

of a page from his 2004 Saltwater Charter Vessel Logbook to support this claim. Appellant can file this appeal because he is directly and adversely affected by the IAD.⁴

I have carefully considered the entire record in this appeal. Appellant did not request a hearing.⁵ I did not hold a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue him a permit with an angler endorsement of six.⁶ I did not interpret Appellant as alleging that he actually reported the August 24, 2004, trip to ADF&G.⁷

If Appellant is alleging that he reported the August 24, 2004 trip, I did not hold a hearing because the record contains only a mere allegation that he reported the trip,⁸ and Appellant did not offer to submit evidence sufficient to enable me to find that he reported the trip to ADF&G.⁹ I conclude that the record contains sufficient information on which to decide this appeal.¹⁰ I therefore close the record and issue this decision.

For the reasons that follow, I conclude that RAM correctly decided that Appellant's transferable permit should have an angler endorsement of five, not six.

ISSUE

Should Appellant's transferable charter halibut permit have an angler endorsement of six?

FINDINGS OF FACT

1. The State of Alaska Department of Fish and Game (ADF&G) issued Appellant a 2004 Saltwater Charter Vessel Logbook on May 24, 2004, which was ADF&G Logbook [REDACTED].¹¹ Each page of the 2004 ADF&G Logbook had seven spaces to enter a trip for each day of the week. Each logbook page had spaces to enter

⁴ See 50 C.F.R. § 679.43(b).

⁵ Letter from Appellant to NMFS (Mar. 21, 2011).

⁶ 50 C.F.R. § 679.43(g)(3)(iv) ("A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.").

⁷ Letter from Appellant to NMFS (Mar. 21, 2011).

⁸ 50 C.F.R. § 679.43(g)(3)(ii) ("A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions.")

⁹ 50 C.F.R. § 679.43(g)(3)(iii) (The appellate officer may order a hearing only if the appeal meets four requirements including that "[t]he evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate.")

¹⁰ 50 C.F.R. § 679.43(g)(2).

¹¹ 2004 Saltwater Charter Vessel Logbook Sign-Out Sheet, signed by Appellant, May 24, 2004, Attachment to email from Dora Sigurdsson, Fishery Biologist, ADF&G, Research and Technical Services to Tracy Buck, NMFS (Nov. 30, 2010).

information on “Number of Clients and Crew Fishing,” “Salmon Fishing” and “Bottomfish Fishing.”¹²

2. The 2004 Logbook Instructions state that the logbook pages must be turned in weekly. The top of each page specified the date for turning that page in. The logbook page for the August 23 – 29, 2004, week stated: “WEEK of Aug. 23-Aug. 29, 2004. This must be postmarked by Sep 6, 2004.”¹³
3. On September 10, 2004, ADF&G received page 19 from Logbook [REDACTED] for trips occurring August 23 – 29, 2004. On the page submitted to ADF&G, Appellant recorded “1” in the “Day No of Multi-Day Trip” column and “Amook I” for “Port or Site of Off-Loading.” Appellant did not fill in any other information. Appellant did not fill in any information under “Number of Clients and Crew Fishing,” “Salmon Fishing” or “Bottomfish Fishing.” Under “Bottomfish Fishing,” Appellant did not fill in the statistical area fished, the maximum number of rods fished, the number of boat hours.¹⁴
4. Appellant did not report six anglers to ADF&G in Logbook [REDACTED] for a trip on August 24, 2004.¹⁵
5. Appellant did not report six anglers to ADF&G for any bottomfish logbook fishing trip in 2004 or 2005.¹⁶
6. During the application process of a charter halibut permit, Appellant submitted a page 19 from Logbook [REDACTED] for trips the week of August 23 – 29, 2004, that had information that was not on the page 19 submitted to ADF&G. On this copy, Appellant had completely filled-in trip information for the trip on August 24, 2004, including “6” as the number of clients, “535733” as the bottomfish statistical area fished, “6” as the maximum number of rods fished and “4.5” as the number of boat hours fished, as well as salmon fishing information.¹⁷
7. Appellant took a charter halibut fishing trip with six anglers on August 24, 2004.¹⁸
8. Appellant timely applied for a charter halibut permit on April 2, 2010.¹⁹

¹² ADF&G’s Logbook [REDACTED] page 19, for August 23-29, 2004, Attachment to email from Dora Sigurdsson to Tracy Buck (Nov. 30 2010).

¹³ 2004 ADF&G Logbook Instructions at iii. The NMFS Alaska Region website has the ADF&G Logbooks, including Instructions, from 2002 to 2011: <http://www.fakr.noaa.gov/appeals/default.htm> (“Additional Resources); ADF&G Logbook [REDACTED], page 19, for August 23-29, 2004.

¹⁴ ADF&G’s copy of Logbook [REDACTED] page 19, for August 23-29, 2004.

¹⁵ ADF&G’s copy of Logbook [REDACTED] page 19, for August 23-29, 2004.

¹⁶ IAD at 3; Official Record Print Summary (date created Jan. 27, 2010).

¹⁷ Compare ADF&G Logbook 40403, page 19, for August 23-29, 2004 with Appellant’s ADF&G Logbook 40403, page 19, for August 23-29, 2004.

¹⁸ Letter of Appeal from Appellant to NMFS (Mar. 21, 2011); Appellant’s copy of ADF&G Logbook [REDACTED] page 19 from August 23-29, 2004 submitted with letter of Appeal; Statement by Client (Jan. 28, 2011). In Client’s written statement, she listed the six anglers, including herself, on the trip.

PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the Charter Halibut Limited Access Program. Those regulations are 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 773c of The Halibut Act.²⁰

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.²¹

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.²²

A bottomfish logbook fishing trip is a logbook fishing trip that was reported in the qualifying period (2004, 2005) with one of the following pieces of information: the statistical area(s) where bottomfish fishing occurred, the boat hours the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²³

A halibut logbook fishing trip is a logbook fishing trip that was reported in the recent participation period (2008) 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.²⁴

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 2005,²⁵ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁶

An applicant must prove different levels of participation for a non-transferable permit and for 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

¹⁹ Application (received Apr. 2, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

²⁰ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

²¹ 50 C.F.R. § 300.67(b)(1)(ii).

²² 50 C.F.R. § 300.67(f)(4).

²³ 50 C.F.R. § 300.67(f)(2). 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)

²⁴ 50 C.F.R. § 300.67(f)(3).

²⁵ 50 C.F.R. § 300.67(f)(6) (definition of qualifying period).

²⁶ 50 C.F.R. § 300.67(f)(7) (definition of recent participation period).

fishing trips in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License for that year²⁷

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 or 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License for that year.²⁸

The angler endorsement number on an applicant's first charter halibut permit is the highest number of anglers that the applicant reported on any bottomfish logbook fishing trip in the qualifying period (2004, 2005), unless that number is less than four. The angler endorsement on an applicant's second permit is the highest number of anglers that the applicant reported on any such trip, unless that number is less than four. If the applicant's highest number of reported anglers is less than four, the applicant's permit will be endorsed for four anglers.²⁹

ANALYSIS

Should Appellant's transferable charter halibut permit have an angler endorsement of six?

The official charter halibut record contains no bottomfish logbook fishing trips in 2004 or 2005 where Appellant reported six anglers.³⁰ In his appeal, Appellant claims he took a trip on August 24, 2004, with six anglers and, by implication, that the official record is incorrect.

A. Appellant took the trip.

In support of his claim that he took the trip, Appellant submitted a copy of page 19 of his 2004 Saltwater Charter Vessel Logbook (Logbook [REDACTED]). Appellant points to the August 24, 2004 trip on his copy of page 19, which has, written in, six clients fishing for bottomfish with six rods for four-and-a-half hours in State statistical area 535733. Appellant also submitted a statement from the client on the trip, who listed the six clients, including herself, that fished for halibut with Appellant on that day.³¹

Appellant's evidence – his copy of the logbook page and his client's statement – is evidence that he took a charter halibut trip on August 24, 2004 and I have found, based on the weight of evidence in the record, that he took that trip.³²

B. Appellant did not report the trip.

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

²⁸ 50 C.F.R. § 300.67(d)(1).

²⁹ 50 C.F.R. § 300.67(e)(1) – (5).

³⁰ IAD at 3.

³¹ Statement by Client (Jan. 28, 2011).

³² Finding of Fact 7.

Appellant's evidence that he took the trip is *some* evidence that he reported the trip to ADF&G,³³ but the evidence that he did not report the trip is stronger than the evidence that he reported the trip. RAM obtained from ADF&G the photocopy of the page 19 in ADF&G's possession. ADF&G's copy contained *no* bottomfish trip information for the August 24, 2004 trip and contained no entry for number for clients or crew fishing.³⁴ I apply a presumption of regularity to the logbook page supplied by ADF&G and have no reason to conclude that ADF&G did not supply a correct copy of the logbook page in its possession or that ADF&G altered a page that applicant submitted in 2004.³⁵

Further, RAM informed Appellant that it obtained a copy of the logbook page in question from ADF&G and that ADF&G's copy did not show six anglers on the August 24, 2004 trip.³⁶ Appellant did not state during his appeal that he had submitted his page 19 to ADF&G. Appellant states "[m]y copy of my 2004 saltwater charter vessel logbook shows that on Tuesday August 24th . . . I indeed did have max. No. of rods fished (6)."³⁷ Appellant's copy *is* evidence that he took the trip but it is not sufficient to prove that he reported the trip to ADF&G. I found, based on the weight of the evidence in the record, that Appellant did not submit his copy of page 19 to ADF&G and, therefore, that Appellant did not report six anglers to ADF&G for a trip on August 24, 2004.³⁸

C. NMFS may not determine an angler endorsement based on this trip.

Unless Appellant reported the August 24, 2004 trip, and reported it with a client number of six,³⁹ Appellant cannot receive an angler endorsement of six based on this trip. That is because, according to the charter halibut regulation, an angler endorsement for an applicant's first transferable permit "will be the greatest number of charter vessel anglers **reported on any logbook trip** in the qualifying period (2004 or 2005) in that area."⁴⁰

Appellant may be arguing that he should be able to report this trip to NMFS during the process of applying for a charter halibut permit, even though he did not report it to ADF&G at or near the time that he made the trip. I do not have authority to order that NMFS credit this trip to Appellant's application for a charter halibut permit.

³³ If the applicant did not take the trip, the applicant could not have truthfully reported a trip to ADF&G. The taking of the trip is the first step for an applicant to prove that he reported the trip.

³⁴ ADF&G's copy of Logbook 40403, page 19, for August 23-29, 2004.

³⁵ It is well-established that "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926)(citation omitted). "Administrative law has adopted a presumption of regularity for official decisions." C. Koch, Jr., *Administrative Law and Practice* § 1.20 [12] (2010)(footnote omitted).

³⁶ Email from Tracy Buck, RAM Supervisory Permit Specialist, to Appellant (Jan. 24, 2011).

³⁷ Letter from Appellant to NMFS (Mar. 21, 2011).

³⁸ Findings of Fact 3 & 4.

³⁹ NMFS determines the number of anglers by the number of clients. Final Rule, 75 Fed. Reg. 56,903, 56,907 (Sep. 17, 2010). Appellant did not report any crew members fishing on this trip either.

⁴⁰ 50 C.F.R. § 300.67(e)(1)(emphasis added).

A “logbook fishing trip” is a regulatory term that 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. . . .”⁴¹ A bottomfish logbook fishing trip is also a regulatory term:

Bottomfish logbook fishing trip mean 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.⁴²

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

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. . . . 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. . . . *Hence, a permit applicant could not add a trip to the official record years after the trip should have been reported to the State.*⁴³

The instructions contained in the 2004 ADF&G Saltwater Charter Logbook state that trips had to be reported weekly to ADF&G.⁴⁴ Appellant did not report this trip to ADF&G.

I conclude that the August 24, 2004, trip is not a bottomfish logbook fishing trip, as defined by 50 C.F.R. § 300.67(f)(2), because Appellant did not report the trip to ADF&G within the time required to report the trip and because Appellant did not report the trip with any of the three pieces of information required for a trip to be a bottomfish logbook fishing trip: the statistical areas 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 (stat area of fishing, boat hours or number of rods). I conclude that Appellant may not rely on this trip to support his claim for an angler endorsement of six.

Appellant has worked hard in the charter halibut fishery for over twenty years and states that his operation is now built and designed around six anglers.⁴⁵ As an appellate officer, however, I can only evaluate whether an applicant meets the requirements in federal regulation for a permit or an endorsement on a permit. Under the charter halibut regulation, the only criterion for issuing an angler endorsement on Appellant’s permit is

⁴¹ 50 C.F.R. § 300.67(f)(4).

⁴² 50 C.F.R. § 300.67(f)(2).

⁴³ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009) (emphasis added).

⁴⁴ Finding of Fact 2.

⁴⁵ Letter from Appellant to NMFS Mar. 21, 2011).

the highest number of anglers that the applicant reported on a bottomfish logbook fishing trip in 2004 or 2005.⁴⁶ RAM correctly applied that regulation and determined that Appellant's permit should be endorsed for five anglers. I therefore uphold the Initial Administrative Determination that is the subject of this appeal.

CONCLUSIONS OF LAW

1. The August 24, 2004 trip is not a bottomfish logbook fishing trip as defined by 50 C.F.R. § 300.67(f)(2).
2. Appellant is not eligible for an angler endorsement of six based on his August 24, 2004 trip because he did not report the trip to ADF&G.
3. Appellant did not report any bottomfish logbook fishing trips to ADF&G in 2004 or 2005 with more than five anglers.
4. Appellant should receive a transferable charter halibut permit with an angler endorsement of five.

ORDER

The IAD dated January 24, 2011 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).

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

⁴⁶ 50 C.F.R. § 300.67(e)(1).