

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0022

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] (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 February 24, 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 13, 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 indicated that Appellant had until August 12, 2010, to submit evidence to show he met participation requirements in 2004 or 2005. On August 6, 2010, Appellant responded to the Notice.⁴

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 February 13, 2010, and received February 24, 2010.

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

⁴ Original File tab, hand-written letter, received August 6, 2010.

Appellant stated that he recorded in excess of fifteen charter vessel bottomfish trips from 2004 to 2005, but that there was nowhere for him to record this information on the 2004 and 2005 logbooks.

On December 15, 2010, RAM sent Appellant the IAD at issue in this case.⁵ 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 February 14, 2011.

On January 26, 2011, Appellant appealed the IAD.⁶ 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, 2011.⁷ On May 18, 2011, NAO received emails from Appellant from Alaska State officials regarding the recording and use of charter vessel trip logbooks.

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.⁸

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.

FINDINGS OF FACT

1. In 2004, Appellant timely and properly reported two bottomfish logbook fishing trips to ADF&G.⁹

⁵ Original File Tab, IAD dated December 15, 2010.

⁶ Pleadings Tab, type-written letter, dated January 23, 2011, received January 26, 2011.

⁷ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

⁸ 50 C.F.R. § 679.43 (g)(2), (k).

⁹ Original File Tab, IAD dated December 15, 2010; printed summary.

2. In 2005, Appellant timely and properly reported two bottomfish logbook fishing trips to ADF&G.¹⁰
3. In 2008, Appellant timely and properly reported one-hundred and thirty seven halibut logbook fishing trips to ADF&G.¹¹

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.¹² This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.¹³

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 2008.¹⁴

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.¹⁵ The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.¹⁶

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.¹⁷

A “halibut logbook fishing tip” 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.¹⁸

¹⁰ Original File Tab, IAD dated December 15, 2010; printed summary.

¹¹ Original File Tab, IAD dated December 15, 2010; printed summary.

¹² 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).

¹³ 50 C.F.R. § 300.67(b)(1)(ii).

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

¹⁵ 50 C.F.R. § 300.67(f)(4).

¹⁶ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

¹⁷ 50 C.F.R. § 300.67(f)(2).

¹⁸ 50 C.F.R. § 300.67(f)(3).

“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.¹⁹

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.²⁰

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 2008.²¹

Appellant properly reported one-hundred and thirty seven logbook fishing trips to ADF&G for 2008. Thus, Appellant meets minimum participation requirements for 2008. However, Appellant reported two qualifying trips to ADF&G in 2004 and two qualifying trips in 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 the logbooks do not have an entry for “halibut”, and that confusion in the system caused paperwork mistakes.

Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.²² With respect to recording bottomfish trips, those instructions provided as follows:

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. . . .

¹⁹ 50 C.F.R. § 300.67(f)(1).

²⁰ 50 C.F.R. § 300.67(f)(5).

²¹ 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).

²² 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>.

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).

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.

Further, some of Appellant's 2004 and 2005 logbooks were filled out completely and correctly, indicating Appellant possessed the knowledge necessary to correctly fill out a log book.

When it published the Final Rule implementing the CHLAP, 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.²³

In his appeal, Appellant submitted emails from Alaska State officials regarding charter vessel trips logbook recording procedures and whether these logbooks would be used in determining CHP eligibility. The above NMFS statement, however, is clear and Appellant's testimony and supporting documents are insufficient to overturn the IAD under the CHLAP regulations.

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).

It is Appellant's burden to show that he properly reported to ADF&G at least five bottomfish fishing trips in a logbook with the requisite information during the 2004 or 2005 qualifying period. Although Appellant claims he took at least five bottomfish fishing trips in 2004 or 2005, he did not properly report those trips as bottomfish fishing trips to ADF&G.

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.

²³ Final Rule, 75 Fed. Reg. 554, 592 (January 5, 2010).

ORDER

The IAD dated December 15, 2010, is upheld. This decision takes effect thirty days from the date issued, November 30, 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 November 10, 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.



—
Steven Goodman
Administrative Judge

Date Issued: October 31, 2011