

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

In re Application of)
)
) Appeal No. 10-0121
 [REDACTED])
) DECISION
)
 Appellant)

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) 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 were filed with OAA. The undersigned is the administrative judge assigned to review and decide this matter.¹

This case comes before NAO based on a timely appeal filed by [REDACTED] doing business as [REDACTED] (Appellant). Appellant appeals an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM) program on October 26, 2010.² In the IAD, RAM denied Appellant's application for a charter halibut permit (CHP) because he lacked the minimum number of qualifying fishing trips in 2004 or 2005.³

On April 2, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).⁴ 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 June 30, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).⁵ In the Notice, RAM advised Appellant that the Official Record showed he met the CHLAP requirements for 2008 by reporting seventeen charter halibut logbook trips to the Alaska Department of Fish and Game

¹ 50 C.F.R. § 679.43.

² Original File Tab, Appellant's appeal submission received December 22, 2010.

³ Original File Tab, IAD.

⁴ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

⁵ Original File Tab, Notice of Opportunity to Submit Evidence.

(ADF&G).⁶ However, RAM also stated in the Notice that Appellant did not meet the CHLAP requirements for 2004 or 2005.⁷ RAM set a July 30, 2010, deadline for Appellant to submit evidence to show he met participation requirements in 2004 or 2005.⁸ On August 6, 2010, Appellant responded to the Notice by waiving his opportunity to submit additional evidence.⁹

On October 26, 2010, RAM issued Appellant the IAD which is the subject of this appeal.¹⁰ In the IAD, RAM denied Appellant's application and reasoned that the Official Record, which RAM uses to determine applicants eligibility, indicated that Appellant only took one bottomfish fishing trip in 2004, and only two bottomfish fishing trips in 2005.¹¹ Since the applicable Charter Halibut Limited Access Program (CHLAP) regulations require a minimum of five qualifying trips in 2004 or 2005, RAM found Appellant ineligible to receive a permit.¹²

On December 22, 2010, Appellant timely appealed the IAD to OAA.¹³ In the appeal, Appellant stated he "could have been more precise" in completing his logbooks and that he was unaware of the significance of his logbooks in determining his eligibility for a CHP.¹⁴

On March 3, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until April 4, 2011, to supplement the record.¹⁵ No additional evidence was received by NAO from Appellant.

Upon review of Appellant's appeal and case record, I have determined that the record contains sufficient information on which to reach a final judgment. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.¹⁶

⁶ Original File Tab, Notice of Opportunity to Submit Evidence.

⁷ Original File Tab, Notice of Opportunity to Submit Evidence.

⁸ Original File Tab, Notice of Opportunity to Submit Evidence.

⁹ Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence received August 6, 2010.

¹⁰ Original File Tab, IAD.

¹¹ Original File Tab, IAD page 3.

¹² Original File Tab, IAD page 3.

¹³ Pleadings File Tab, Appellant's appeal letter received December 22, 2010.

¹⁴ Pleadings File Tab, Appellant's appeal letter received December 22, 2010.

¹⁵ Appeals Correspondence Tab, NAO letter dated March 3, 2011.

¹⁶ 50 C.F.R. § 679.43 (g) and (k).

ISSUES

At issue in this appeal is whether Appellant is eligible for a CHP. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence that he properly recorded and reported to the Alaska Department of Fish and Game (ADF&G) the minimum amount of logbook fishing trips in 2004 or 2005?

If the answer to the question is “no,” I must uphold the IAD and conclude that Appellant does not qualify for a CHP.

FINDINGS OF FACT

1. In 2004, ADF&G issued Appellant a license to operate his charter fishing business.¹⁷
2. In 2004, Appellant reported one bottomfish logbook fishing trips to ADF&G.¹⁸
3. In 2005, ADF&G issued Appellant a license to operate his charter fishing business.¹⁹
4. In 2005, Appellant reported two bottomfish logbook fishing trips to ADF&G.²⁰
5. In 2008, ADF&G issued Appellant a license to operate his charter fishing business.²¹
6. In 2008, Appellant reported to ADF&G seventeen halibut logbook fishing trips.²²

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if an applicant meets certain requirements. One such requirement is that the applicant is an individual, or entity, to which ADF&G issued an ADF&G Business Owner License that authorized logbook fishing trips that meet minimum participation requirements.²³ Minimum participation requirements to qualify for a nontransferable CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one

¹⁷ Original File Tab, IAD.

¹⁸ Original File Tab, IAD; Original File Tab, Print Summary.

¹⁹ Original File Tab, IAD.

²⁰ Original File Tab, IAD; Original File Tab, Print Summary.

²¹ Original File Tab, IAD.

²² Original File Tab, IAD; Original File Tab, Print Summary.

²³ 50 C.F.R. § 300.67(b)(1)(ii).

year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008.²⁴

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.²⁵ The time limit to submit data about logbook fishing trips was within eight to fourteen days of a qualifying trip, as delineated in the logbooks.²⁶

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to ADF&G 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.²⁷

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to ADF&G 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.²⁸

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS used the Official Record to implement the CHLAP, including evaluating applications for charter halibut permits.²⁹

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 2008.³⁰

As indicated in the Findings of Fact, Appellant properly reported seventeen halibut logbook fishing trips to ADF&G for 2008. Thus, Appellant meets minimum participation requirements for 2008. However, Appellant only reported one qualifying trip to ADF&G in 2004 and two in 2005. Since the CHLAP regulations require minimum participation in

²⁴ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

²⁵ 50 C.F.R. § 300.67(f)(4).

²⁶ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

²⁷ 50 C.F.R. § 300.67(f)(2).

²⁸ 50 C.F.R. § 300.67(f)(3).

²⁹ 50 C.F.R. § 300.67(f)(5).

³⁰ 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).

both 2004 or 2005 and 2008, Appellant does not meet the minimum participation requirements for a CHP.

On appeal, Appellant explains that he disagrees with RAM's determination that he had only two qualifying trips in 2004 and 2005. Appellant contends he was not provided sufficient instructions in order to accurately complete the logbooks, that he was unaware of the importance of the logbooks in determining his eligibility for a CHP, and that, although not indicated in the logbooks, he did meet the minimum participation requirements in 2004 or 2005 and in 2008.³¹

Instructions explaining how to complete the 2004 and 2005 Saltwater Charter Vessel Logbooks³² were provided in the logbooks. With respect to recording halibut 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. . . .
No. Boat Hours Fished	The number of boat hours that at least one 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 . Halibut kept and released data is collected through established survey programs.
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted? Example 3: Two Targets Salmon and Bottomfish (including halibut) Simultaneously	. . . record 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.

³¹ Pleadings File Tab, Appellant's appeal letter received December 22, 2010.

³² ADF&G Saltwater Logbooks for the years 2001 through 2011 are displayed on the NMFS, Alaska Region, web site at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

(i.e., mooching)	
Example 4: A combination of any of the above	. . . record 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 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.

If Appellant had followed the written instructions supplied with the 2004 and 2005 ADF&G Saltwater Charter Vessel Logbooks, his charter halibut fishing business activity would have been properly recorded and reported. 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.

Appellant states he was unaware of the importance of the logbooks in determining his eligibility for a CHP, unfortunately, this is not a sufficient reason to overturn IAD under the CHLAP regulations.

In reaching my decision, I have carefully reviewed the entire record. I have been mindful of Appellant’s background and experience. I recognize Appellant’s interests in continuing in charter halibut fishing, however I am bound by the CHLAP regulations, and I am unable to provide Appellant relief under the regulations and the facts of this case.

CONCLUSIONS OF LAW

Appellant has not established by a preponderance of the evidence that he properly recorded and reported to ADF&G at least five logbook fishing trips for 2004 or 2005.

Because Appellant did not report at least five logbook fishing trips in 2004 or 2005, he is not eligible for a CHP.

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated October 26, 2010 is upheld. This decision takes effect thirty days from the date issued, October 11, 2011,³³ 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 elects to review this decision pursuant to 50 C.F.R. § 679.43(k) and (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 Time, on the tenth day after the date of this Decision, September 19, 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 in support of the motion.

████████████████████
—
Steven Goodman
Administrative Judge

Date Issued: September 9, 2011

³³ 50 C.F.R. § 679.43(k) and (o).