(2).

A halibut logbook fishing trip is a logbook fishing trip that was reported in the recent participation period with one of the following pieces of information: the number of halibut kept, the number of halibut released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.¹⁸

An applicant must prove participation in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,¹⁹ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁰

An applicant must prove different levels of participation to receive a non-transferable and a transferable permit. To receive a non-transferable permit, an applicant must have taken at least 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).²¹

To receive a transferable charter halibut permit, an applicant must have taken at least fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).²² The number of transferable charter halibut permits issued to an applicant will be equal to the number of vessels that met these qualifications.

If an applicant does not meet the requirements for a permit, or an endorsement on a permit, in the applicable regulations, NMFS does not have authority to award the applicant the permit or the endorsement on the permit.

The function of an administrative judge, or appellate officer, is to evaluate whether the federal agency correctly applied the regulations in evaluating an application for a permit or endorsement on a permit.

ANALYSIS

1. Did RAM correctly determine that Appellant met the requirements for two non-transferable charter halibut permits?

Under the charter halibut regulation, RAM first determines if an applicant submitted a timely application.²³ Appellant submitted a timely application.

Once RAM makes that determination, RAM takes the following steps to evaluate the application:

¹⁸ 50 C.F.R. § 300.67(f)(3).

¹⁹ 50 C.F.R. § 300.67(f)(6).

²⁰ 50 C.F.R. § 300.67(f)(7).

²¹ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

²² 50 C.F.R. § 300.67(d)(1)(i)-(ii).

²³ 50 C.F.R. § 300.67(b)(1)(i).

Step 1: applying 50 C.F.R. § 300.67(b), does the applicant meet the participation requirements for a non-transferable permit?

Step 2: applying 50 C.F.R. § 300.67(c), does the applicant meet the participation requirements for any additional permits?

Step 3: applying 50 C.F.R. § 300.67(d), does the applicant meet the participation requirements for any of its permits to be a transferable permit?

Step 4: applying 50 C.F.R. § 300.67(e), what is the angler endorsement number on the applicant's permit or permits?

I conclude that RAM correctly applied these steps in evaluating Appellant's application.

Step 1: RAM correctly determined that Appellant met the participation requirements for one non-transferable permit in 50 C.F.R. § 300.67(b), namely Appellant took at least five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and at least five halibut logbook fishing trips in the recent participation period (2008).²⁴

Step 2: RAM correctly determined that Appellant met the participation requirement for a second permit in 50 C.F.R. § 300.67(c), which states:

(c) *Number of permits.* An applicant that meets the participation requirements in paragraph (b) of this section [to receive at least one non-transferable charter halibut permit] will be issued the number of charter halibut permits *equal to the lesser of the number of permits* determined by paragraphs (c)(1) or (c)(2) of this section as follows:

- (1) The *total number of bottomfish logbook fishing trips* made pursuant to the applicant's ADF&G Business License in *the applicant-selected year* divided by five, and rounded down to a whole number; or
- (2) The *number of vessels* that made the bottomfish logbook fishing trips in the applicant-selected year. [italics added]

The applicant-selected year means the year in the qualifying period, either 2004 or 2005, that the applicant selects for NMFS to use in determining the number and type (transferable or non-transferable) of the applicant's permits.²⁵

Applying federal regulation 50 C.F.R. § 300.67(c) to this applicant, the result is as follows:

*The applicant-selected year: 2005.*²⁶

The total number of bottomfish logbook fishing trips in 2005: 19.

²⁴ These requirements are specifically at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

²⁵ 50 C.F.R. § 300.67(f)(1).

²⁶ Application for Charter Halibut Permit(s) at 2 (dated Mar. 23, 2010, received Mar. 25, 2010)

*The total number of bottomfish logbook fishing trips in 2005 divided by five, rounded to nearest whole number. $19 \div 5 = 3.8$, rounded to **3**.*

*The number of vessels that made those trips: **2**.*

Applicant receives **the lesser** of **3** or **2**. Appellant receives **2 permits**.

Although this regulation may seem confusing, the underlying rationale is fairly straightforward. If an applicant used two vessels in the applicant-selected year (2004 or 2005), the applicant receives two permits. Appellant used two vessels in 2005. Therefore, Appellant can only receive two permits, no matter how many trips he took with those vessels in 2005.

Put another way, the regulation prevents an applicant from receiving a greater number of permits than the number of vessels that the applicant used in the qualifying period, with the proviso that the applicant must choose one year in the qualifying period, either 2004 or 2005, to determine the number and type of permits the applicant will receive.

Step 3: RAM correctly determined that Appellant did not meet the requirement in 50 C.F.R. § 300.67(d) for its permit to be transferable. Appellant had not taken fifteen or more logbook fishing trips with one vessel in the applicant-selected year, which is 2005, and Appellant had not taken fifteen or more halibut logbook fishing trips with one vessel in the recent period, which is 2008. Therefore, Appellant did not meet the requirement for either of its permit to be a transferable permit.

Step 4: RAM correctly determined that Appellant's first permit will have an angler endorsement of six and its second permit will have an angler endorsement of four, in accord with 50 C.F.R. § 300.67(e). Subject to a minimum angler endorsement of four, the angler endorsement on an applicant's first non-transferable permit is the highest number of anglers that the applicant took on a bottom logbook fishing trip in 2004 or 2005 with one vessel. The angler endorsement on an applicant's second non-transferable permit is the highest number of anglers that the applicant took on a bottomfish logbook fishing trip in 2004 or 2005 with its second vessel.²⁷

Based on the CHLAP regulation as originally adopted,²⁸ and the official charter halibut record as originally created,²⁹ RAM determined that both of Appellants permits would have angler endorsements of nine.³⁰ After notice-and-comment rulemaking, NMFS changed the regulation for angler endorsements, so that an applicant's first permit received an angler endorsement equal to the highest number of anglers that an applicant took on a bottomfish logbook trip in the qualifying period on one vessel. An applicant's second permit received an angler endorsement number equal to the highest

²⁷ 50 C.F.R. § 300.67(e)(3),(4),(5). The same rules apply to angler endorsements on transferable permits. 50 C.F.R. § 300.67(e)(1), (2), (5).

²⁸ Final Rule, 75 Fed. Reg. 554, 601 (Jan. 5, 2010) *adopting* 50 C.F.R. § 300.67(e)(1).

²⁹ Summary of Official Charter Halibut Record (Jan, 28, 2010).

³⁰ Summary of Official Charter Halibut Record (Jan, 28, 2010).

number of anglers that the applicant took on its second vessel.³¹ The new regulation made the angler endorsement “vessel-specific.”³² Thus, under the new regulation, to receive two permits with angler endorsements of six, an applicant must have taken a bottomfish logbook fishing trip with six anglers in 2004 or 2005 with two vessels.

With respect to this applicant, NMFS also changed the official charter halibut record with respect to the number of anglers that the applicant reported on bottomfish logbook fishing trips based on data entry corrections made by ADF&G to the applicant’s Saltwater Logbook records. RAM sent Appellant a revised Official Record Summary.³³

Based on the revised Official Record Summary, the highest number of anglers that Appellant took on a bottomfish logbook fishing trip in 2004 or 2005 with one vessel was six. The highest number of anglers that Appellant took on a bottomfish logbook fishing trip with its other vessel was four. With the revised summary, RAM provided Appellant with a notice of opportunity to object to the revised angler endorsement calculation.³⁴ Appellant did not object to the revised angler determination to RAM or during his appeal.³⁵ I conclude that RAM correctly determined that Appellant’s first permit will have an angler endorsement of six and his second permit will have an angler endorsement of four.

2. May Appellant receive a transferable charter halibut permit based on the claim that he took fifteen or more charter halibut trips in 2004 and 2005 but did not report them because his captain did not understand the reporting instructions from ADF&G?

Appellant claims he met the minimum participation requirement in the qualifying period for a transferable charter halibut permit by taking fifteen or more charter halibut trips in 2004 and 2005. Specifically, Appellant claims he took fifteen trips in those years but did not report fifteen trips because his captain failed to report all the trips that Appellant’s vessels took. Appellant indicated that his captain stopped reporting the trips because an official from ADF&G told him that he did not need to record halibut trips in his logbook for those years.

Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.³⁶ With respect to recording bottomfish trips, including halibut, the 2004 instructions provided as follows:

³¹ Proposed Rule, 75 Fed. Reg. 38,758 (July 6, 2010); Final Rule, 75 Fed. Reg. 56,903 (Sep 17, 2010).

³² Final Rule, 75 Fed. Reg. 38,758, 38,760 (July 6, 2010).

³³ Revised Official Record Summary, Charter Halibut Permits (Jan. 6, 2011).

³⁴ Revised Notice of Opportunity to Provide Evidence, Revised Transferability Determination and Computation of Angler Endorsements for Charter Halibut Limited Access Program (Jan. 6, 2011).

³⁵ Letter from Appellant to NMFS (dated Apr. 8, 2011, receive Apr. 8, 2011).

³⁶ 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>. The emphasis in the Instructions, quoted in the text, is in the original document.

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:	. . . [R]ecord the maximum number of rods and boat hours spent targeting salmon AND targeting both

<p>A combination of any of the above</p>	<p>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.</p>
<p>Special Notes and Instructions</p>	
<p>“Halibut”</p>	<p>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).</p>

There were similar instructions in the 2005 ADF&G Saltwater Charter Vessel Logbook. If Appellant had followed the written instructions supplied with the 2004 and 2005 Saltwater Charter Vessel Logbooks, Appellant (or his captain) would have properly recorded and reported his charter halibut fishing business activity.

When it published the final rule implementing the Charter Halibut Limited Access program, NMFS considered the issue of bottomfish reporting and that some participants may have received confusing or conflicting advice from ADF&G officials. After due consideration of comments received on the proposed rule, NMFS stated:

If a business owner did not comply with specified reporting requirements, then the fishing trip will not be counted as either a bottomfish logbook fishing trip during the qualifying period or a halibut logbook fishing trip during the recent participation period for purposes of this rule. Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.³⁷

But even if Appellant could get credit for fifteen bottomfish logbook fishing trips in 2004 or 2005, Appellant still would not receive a transferable charter halibut permit. To receive a transferable charter halibut permit, an applicant must also have reported fifteen halibut logbook fishing trips in 2008. A halibut logbook fishing trips means a trip that was reported in 2008 with one of the following pieces of information: the number of

³⁷ Final Rule, 75 Fed. Reg. 554, 592 (January 5, 2010).

halibut kept, the number of halibut released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.³⁸

From 2006 to the present, ADF&G has required vessel operators to specifically report halibut kept and halibut released.³⁹ The 2008 logbook clearly and unequivocally instructs the vessel operator to report halibut kept and halibut released. Appellant makes no claim that he or his captain were misadvised as to the 2008 reporting requirements. Appellant reported nine halibut logbook fishing trips in 2008. Therefore, even if Appellant were credited fifteen trips in 2004 or 2005, he would still not qualify for a transferable because he lacks the requisite trips in the recent participation period (2008).

In reaching my decision in this appeal, I carefully reviewed the entire record. I understand that Appellant has operated his charter halibut business for a long time and, when he sells it, he wishes to sell the business with a permit. I am, however, bound by the regulations that have been adopted and I only have authority to apply those regulations in deciding this appeal. Based on those regulations, I conclude that Appellant does not qualify for a transferable charter halibut permit by initial issuance.⁴⁰

CONCLUSIONS OF LAW

1. RAM correctly determined that Appellant met the requirements in the charter halibut regulation for two non-transferable permits, one with an angler endorsement of six and one with an angler endorsement of four.
2. Appellant may not receive credit for charter halibut trips that he took in 2004 and 2005 but did not report based on claims that his captain received misadvice from ADF&G staff on the reporting requirements for charter halibut trips.
3. Appellant does not meet the participation requirements in the qualifying period and the recent period, as specified in 50 C.F.R. § 300.67(d), for a transferable charter halibut permit.
4. Appellant does not qualify for a transferable charter halibut permit through initial issuance.

³⁸ 50 C.F.R. § 300.67(f)(3).

³⁹ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009). See ADF&G Saltwater Logbooks for the years 2006 through 2011, NMFS Alaska Region website at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

⁴⁰ Appellant or a prospective buyer of Appellant's business can obtain a charter halibut permit by transfer from a person who holds a transferable charter halibut permit. See 50 C.F.R. § 300.67(i)(transfer provisions).

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on November 21, 2011, unless by that date the Regional Administrator reverses, modifies, or demands 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 31, 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]

Mary Alice McKeen
Administrative Judge

Date Issued: October 21, 2011