

the highest number of anglers that Appellant reported on any trip in the qualifying period (2004, 2005) was six.⁵ All activity relevant to this application occurred in IPHC Area 3A.

On appeal, Appellant contends that it should receive two transferable charter halibut permits, each with an angler endorsement of six, because it had a vessel under construction in October 2005 and has used that vessel extensively in the charter halibut fishery since 2006.⁶

Appellant can file this appeal because the IAD directly and adversely affected its interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that it meets the requirements for two transferable charter halibut permits with angler endorsements of six. I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue two transferable charter halibut permits with angler endorsements of six.⁷ 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 a decision.

For the reasons that follow, I conclude that RAM correctly determined that Appellant met the requirements in the charter halibut regulation for one transferable charter halibut permit with an angler endorsement of six and that Appellant did not meet the requirements for a second transferable permit.

ISSUES

1. Did RAM correctly determine that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of six?
2. May an applicant receive a second transferable permit because the applicant had a vessel under construction in October 2005 and has participated heavily in the charter halibut fishery with that vessel since 2006?

FINDINGS OF FACT

I find the following facts by a preponderance of evidence in the record:

1. In 2004, Appellant took seventy-five bottomfish logbook fishing trips with [REDACTED] (VESSEL 1).⁸

⁵ See 50 C.F.R. § 300.67(e) (participation requirement for angler endorsement).

⁶ Appellant's Appeal Letter (February 16, 2011).

⁷ 50 C.F.R. § 679.43(g)(3)(iv).

⁸ Summary of Official Record for Appellant, email from NMFS Computer Specialist (Aug. 17, 2011). Appellant stated that he took ninety trips with VESSEL 1 in 2004. Appellant's Appeal Letter (received Feb. 16, 2011). The difference between Appellant's number of trips in 2004 and NMFS's number is not material to resolving any issue in this appeal. When I say that Appellant took a bottomfish or halibut logbook fishing trip, I also mean that the Appellant timely reported the trip to ADF&G in its Saltwater

2. In October 2004, Appellant began making preparations to order another vessel to be built for his company.⁹
3. Appellant was unable to attain financing in 2004 and therefore postponed his plans.¹⁰
4. In 2005, Appellant took eighty-one bottomfish logbook fishing trips with VESSEL 1. The highest number of anglers that Appellant took on any trip in 2005 was six.¹¹
5. In October 2005, Appellant again ordered a second vessel, put down a deposit of \$9,000, but was unable to have [REDACTED] (VESSEL 2), delivered until May 2006.¹²
6. In 2006, Appellant took well over fifteen halibut logbook fishing trips with VESSEL 1 and with VESSEL 2. Appellant stated that he took sixty-four bottomfish logbook fishing trips with VESSEL 1 and forty-two bottomfish logbook fishing trips with VESSEL 2.¹³
7. In 2008, Appellant took 126 halibut logbook fishing trips with VESSEL 1 and VESSEL 2. Appellant took fifteen or more trips with VESSEL 1 and fifteen or more trips with VESSEL 2.¹⁴
8. Appellant filed a timely application for a charter halibut permit on April 5, 2010.¹⁵

PRINCIPLES OF LAW

In March 2007, the North Pacific Fishery Management Council recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.¹⁶ In January 2010, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP) pursuant to section 773c of The Halibut Act.¹⁷ These regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. NMFS must follow these regulations in evaluating applications for charter halibut permits.

Charter Logbook, because the definition of logbook fishing trip includes that the trip was reported to ADF&G in accord with the time limit for reporting the trip. 50 C.F.R. § 300.67(f)(4).

⁹ Appellant's Appeal Letter (received Feb. 16, 2011).

¹⁰ Appellant's Appeal Letter (received Feb. 16, 2011).

¹¹ Summary of Official Record for Appellant, email from NMFS Computer Specialist (Aug. 17, 2011). 2010). Appellant stated that he took seven-six bottomfish trips in 2005 with VESSEL 1.

¹² Appellant's Appeal Letter (received Feb. 16, 2011).

¹³ Appellant's Appeal Letter (received Feb. 16, 2011).

¹⁴ Summary of Official Record for Appellant, email from NMFS Computer Specialist (Aug. 17, 2011).

¹⁵ Application for Charter Halibut Permit(s) (dated Apr. 1, 2010, received Apr. 5, 2010).

¹⁶ Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009).

¹⁷ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁸ A person can be an individual, a corporation, firm or association.¹⁹

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 limit for reporting the trip in effect at the time of the trip except that for multi-day trips, the number of trips will be equal to the number of days of the multi-day trip, e.g., a two-day trip will be counted as two trips.²⁰

A bottomfish logbook fishing trip is a logbook fishing trip that was reported in the qualifying period 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.²¹

A halibut logbook fishing trip is a logbook fishing trip that was reported in the recent participation period 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.²²

An applicant must prove participation in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,²³ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁴

An applicant must prove different levels of participation to receive a non-transferable and a transferable permit. To receive a non-transferable permit, an applicant must have taken at least 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).²⁵

To receive a transferable charter halibut permit, an applicant must have taken at least fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).²⁶ The number of transferable charter halibut permits

¹⁸ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁹ 50 C.F.R. § 300.61 (definitions).

²⁰ 50 C.F.R. § 300.67(f)(4).

²¹ 50 C.F.R. § 300.67(f)(2).

²² 50 C.F.R. § 300.67(f)(3).

²³ 50 C.F.R. § 300.67(f)(6).

²⁴ 50 C.F.R. § 300.67(f)(7).

²⁵ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

²⁶ 50 C.F.R. § 300.67(d)(1)(i)-(ii).

issued to an applicant will be equal to the number of vessels that met these qualifications.²⁷

The angler endorsement number on a charter halibut permit is the highest number of anglers reported on any trip in the qualifying period (2004, 2005), unless the highest number is less than four. If that is the case, the angler endorsement number will be four.²⁸

If an applicant does not meet the requirements for a permit, or an endorsement on a permit, in the applicable regulations, NMFS does not have authority to award the applicant the permit or the endorsement on the permit.

The function of an administrative judge, or appellate officer, is to evaluate whether the federal agency correctly applied the regulations in evaluating an application for a permit or endorsement on a permit.

ANALYSIS

1. Did RAM correctly determine that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of six?

Under the charter halibut regulation, RAM first determines if an applicant submitted a timely application.²⁹ Appellant submitted a timely application.

Once RAM makes that determination, RAM takes the following steps to evaluate the application:

Step 1: applying 50 C.F.R. § 300.67(b), does the applicant meet the participation requirements for a non-transferable permit?

Step 2: applying 50 C.F.R. § 300.67(c), does the applicant meet the participation requirements for any additional permits?

Step 3: applying 50 C.F.R. § 300.67(d), does the applicant meet the participation requirements for any of its permits to be a transferable permit?

Step 4: applying 50 C.F.R. § 300.67(e), does the applicant meet the participation requirement for an angler endorsement greater than four?

RAM correctly applied these steps in evaluating Appellant's application.

Step 1: RAM determined that Appellant met the participation requirements for a transferable permit in 50 C.F.R. § 300.67(b), namely Appellant took at least five

²⁷ 50 C.F.R. § 300.67(d)(2).

²⁸ 50 C.F.R. § 300.67(e)(1),(3),(5). This is the rule for an applicant's first permit.

²⁹ 50 C.F.R. § 300.67(b)(1)(i).

bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and at least five halibut logbook fishing trips in the recent participation period (2008).³⁰

Step 2: RAM determined that Appellant did not meet the participation requirement for a second permit in 50 C.F.R. § 300.67(c), which states:

(c) *Number of permits.* An applicant that meets the participation requirements in paragraph (b) of this section [to receive at least one non-transferable charter halibut permit] will be issued the number of charter halibut permits *equal to the lesser of the number of permits* determined by paragraphs (c)(1) or (c)(2) of this section as follows:

(1) The *total number of bottomfish logbook fishing trips* made pursuant to the applicant's ADF&G Business License in *the applicant-selected year* divided by five, and rounded down to a whole number; or

(2) The *number of vessels* that made the bottomfish logbook fishing trips in the applicant-selected year. [italics added]

The applicant-selected year means the year in the qualifying period, either 2004 or 2005, that the applicant selects for NMFS to use in determining the number of applicant's permits.³¹

Applying federal regulation 50 C.F.R. § 300.67(c) to this applicant, the result is as follows:

The applicant-selected year: **2005.**³²

The total number of bottomfish logbook fishing trips in 2005: **81.**

The total number of bottomfish logbook fishing trips in 2005 divided by five, rounded to nearest whole number. $81 \div 5 = 16.2$, rounded to **16.**

The number of vessels that made those trips: **1.**

Applicant receives **the lesser of 16 or 1.** Appellant receives **1 permit.**

Although this regulation may seem confusing, the underlying rationale is fairly straightforward. If an applicant only used one vessel in the applicant-selected year (2004 or 2005), the applicant receives one permit. Appellant used one vessel in 2005. Therefore, Appellant can only receive one permit, no matter how many trips it took with that vessel in 2005.

Put another way, the regulation prevents an applicant from receiving a greater number of permits than the number of boats that the applicant used in the qualifying period, with the proviso that the applicant must choose one year in the qualifying period, either 2004

³⁰ These requirements are specifically at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

³¹ 50 C.F.R. § 300.67(f)(1).

³² Application for Charter Halibut Permit(s) at 2 (dated Apr. 1, 2010, received Apr. 5, 2010)

or 2005, to determine the number and type of permits it receives. To receive two permits, an applicant would have had to have used two boats in the applicant-selected year and made a total of at least ten trips.

Step 3: RAM determined that Appellant met the requirement in 50 C.F.R. § 300.67(d) for its permit to be transferable, namely Appellant took fifteen or more logbook fishing trips with one vessel in the applicant-selected year, which is 2005, and Appellant took fifteen or more halibut logbook fishing trips with one vessel in the recent period, which is 2008. Appellant did not meet the requirement for a second transferable permit because it did not take fifteen trips with a second vessel in the applicant-selected year of 2004.

Step 4: RAM determined that Appellant's permit will have an angler endorsement of six, in accord with 50 C.F.R. § 300.67(e). If an applicant receives one transferable permit, the permit will have an angler endorsement of four, unless the applicant took at least one bottomfish logbook fishing trip in 2004 or 2005 with more than four anglers.³³ Appellant took at least one trip in 2004 or 2005 with six anglers. Therefore, Appellant's permit will have an angler endorsement of six.

I conclude that RAM correctly determined that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of six.

2. May an applicant receive a second transferable permit on the grounds that he had a second vessel under construction in October 2005 and has participated heavily in the charter halibut fishery with that vessel since 2006?

An applicant may not receive a second transferable permit on the grounds that the applicant had a second vessel under construction in October 2005 and has participated heavily in the charter halibut fishery with that vessel since 2006. An applicant may not receive a permit on that basis because the charter halibut regulation does not authorize NMFS to issue a permit on that basis.

Under the charter halibut regulation, an applicant can receive two non-transferable charter halibut permits only if the applicant used two vessels in the applicant-selected year (2004 or 2005) and made at least ten trips in that year.³⁴ An applicant can receive two transferable charter halibut permits only if the applicant used two vessels in the applicant-selected year (2004 or 2005) and made at least fifteen logbook fishing trips with each vessel in that year.³⁵

Appellant states that he followed the development of the charter halibut regulation and submits portions of documents from the development of the charter halibut rule.³⁶

³³ 50 C.F.R. § 300.67(e)(1),(5).

³⁴ 50 C.F.R. § 300.67(c). The applicant must also have taken at least five halibut logbook fishing trips in the recent period (2008). 50 C.F.R. § 300.67(b)(1)(ii)(B). Appellant meets that requirement.

³⁵ 50 C.F.R. § 300.67(d)(1)(i). The applicant also must have taken fifteen halibut logbook fishing trips with each of two vessels in the recent period (2008). 50 C.F.R. § 300.67(d)(1)(ii). Appellant meets that requirement.

³⁶ Letter from Appellant with application (Apr. 1, 2010) and attachments to letter; Appellant's Appeal Letter with attachments (received Feb. 18, 2011)

Appellant made a down payment on his second vessel in October 2005, and it was under construction on or before the control date, December 9, 2005. The control date is a date set by the Council. The control date was the subject of a notice that NMFS published in the Federal Register which stated, in part: "This notice announces that anyone entering the charter sport fishery for Pacific halibut in and off Alaska after December 9, 2005 (control date) will not be assured of future access to that fishery if a management regime that limits the number of participants is developed and implemented under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act)."³⁷

Appellant's argument that he had a vessel under construction on or before the control date is not a basis for me to order that he receive a second transferable permit. First, the control date notice stated: "Charter vessel operators are not guaranteed future participation in the charter halibut fishery regardless of their date of entry or intensity of participation in the fishery before or after the control date. The Council may choose a different control date, or it may choose a management regime that does not make use of such a date"³⁸

Second, the Council did recommend,³⁹ and the Secretary adopted, a management regime that credited all participation that occurred on or before the control date (December 9, 2005) toward a charter halibut permit.⁴⁰ Appellant did participate in the charter halibut fishery before the control date *but only with one vessel*. All of Appellant's participation counted toward a charter halibut permit. The Council recommended,⁴¹ and the Secretary adopted, a limitation on the number of permits based on the number of vessels that an applicant used to participate in the qualifying period.⁴² I therefore must apply that rule in deciding this appeal.

Appellant refers to actions by the Charter Halibut Stakeholder Committee. In December 2005, in addition to adopting a control date, the Council established a Charter Halibut Stakeholder Committee to make recommendations to the Council on the charter halibut fishery.⁴³ Appellant states that, in March 2006, the Committee recommended that an applicant be awarded a permit for a vessel under construction as of the control date.⁴⁴ Appellant states that it was not until December 2006, after he had purchased a second

³⁷ *Id.* at 6442.

³⁸ *Id.* at 6444.

³⁹ Council Motion on Charter Halibut Moratorium in Area 2C and 3A, (Mar. 31, 2007), available on available on NMFS website http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

⁴⁰ 50 C.F.R. § 300.67(f)(6) ("Qualifying period means the sport fishing season established by the international Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005.")

⁴¹ Council Motion on Charter Halibut Moratorium in Area 2C and 3A, Issue 10 ("A business would be limited to the number of permits equal to the highest number of vessels used in any one year during the qualifying period.") (Mar. 31, 2007), available on available on NMFS website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

⁴² 50 C.F.R. § 300.67(c); 50 C.F.R. § 300.67(d)(2).

⁴³ Proposed Rule, 75 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009).

⁴⁴ Attachment 5 to Appellant's Appeal Letter (received Feb. 16, 2011).

vessel, that the Council proposed to limit the number of permits to the number of vessels that the applicant used in the qualifying period.⁴⁵

I cannot decide an appeal based on a proposal for a rule that was never adopted. The Council did not propose, and the Secretary did not adopt, a rule that an applicant receive a permit for a vessel that was under construction as of December 9, 2005. As an appellate officer, I only have authority to apply the regulation as it was adopted by the Secretary of Commerce. Under that regulation, Appellant does not meet the participation requirement in the qualifying period for a second transferable permit, namely participation by two vessels at the fifteen-trip level.⁴⁶ I therefore affirm the IAD that is the subject of this appeal. Under the charter halibut regulation, the only way this applicant can get a second charter halibut permit is by transfer from a person who has a transferable permit.⁴⁷

CONCLUSION

1. RAM correctly determined that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of six.
2. NMFS cannot issue an applicant a charter halibut permit, or a particular angler endorsement on a permit, if the applicant does not meet the requirements in the charter halibut regulation for the permit or for the angler endorsement.
3. Appellant does not meet the participation requirement in the qualifying period in 50 C.F.R. § 300.67(c) for a second charter halibut permit, namely that Appellant did not take ten or more bottomfish logbook fishing trips with two vessels in the applicant-selected year (2005).
4. Appellant does not meet the participation requirement in the qualifying period in 50 C.F.R. § 300.67(d) for a second transferable charter halibut permit, namely Appellant did not take fifteen or more bottomfish logbook fishing trips with a second vessel in the applicant-selected year (2005).
5. An applicant may not receive a second transferable permit because the applicant had a second vessel under construction in October 2005, the vessel was delivered in May 2006 and the applicant has participated heavily in the charter halibut fishery with that vessel since 2006.
6. As an administrative judge, I must interpret and apply the regulations, as adopted, to decide an appeal.

⁴⁵ Appellant's Appeal Letter and Attachment 8 to Letter (received Feb. 16, 2011).

⁴⁶ 50 C.F.R. § 300.67(d)(1)(i).

⁴⁷ 50 C.F.R. § 300.67(i) (transfer provisions). An applicant cannot receive a second permit under the unavoidable circumstance provision. 50 C.F.R. § 300.67(g).

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on, October 13, 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 the tenth day after the date of this Decision, September 23, 2011.⁴⁸ 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.

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Mary Alice McKeen
Administrative Judge

Date Issued: September 13, 2011

⁴⁸ The procedure for filing a motion for reconsideration is on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>.