

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 an angler endorsement of five on his second permit. Appellant's first permit has a angler endorsement of six because RAM determined that he took a bottomfish logbook fishing trip in the qualifying period (2004, 2005) with six anglers with [REDACTED] (VESSEL 1). To receive an angler endorsement of five on his second permit, Appellant must show that he took a bottomfish logbook fishing trip in the qualifying period (2004, 2005) with five anglers with a second vessel.

On appeal, Appellant asked me to obtain legible copies of two logbook pages for the weeks of May 24 – May 30, 2004, and May 31 – Jun 6, 2004, that he submitted to the Alaska Department of Fish and Game (ADF&G) for trips with his second vessel, [REDACTED] (VESSEL 2). Appellant's copies were not legible and he thought the number of anglers on one trip might have been five.⁶ I obtained copies of those logbook trip reports from ADF&G, provided them to Appellant and gave him an opportunity to submit further argument.⁷ Appellant did not submit any further argument or evidence.

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 this decision.

For reasons which follow, I conclude that RAM correctly determined that Appellant should receive one transferable permit with an angler endorsement of six and a second transferable permit with an angler endorsement of four.

ISSUE

Did RAM correctly determine that Appellant's second transferable charter halibut permit should have an angler endorsement of four?

FINDINGS OF FACT

1. Appellant selected 2005 as the year that NMFS should use to determine the number of permits that Appellant should receive.⁸
2. Appellant took fifteen or more bottomfish logbook fishing trips with VESSEL 1 in 2005.⁹

⁶ Letter from Appellant to OAA(Feb. 11, 2011)

⁷ Order (Sep. 16, 2011). Appellant had until September 26, 2011, to submit additional argument or evidence.

⁸ IAD at 2 (Dec. 15, 2010).

⁹ IAD (Dec. 15, 2010). I make this finding because RAM determined that Appellant met the requirements for a transferable charter halibut permit and an applicant must have a minimum of fifteen trips in its applicant-selected year (2004 or 2005) to receive a transferable charter halibut permit. 50 C.F.R.

3. Appellant took fifteen or more bottomfish logbook fishing trips with VESSEL 2 in 2005.¹⁰
4. The highest number of clients that Appellant reported on a bottomfish logbook fishing trip in 2004 or 2005 with VESSEL 1 was six.¹¹
5. The highest number of clients that Appellant reported on a bottomfish logbook fishing trip in 2004 or 2005 with VESSEL 2 was four.¹²
6. Appellant reported four clients on the May 30, 2004, trip with VESSEL 2 in Logbook 41319.¹³
7. Appellant filed a timely application for a charter halibut permit on February 8, 2010.¹⁴

PRINCIPLES OF LAW

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.

Effective February 1, 2011, any operator of a vessel with one or more charter vessel anglers catching and retaining Pacific halibut must have a charter halibut permit on board the vessel. The charter halibut permit must be endorsed for at least the number of charter vessel anglers who are catching and retaining Pacific halibut on board the vessel.¹⁵

The Official Charter Halibut Record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.¹⁶ It is

§ 300.67(d)(1)(i).

¹⁰ IAD (Dec. 15, 2010). I make this finding because RAM determined that Appellant met the requirements for a second transferable charter halibut permit and an applicant must have a minimum of fifteen trips in its applicant-selected year (2004 or 2005) with a second vessel to receive a second transferable charter halibut permit. 50 C.F.R. § 300.67(d)(1)(i); 50 C.F.R. § 300.67(d)(iii).

¹¹ IAD at 3, relying on the Official Charter Halibut Record (Dec. 15, 2010).

¹² IAD at 3, relying on the Official Charter Halibut Record (Dec. 15, 2010); Email from Dora Sigurdsson, ADF&G, with copies of Appellant's logbook trip reports for week of May 24 – May 30, 2004, and May 31 – June 6, 2004, Exhibit 1 to Order (Sep. 16, 2011); Statement on Appellant's website ("This boat fishes up to four people comfortably."), Exhibit 2 to Order (Sep. 16, 2011).

¹³ Email from Dora Sigurdsson, ADF&G, with copies of Appellant's logbook trip reports for week of May 24 – May 30, 2004, and May 31 – June 6, 2004, Exhibit 1 to Order (Sep. 16, 2011); Statement on Appellant's website ("This boat fishes up to four people comfortably."), Exhibit 2 to Order (Sep. 16, 2011)..

¹⁴ Application for Charter Halibut Permit(s) (dated Feb. 3, 2010, received Feb. 8, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

¹⁵ 50 C.F.R. § 300.67(a); Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010) (effective date of regulation).

¹⁶ 50 C.F.R. § 300.67(f)(5).

derived from the logbook trip reports submitted to the Alaska Department of Fish and Game (ADF&G).

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued a Business Owner License that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁷ A person can be an individual, a corporation, firm or association.¹⁸

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 2005,¹⁹ 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 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).²¹

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with one vessel in the applicant-selected 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 regulation that determines the angler endorsement on a charter halibut permit is 50 C.F.R. § 300.67(e). This provision, as originally adopted, assigned the same angler endorsement to all charter halibut permits that an applicant received, namely the highest number of anglers that the applicant reported on any bottomfish logbook fishing trip with any vessel in 2004 or 2005.²³

NMFS amended the regulation in 2010 to establish different rules for assigning angler endorsements when an applicant received more than one permit.²⁴ The new provision was recommended by the North Pacific Fishery Management Council, and adopted by the Secretary of Commerce, pursuant to The Halibut Act.²⁵ The Council concluded that the original regulation could result in an undue increase in fishing capacity because the highest number of anglers reported by one vessel would determine the angler endorsement on more than one permit.²⁶ If the applicant received two permits, the

¹⁷ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁸ 50 C.F.R. § 300.61 (definitions).

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

²⁴ Final Rule, 75 Fed. Reg. 56,903 (Sep. 17, 2010).

²⁵ Final Rule, 75 Fed. Reg. 56,903, 56,904 (Sep. 17, 2010). The full name of the act is The Northern Halibut Act of 1982.

²⁶ Proposed Rule, 75 Fed. Reg. 38,758, 38,759 - 38,760 (July 6, 2010)

applicant had shown participation in the qualifying period by two vessels.²⁷ The Council concluded that the angler endorsement on the second permit should be determined by the highest number of anglers reported by the applicant's second vessel during the qualifying period.

Thus, under the revised regulation, subject to a minimum angler endorsement of four, the angler endorsement on an applicant's first transferable permit the permit is the highest number of anglers that the applicant reported on any bottomfish logbook fishing trip in the qualifying period.²⁸ If an applicant receives a second transferable permit, the angler endorsement on the second permit will be the highest number of anglers that the applicant reported on any bottomfish logbook fishing trip in the qualifying period with a different vessel.²⁹

ANALYSIS

The issue on appeal is whether RAM correctly determined that Appellant's second transferable charter halibut permit should have an angler endorsement of four. There is no dispute that Appellant meets the requirements to receive two transferable charter halibut permits and that one permit should have an angler endorsement of six.

I conclude that RAM's determination was correct and that the angler endorsement on Appellant's second permit should be four. I base this on the angler endorsement provision in the charter halibut regulation, 50 C.F.R. § 300.67(e), described above. An applicant's first transferable charter halibut permit will have an angler endorsement equal to the highest number of anglers that the applicant reported on a bottomfish logbook fishing trip in the qualifying period.³⁰ Appellant reported six anglers with VESSEL 1 on a trip in the qualifying period and therefore will have an angler endorsement of six on its first transferable charter halibut permit.

An applicant's second transferable charter halibut permit will have an angler endorsement equal to the highest number of anglers that the applicant reported on a bottomfish logbook fishing trip in the qualifying period with the applicant's second vessel.³¹ The highest number of anglers that Appellant reported on a trip with VESSEL 2 in the qualifying period was four. Therefore, Appellant's second permit will have an angler endorsement of four.

Appellant makes four arguments. First, Appellant states that it took several halibut logbook fishing trips in 2008 with five anglers.³² Appellant did take several halibut logbook fishing trips in 2008 with five anglers. But the regulation assigns an angler

²⁷ 50 C.F.R. § 300.67(c)(number of permits); 50 C.F.R. § 300.67(d)(2)(number of transferable permits).

²⁸ 50 C.F.R. § 300.67(e)(1), (5).

²⁹ 50 C.F.R. § 300.67(e)(2), (5).

³⁰ 50 C.F.R. § 300.67(e)(1).

³¹ 50 C.F.R. § 300.67(e)(2).

³² Letter from Appellant to OAA (Feb. 11, 2011).

endorsement based on the highest number of anglers on a trip in the qualifying period, which is 2004 and 2005, not the highest number in the recent participation period, which is 2008.³³ NMFS may not assign angler endorsements based on trips in 2008.

Second, before RAM, Appellant stated that he took five clients on two trips in 2005 that were recorded in Logbook 51638, which was the Logbook assigned to VESSEL 2 in 2005.³⁴ Appellant did report five clients on two trips on July 11, 2005, with VESSEL 2, but these were salmon trips, not bottomfish logbook fishing trips. For these two trips, Appellant reported, *with respect to salmon fishing*, statistical areas where most fish were caught, the maximum number of rods fished and the number of boat hours fished. For each trip, Appellant also reported retaining pelagic rockfish and lingcod.³⁵

To count toward a charter halibut fishing permit, a trip in 2004 or 2005 must be a bottomfish logbook fishing trip.³⁶ A bottomfish logbook fishing trip is a regulatory term, defined at 50 C.F.R. § 300.67(f)(2), as follows:

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.

For 2004 and 2005, ADF&G did not require charter operators to report halibut specifically, but required them to report halibut effort as bottomfish effort.³⁷ ADF&G required operators to report the three markers of bottomfish effort identified in 50 C.F.R. § 300.67(f)(2): statistical areas of bottomfish fishing, boat hours and the number of rods engaged in bottomfish fishing.³⁸ The reporting of any one of these pieces of information makes the trip a bottomfish logbook fishing trip.

For Appellant's two trips on July 11, 2005, under "Bottomfish Fishing," Appellant put a line through the box for primary statistical area where most fish were caught, put "0" under maximum number of rods fished, and put "0" under number of boat hours fished. The July 11, 2005, logbook trip reports do not contain any of the three pieces of information that are required for a trip to be a bottomfish logbook fishing trip. Therefore,

³³ 50 C.F.R. § 300.67(e).

³⁴ Official Record Challenge Response Form submitted by Appellant (Nov. 21, 2010).

³⁵ Email from ADF&G Research Analyst to Tracy Buck, RAM (Dec. 14, 2010) with page from Logbook 51638 reporting trips from July 4, 2005, to July 11, 2005.

³⁶ 50 C.F.R. § 300.67(b)(1)(ii)(A); 50 C.F.R. § 300.67(d)(1)(i).

³⁷ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009). Beginning in 2006, ADF&G required participants to report halibut specifically. *Id.*

³⁸ See 2005 Logbook [REDACTED] page attached to Appellant's Official Record Challenge Response Form (Nov. 21, 2010); 2004 Logbook [REDACTED] page, attached to Email from Dora Sigurdsson, ADF&G, to Mary Alice McKeen (July 20, 2011). The NMFS Alaska Region, Administrative Appeals website, has the AFG&G Logbooks, which include Logbook instructions, from 2002 to 2011. <http://www.fakr.noaa.gov/appeals/default.htm>.

these trips are not bottomfish logbook fishing trips and the angler number reported on these trips cannot be used to determine an angler endorsement on a charter halibut permit.

Third, Appellant states that, as of this year, it intended to start fishing with groups of five people which would be a major source of his business.³⁹ The assignment of angler endorsements is based on past participation in 2004 and 2005, not future participation.

Finally, Appellant asked me to review pages 6 and 7 of Logbook No. [REDACTED] because his copies were not legible and he thought the trip on May 30, 2004 might show five anglers.⁴⁰ These two pages show the bottomfish logbook fishing trips for the weeks of May 24 – May 30, 2004, and May 31 – June 6, 2004.⁴¹

I obtained these two pages from ADF&G, provided Appellant with a copy and stated that the number of clients on the May 30, 2004 trip appeared to be four, not five.⁴² I also put in the record a copy of a page from Appellant's website that VESSEL 2 fishes up to four persons comfortably and provided that to Appellant.⁴³ Appellant did not submit any further argument or evidence. I have found that the number of clients on the May 30, 2004 trip was four.⁴⁴ NMFS determines the number of anglers by the number of clients.⁴⁵ I therefore conclude that the angler endorsement on Appellant's second permit should be four because the highest number of anglers that Appellant reported on a bottomfish logbook fishing trip with VESSEL 2 in 2004 or 2005 was four.

CONCLUSIONS OF LAW

1. RAM correctly applied 50 C.F.R. § 300.67(e) and determined that Appellant's second transferable charter halibut permit should have an angler endorsement of four.
2. Appellant does not qualify for a second transferable permit with an angler endorsement of five.

DISPOSITION

The IAD that is the subject of this appeal is upheld. This decision takes effect on November 28, 2011, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(k), (o).

³⁹ Letter from Appellant to OAA (Feb. 11, 2011).

⁴⁰ Letter from Appellant to OAA (Feb. 11, 2011).

⁴¹ Exhibit 1 to Order (Sep. 19, 2011).

⁴² Order (Sep. 19, 2011).

⁴³ Exhibit 2 to Order (Sep. 19, 2011).

⁴⁴ Finding of Fact 6.

⁴⁵ Final Rule, 75 Fed. Reg. 56,903, 56,907 (Sep. 17, 2010). Appellant did not report any crew members fishing on the May 30, 2004 trip nor any of the other trips reported from May 24 to June 6, 2004.

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 November 7, 2011, the tenth day after the date of this Decision. 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.



Mary Alice McKeen
Administrative Judge

Date issued: October 28, 2011