



On June 15, 2010, Appellant submitted additional documentation to RAM.<sup>8</sup> In summary, Appellant argued in the documentation that he did not report his fishing business activities to the Alaska Department of Fish and Game (ADF&G) prior to 2006, because he understood from State of Alaska officials that he was not required to do so. Appellant explained that he does not run a traditional charter fishing operation in that “guests run their own boats and we provide guiding help from separate boats.”<sup>9</sup> However, Appellant argued, he nevertheless was operating a charter fishing business in 2004 and 2005 as shown in personal catch records (copies of which were part of the June 15, 2010 documentation).<sup>10</sup>

On October 13, 2010, RAM sent Appellant the IAD at issue in this case.<sup>11</sup> In its IAD, 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). Generally, “minimum participation requirements” for 2004 or 2005 means that an applicant properly reported to ADF&G five or more charter fishing trips. RAM acknowledged Appellant’s contentions set forth in his application and letter supplementing the application dated April 4, 2010 as well as Appellant’s claims made in his June 15, 2010 response.<sup>12</sup> In essence, Appellant’s claim was that due to his atypical business model and based on advice from ADF&G, he did not report 2004 and 2005 logbook fishing trips to ADF&G.

In the IAD RAM also denied Appellant’s application for a CHP. RAM reasoned that Appellant did not hold the requisite ADF&G Business Owner Licenses for 2004 or 2005, did not have proof that he took at least five logbook fishing trips in 2004 or 2005, and that in fact, Appellant reported no such trips.

On December 9, 2010, OAA received Appellant’s timely appeal.<sup>13</sup> In his appeal, Appellant reiterates the arguments he made before RAM. Appellant contends that Alaska officials advised him he did not need guide licenses pursuant to state law. In 2006, according to Appellant, the state changed its mind and required licenses and fishing activity reported in logbooks. Appellant contends RAM erred when it indicated in the IAD that Appellant operated three vessels because “the three (3) vessels in 2008 actually represent 26 guided vessels.”<sup>14</sup> Appellant believes RAM erred when it stated in

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<sup>8</sup> Original File Tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence received by RAM on June 21, 2010 with seven-page attachment.

<sup>9</sup> Original File Tab, Appellant’s letter dated June 16, 201 attached to Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence received by RAM on June 21, 2010.

<sup>10</sup> Original File Tab, Appellant’s letter dated June 16, 201 attached to Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence received by RAM on June 21, 2010.

<sup>11</sup> Original File Tab, IAD dated October 13, 2010.

<sup>12</sup> RAM refers to Appellant’s June 15, 2010 letter by the date RAM received it, June 21, 2010. Original File Tab, IAD dated October 13, 2010, page 3.

<sup>13</sup> Pleadings Tab, Appellant’s Letter of Appeal received by OAA on December 9, 2010 with attachments.

<sup>14</sup> Pleadings Tab, Appellant’s Letter of Appeal received by OAA on December 9, 2010, 3<sup>rd</sup> page.

the IAD it could not deviate from the regulatory requirements; but NOAA has set aside the “onboard” requirement of 50 C.F.R. § 300.61. Appellant explained the anticipated adverse affects if he should not be granted a permit. Appellant requests a hearing.

In a letter dated February 16, 2011, OAA acknowledged Appellant’s appeal and requested that any additional documentation or information in support of his appeal be submitted to OAA.<sup>15</sup> The record does not show that Appellant responded with additional evidence or information.

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. Under applicable regulations, I have the discretion to order an oral hearing if Appellant’s appeal documentation shows an adjudicative fact or a factual issue that needs to be resolved by an oral hearing. See *generally* 50 C.F.R. § 679.43(g). Even if I accept all the evidence provided by Appellant as accurate and true, as explained in the Analysis section of this decision, Appellant cannot prevail in this appeal. I have determined that the information in the record is sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(g)(2)&(k). I therefore close the record and render this decision.<sup>16</sup>

## ISSUES

On appeal, Appellant does not dispute that he does not meet the minimum participation requirements for eligibility for a CHP. Appellant did not meet the minimum participation requirements for 2004 or 2005, although he did meet the minimum participation requirements for 2008. Thus, the issue before me is whether without meeting minimum participation requirements in 2004 or 2005, Appellant is eligible for a CHP.

## FINDINGS OF FACT

1. In 2004 and 2005, Appellant did not hold an ADF&G Business Owner License.<sup>17</sup>
2. Appellant did not timely report any logbook fishing trips to ADF&G in 2004 or 2005.<sup>18</sup>
3. Appellant is a charter halibut fishing operator.<sup>19</sup>

<sup>15</sup> Pleadings Tab, Initial Order dated Aug. 20, 2010.

<sup>16</sup> See 50 C.F.R. § 679.43(g)(2) and (k).

<sup>17</sup> Original File Tab, IAD dated October 13, 2010; Pleadings Tab, Appellant’s appeal letter with attachments received by OAA on December 9, 2010.

<sup>18</sup> Original File Tab, IAD dated October 13, 2010; Pleadings Tab, Appellant’s appeal letter with attachments received by OAA on December 9, 2010.

<sup>19</sup> Pleadings Tab, Appellant’s appeal letter with attachments received by OAA on December 9, 2010; Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Mar. 8, 2010 received by RAM on Mar. 26, 2010. By signing the application, Appellant certified under penalty of perjury that “the information and claims provided on this application and, to the best of my

## 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 an ADF&G Business Owner License.<sup>20</sup> An ADF&G Business Owner License is a business registration, sport fish business owner license, sport fish business license, and ADF&G business license.<sup>21</sup> This license authorized the logbook fishing trips that were used to meet the minimum participation requirements to qualify for a CHP.<sup>22</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 (2004 or 2005) and must have reported five or more halibut logbook fishing trips during the recent participation period (2008).<sup>23</sup>

## ANALYSIS

In reaching my decision, I have carefully reviewed Appellant's appeal as well as the entire record. The issue before me is whether without meeting minimum participation requirements in 2004 or 2005, Appellant is eligible for a CHP. The issue is based on the regulations that govern the CHLAP program and the evidentiary record. The key regulation applicable in this case mandates that to be eligible for a permit, among other criteria, an applicant must have proof that he logged five or more bottomfish logbook fishing trips in 2004 or 2005. To be more precise, the CHLAP regulations require an applicant to report five or more bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005) and must have five or more halibut logbook fishing trips during the recent participation period (2008). To obtain a logbook, a business would need an ADF&G Business Owner License.<sup>24</sup>

Appellant has conceded and I have found as a fact that he did not hold an ADF&G Business Owner License nor did he report logbook fishing trips to ADF&G for 2004 or 2005. Therefore, Appellant does not meet two of the basic requirements for eligibility for a permit, namely an appropriate license and properly reported fishing trips. Therefore, NMFS's decision to deny Appellant a CHP, as stated in the IAD, is consistent with CHLAP regulations.

In deciding that RAM did not err in the IAD, I have carefully considered Appellant's arguments raised in the appeal. I understand that Appellant believes that because Alaska officials advised him he did not need a guide license pursuant to state law, that should be a basis for him to receive a CHP. Appellant explains that the state changed

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knowledge, all statements in the application are true." (Page 6) On page 3 of the application, Appellant indicated that he owned a charter halibut fishing business in 2004, 2005, and 2008.

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

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

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

<sup>23</sup> 50 C.F.R. § 300.67(b)(1)(ii) (A)-(B); 50 C.F.R. § 300.67(f)(6)-(7).

<sup>24</sup> See 50 C.F.R. § 300.67(b)(1)(ii).

its mind and required licenses and fishing activity reported in logbooks. For the sake of argument, I accept those statements as accurate. However, even if accurate, that does not change the Federal regulatory requirements for a permit. Since both RAM and NAO are bound to follow agency regulations, I am not persuaded that Appellant's concerns about State of Alaska policy or interpretation of state law provides a basis for him to be issued a permit under Federal regulations.

Appellant also contends on appeal RAM erred when it indicated in the IAD that Appellant operated three vessels because "the three (3) vessels in 2008 actually represent 26 guided vessels." The Official Record showed in 2008 Appellant was licensed for three boats;<sup>25</sup> therefore, RAM's statement is not inaccurate. In any event, even if I assume Appellant's contention is true on its face, it would not change the fact that Appellant was not licensed nor did he properly report fishing trips in 2004 and 2005.

Further, Appellant states on appeal RAM erred when it stated in the IAD it could not deviate from the regulatory requirements; but NOAA has set aside the "onboard" requirement of the definition of "sport fishing guide services" and "charter vessel guide trip" in 50 C.F.R. § 300.61. I construe Appellant's argument on this point to be that he should not be required to have a CHP to continue his operations because he does not provide "sport fishing guide services" and "charter vessel guide trips" within the meaning of 50 C.F.R. § 300.61, as incorporated in 50 C.F.R. § 300.67. However, Appellant chose to file an application for a permit, and that is the issue properly before me as it is the subject of the IAD. As indicated previously, Appellant is not eligible under the CHLAP regulations for a permit, and therefore, RAM did not err when it denied Appellant's application. I also note that section 300.67 requires "any operator of a vessel with one or more charter vessel anglers catching and retaining Pacific halibut on board a vessel must have on board the vessel an original valid charter halibut permit or permits endorsed for the regulatory area in which the vessel is operating and endorsed for at least the number of charter vessel anglers who are catching and retaining Pacific halibut. Each charter halibut permit holder must insure that the operator of the permitted vessel complies with all requirements of §§ 300.65 and 300.67."

Lastly, Appellant stated he would experience anticipated adverse effects if he should not be granted a permit. I have considered this argument. While unfortunate, Appellant does not qualify for a permit and the regulations do not provide authority for the proposition that I may entertain the potential adverse effects on Appellant should he not obtain a permit based on his application.

## CONCLUSIONS OF LAW

Appellant is not eligible for a CHP under the basic requirements 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>25</sup> By email message dated September 14, 2011, RAM provided NAO with the summary of the Official Record. That summary is now part of the case file under the Evidence Tab.

