



either 2004 or 2005 with one vessel.<sup>4</sup> But RAM determined that Appellant did not meet the participation requirement in the recent period for a transferable permit: fifteen halibut logbook fishing trips with the same vessel in 2008.<sup>5</sup>

RAM determined that Appellant made fourteen halibut logbook fishing trips with [REDACTED] (VESSEL) in 2008. The requirement for a non-transferable permit in the recent period is five halibut logbook fishing trips.<sup>6</sup> With fourteen trips in 2008, RAM concluded that Appellant should receive a non-transferable permit.

On appeal, Appellant states that he meets the fifteen-trip requirement for a transferable permit in both periods: the qualifying period and the recent period. Appellant has the burden to prove that the official record is incorrect and that he meets the requirements for a transferable permit.

I held a hearing on Appellant's claim on October 31, 2011.<sup>7</sup> I added to the record documents from Alaska Department of Fish and Game (ADF&G): copies of logbook pages from Appellant's Saltwater Charter Logbook for 2008 (Logbook [REDACTED]), the sign-out sheet for the 2008 Logbook, the schedule for reporting of logbooks in 2008, and a statistical area map.<sup>8</sup> I also added to the record Appellant's history of participation as contained in NMFS's official charter halibut record.<sup>9</sup> I have carefully reviewed the entire record of this appeal. I conclude that the record contains sufficient information upon which to decide this appeal.<sup>10</sup> I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant meets the requirements for a transferable permit because Appellant's charter trip on July 8, 2008, was a halibut logbook fishing trip as defined by 50 C.F.R. § 300.67(f)(3). With that additional trip, Appellant meets the fifteen-trip requirement in the recent period for a transferable permit.

## ISSUES

1. Were Appellant's charter trips in 2008 on July 14, July 15, July 21 and July 22 halibut logbook fishing trips as defined by 50 C.F.R. § 300.67(f)(3)?
2. Was Appellant's charter trip on July 8, 2008, a halibut logbook fishing trip as defined by 50 C.F.R. § 300.67(f)(3)?

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<sup>4</sup> 50 C.F.R. § 300.67(d)(1)(i).

<sup>5</sup> 50 C.F.R. § 300.67(d)(1)(ii).

<sup>6</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A).

<sup>7</sup> Order Providing for Hearing (Oct. 31, 2011).

<sup>8</sup> Emails from Dora Sigurdsson, Research and Technical Services, ADF&G (Oct. 14, 18 & 25, Nov. 1, 2011).

<sup>9</sup> Official Record Summary and Official Record List of Trips by Appellant, attached to emails from Mukhya Khalsa, NMFS Computer Specialist, Information Services Division, NMFS Alaska Region (Sep. 18, Nov. 1, Nov. 7, 2011). I cite these as Official Record Summary or Official Record List of Trips by Appellant with the date of the email.

<sup>10</sup> 50 C.F.R. § 679.43(g)(2).

## FINDINGS OF FACT

1. Appellant has operated a charter halibut fishing business since the 1970's.<sup>11</sup>
2. Appellant took and reported thirteen bottomfish logbook fishing trips in 2004.<sup>12</sup>
3. Appellant took and reported twenty-five bottomfish logbook fishing trips in 2005.<sup>13</sup>
4. Appellant took and reported thirty halibut logbook fishing trips in 2007.<sup>14</sup>
5. On charter trips conducted by Appellant, anglers usually caught, or tried to catch, both salmon and halibut.<sup>15</sup>
6. For 2008, Appellant was issued a combined ADF&G Business Owner/Guide License [REDACTED] and a 2008 Saltwater Sport Fishing Charter Trip Logbook to report trips by VESSEL.<sup>16</sup>
7. Appellant reported twenty trips to ADF&G with VESSEL between July 7 and August 1, 2008.<sup>17</sup>
8. In the official record, NMFS categorized fourteen of the twenty trips as halibut logbook fishing trips. NMFS categorized six trips as salmon-only trips and not halibut logbook fishing trips: July 8, July 14, July 15, July 21, July 22 and July 31.<sup>18</sup>
9. Of the six trips that were not halibut logbook fishing trips, Appellant reported the July 31 trip with the notation, "Did not fish for halibut." Appellant states that his fishing party did not catch or attempt to catch halibut on July 31. Appellant does not contend the trip on July 31, 2008, is a halibut logbook fishing trip.<sup>19</sup>

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<sup>11</sup> Testimony of Appellant (Oct. 31, 2011). Appellant testified it was since 1973 or 1974. The State of Alaska Commercial Fisheries Entry Commission (CFEC) has charter vessel information on its website from 1998 to 2004. It shows Appellant registered four charter vessels in 1998, four in 1999, four in 2000, four in 2002 and one in 2004, his current vessel. <http://www.cfec.state.ak.us/plook>

<sup>12</sup> Official Record Summary (Nov. 1, 2011).

<sup>13</sup> Official Record Summary (Nov. 1, 2011).

<sup>14</sup> Official Record List of Trips (Sep. 19, 2011). The record does not have the specific number of halibut logbook fishing trips by Appellant in 2006.

<sup>15</sup> Testimony of Appellant (Oct. 31, 2011); Official Record List of Trips by Appellant (Nov. 1, 2011); Submission by Appellant (Nov. 23, 2010); Email statement from Clients 1 (two persons) (Nov. 3, 2010); Letter from Client 2 to Appellant (Client 2) (Oct. 26, 2010); Letter from Client 3 to NOAA (Nov. 11, 2010); Statement from Clients 4 (two persons) (Oct. 1, 2010); Statement from Client 5 (Oct. 25, 2010).

<sup>16</sup> Appellant's 2008 Logbook (each page shows Owner and Guide License [REDACTED]); "Sign-out sheet" for Appellant's 2008 Logbook with email from ADF&G, Research and Technical Services (Oct. 14, 2011).

<sup>17</sup> Official Record Listing of Trips by Appellant (Nov. 1, 2011).

<sup>18</sup> Official Record Listing of Trips by Appellant (Nov. 1, 2011).

<sup>19</sup> Application for charter halibut permit with copy of page 19; Testimony of Appellant (Oct. 31, 2011).

10. On the five remaining trips, namely the trips in 2008 on July 8, July 14, July 15, July 21 and July 22, the anglers caught, or tried to catch, salmon and halibut.<sup>20</sup>
11. For the trips on July 14, July 15, July 21 and July 22, Appellant reported salmon information but not halibut caught, halibut released, statistical areas or stat areas where bottomfish fishing occurred or boat hours of bottomfish fishing.<sup>21</sup>
12. The trip on July 8, 2008, was the second day of a five-day trip from July 7 – 11, with five anglers. For July 7, July 9, July 10 and July 11, Appellant reported halibut kept and halibut released. NMFS categorized the trips on these days as halibut logbook fishing trips.<sup>22</sup>
13. On July 8, 2008, the anglers on VESSEL tried to catch salmon and halibut primarily in stat area 112120 but caught neither. Stat area 112120 is in IPHC Area 2C.<sup>23</sup>
14. For the trip on July 8, Appellant submitted page 2 of Appellant’s 2008 Logbook. Appellant did not report any halibut caught or released. Appellant did not report the number of boat hours of bottomfish fishing due to an oversight on his part.<sup>24</sup>
15. For the trip on July 8, for the stat area where salmon fishing occurred, Appellant wrote “112120.” For bottomfish, Appellant wrote a check mark directly below “112120” in the box for “Primary Stat Area,” as follows:

⇒ PRIMARY STAT AREA & BOAT HOURS:

Targeted Species	Primary Stat. Area where <u>most fish</u> were caught. (6-digit Code)	No. of Boat Hours Fished this Trip
Salmon	112120	
Bottomfish	✓	

<sup>20</sup> Letter from Appellant to NOAA with application (Mar. 22, 2010); Statement of Appeal by Appellant (Nov. 23, 2010); Testimony of Appellant (Oct. 31, 2011); Testimony of Appellant’s Wife (Oct. 31, 2011); Appellant’s 2008 Logbook (pages 2, 6, 7, 11, 12) (shows salmon data). I also rely on the evidence in the record, cited in note 15 *supra*, that Appellant generally fished for salmon and halibut together.

<sup>21</sup> Pages 6, 7, 11, 12, Appellant’s 2008 Logbook.

<sup>22</sup> Appellant’s 2008 Logbook (page 2)(indicates second day of five day trip); Official Record Listing of Trips by Appellant (Nov. 1, 2011). Each day of a multi-day trip is a separate trip. 50 C.F.R. § 300.67(f)(4).

<sup>23</sup> ADF&G Statistical Area Map attached to email from Dora Sigurdsson, ADF&G Research and Technical Services (Nov. 1, 2011) (location of stat area 112120).

<sup>24</sup> Testimony of Appellant (Oct. 31, 2011).

## PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the Charter Halibut Limited Access Program (CHLAP), which 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.<sup>25</sup> The following is a brief description of the features of the CHLAP relevant to this appeal.

The official charter halibut record is the information prepared by NMFS on participation in the charter halibut fishery that NMFS used to implement the CHLAP.<sup>26</sup> If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.<sup>27</sup>

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>28</sup>

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, and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>29</sup>

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).<sup>30</sup> 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).<sup>31</sup>

The charter halibut regulation defines a halibut logbook fishing trips in 50 C.F.R. § 300.67(f)(3):

*Halibut logbook fishing trip* 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: [1] The number of halibut that was kept, [2] the number of halibut that was

<sup>25</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

<sup>26</sup> 50 C.F.R. § 300.67(f)(5).

<sup>27</sup> See 50 C.F.R. § 300.67(h)(4).

<sup>28</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>29</sup> 50 C.F.R. § 300.67(f)(6)-(7)(definitions of qualifying period and recent participation period).

<sup>30</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B); 50 C.F.R. § 300.67(f)(2)(definition of bottomfish logbook fishing trip); 50 C.F.R. § 300.67(f)(3)(definition of halibut logbook fishing trip, quoted above).

<sup>31</sup> 50 C.F.R. § 300.67(d)(1).

released, [3] ***the statistical area(s) where bottomfish fishing occurred***, or [4] the boat hours that the vessel engaged in bottomfish fishing.<sup>32</sup>

An administrative judge must interpret and apply the regulations, as adopted by the Secretary of Commerce, to decide an appeal of the denial of a charter halibut permit.<sup>33</sup>

## ANALYSIS

Appellant reported twenty days of logbook trips in 2008 between July 7, 2008, and August 1, 2008: fourteen days which NMFS determined were halibut logbook fishing trips; one day (July 31) which NMFS determined was not a halibut logbook fishing trip, a finding Appellant does not contest; and five days that NMFS determined were not halibut logbook fishing trips but Appellant believes were halibut logbook fishing trips.

The trips at issue occurred on July 8, July 14, July 15, July 21 and July 22, 2008. I conclude the trips in 2008 on July 14, 15, 21, and 22 were not halibut logbook fishing trips. I conclude the trip on July 8, 2008, was a halibut logbook fishing trip because Appellant reported the statistical area where bottomfish fishing occurred, as required by the definition of a halibut logbook fishing trip in 50 C.F.R. § 300.67(f)(3).

### **1. Were Appellant's charter trips on July 14, July 15, July 21 and July 22, 2008 halibut logbook fishing trips as defined by 50 C.F.R. § 300.67(f)(3)?**

Appellant reported the trips on July 14, 15, 21 and 22, 2008 to ADF&G with salmon data only. Although the anglers on those trips tried, unsuccessfully, to catch halibut,<sup>34</sup> Appellant did not report the stat area where this fishing occurred or the number of boat hours that the vessel engaged in this fishing.

Appellant explained that he conscientiously reported the number of halibut kept and released and thought that was the key halibut information that NMFS wanted: "I would like at this time to reiterate the fact that the one trip that I lacked to qualify for a transferable permit was due to my mistake in not realizing that the number of halibut taken was not the primary motive for the record keeping by the ADF&G and NOAA, but that it was the number of days we fished for them that mattered."<sup>35</sup>

I do not doubt Appellant's sincerity but the regulation establishes a precise definition of a halibut logbook fishing trip as a trip reported to the State with *one* of the following pieces of information: [1] The number of halibut that was kept, [2] the number of halibut

<sup>32</sup> 50 C.F.R. § 300.67(f)(3)(boldface and square brackets added).

<sup>33</sup> Pursuant to 50 C.F.R. § 679.43, the decision of an appellate becomes final agency action thirty days after it is issued, subject to the authority of the Regional Administrator for the Alaska Region to reverse, remand or modify it. 50 C.F.R. § 679.43 (k), (o).

<sup>34</sup> Findings of Fact 5, 12.

<sup>35</sup> Letter from Appellant to NOAA (received Jan. 11, 2011).

that was released, [3] the statistical area(s) where bottomfish fishing occurred, or [4] the boat hours that the vessel engaged in bottomfish fishing.<sup>36</sup>

The logbook pages for July 14, July 15, July 21 and July 22 do not contain, and cannot be reasonably interpreted to contain, any of the four specified pieces of information for a trip to be a halibut logbook fishing trip: the number of halibut kept, the number released, stat areas, or boat hours. Under the charter halibut regulation, I do not have the authority to evaluate why an applicant did not report a trip with one of the four specified pieces of information and, based on that evaluation, excuse some applicants from reporting and not others. I therefore affirm the determination in the IAD that the trips by Appellant on July 14, 15, 21 and 22 are not halibut logbook fishing trips.

**2. Was Appellant’s charter trip on July 8, 2008, a halibut logbook fishing trip as defined by 50 C.F.R. § 300.67(f)(3)?**

On July 8, 2008, Appellant took a party of five anglers to stat area 112120, which is in IPHC Area 2C. The anglers targeted halibut and salmon but caught neither.<sup>37</sup> Appellant reported the location of the trip as follows:

⇒ PRIMARY STAT AREA & BOAT HOURS:

Targeted Species	Primary Stat. Area where <u>most fish</u> were caught. (6-digit Code)	No. of Boat Hours Fished this Trip
Salmon	112120	
Bottomfish	✓	

As noted, a trip is a halibut logbook fishing trip if the applicant reported the trip with one of four pieces of information within the time limits for reporting the trip: [1] the number of halibut kept, [2] the number released, [3] the statistical area where bottomfish fishing occurred, or [4] the boat hours that the vessel engaged in bottomfish fishing.<sup>38</sup>

For the trip on July 8, 2008, Appellant did not report the number of halibut kept, the number released or the boat hours that the vessel engaged in bottomfish fishing. Appellant contends that, by his check mark, he did report the statistical area where bottomfish fishing occurred, even though he did not write “112120” in the bottomfish box.

<sup>36</sup> 50 C.F.R. § 300.67(f)(3). The definition also states that the trip must have been reported within the time limits for reporting in effect at the time of the trip.

<sup>37</sup> Finding of Fact 13.

<sup>38</sup> 50 C.F.R. § 300.67(f)(3).

The issue is whether Applicant's check mark constitutes reporting the trip with the statistical area where bottomfish fishing occurred within the meaning of 50 C.F.R. § 300.67(f)(3). That regulation, by its terms, does not require reporting the statistical area by writing the six-digit code of the statistical area. It requires that the trip was "reported . . . with one of the following pieces of information: . . . the statistical area(s) where bottomfish fishing occurred."<sup>39</sup>

In reviewing Appeal 10-0123, the Regional Administrator for the Alaska Region stated that the issue was not whether the applicant wrote the six digits of the statistical area on the logbook trip report but whether the applicant "satisfied the requirement of recording the statistical area where he fished."<sup>40</sup> Even if an applicant did not write the six-digit statistical area code, an applicant could satisfy the requirement of recording the statistical area if the applicant wrote symbols or words that conveyed the same information as the six-digit stat area code. The Regional Administrator stated, for example, that an applicant who wrote "ditto" in the bottomfish box would have reported the statistical area even though the applicant did not write the six numbers of the statistical area.<sup>41</sup>

Measured against that standard, I conclude that, for the trip on July 8, 2008, Appellant "satisfied the requirement of recording the statistical area where he fished."<sup>42</sup> Appellant's check mark in the bottomfish box conveyed the same information that writing the six-digit statistical area code would have conveyed. Appellant's check mark was a shorthand way to write "same as above." Appellant reported salmon fishing in statistical area 112120 and reported that he was bottomfish fishing in the "same as above" statistical area, which was statistical area 112120.

The conclusion that Appellant used the check mark to mean "same as above" on the July 8 trip is supported by the fact that he used check marks the same way in many other places in his 2008 Logbook. On two other days – July 7 and July 9 – Appellant wrote the six-digit statistical area where the anglers were salmon fishing and used a check mark to convey that the statistical area for bottomfish fishing was the "same as above" statistical area.<sup>43</sup> On sixteen pages of the 2008 Logbook, Appellant used a check mark to report that the community where the trip ended was the "same as above" community where the trip began.<sup>44</sup>

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<sup>39</sup> 50 C.F.R. § 300.67(f)(3).

<sup>40</sup> Regional Administrator's Final Decision Granting Appellant a Charter Halibut Limited Access Permit, Appeal 10-0123 at 1 (Dec. 6, 2011), copy provided to Appellant with this decision.

<sup>41</sup> Regional Administrator's Final Decision Granting Appellant a Charter Halibut Limited Access Permit, Appeal 10-0123 at 1 (Dec. 6, 2011).

<sup>42</sup> Regional Administrator's Final Decision Granting Appellant a Charter Halibut Limited Access Permit, Appeal 10-0123 at 1 (Dec. 6, 2011).

<sup>43</sup> Appellant's 2008 Logbook. NMFS classified the trips on July 7 and July 9 as halibut logbook fishing trips, as defined by 50 C.F.R. § 300.67(f)(3), because the applicant either reported halibut kept, halibut released, or the number of boat hours that the vessel engaged in bottomfish fishing.

<sup>44</sup> Appellant's 2008 Logbook for trips on the following dates: July 8, 9, 10, 11, 14, 15, 22, 24, 25, 28, 29, 30, 31, August 1.

I believe that the written record alone provides a sufficient basis to conclude that Appellant reported bottomfish fishing on July 8, 2008, in statistical area 112120. Appellant's testimony at the hearing did corroborate the written record. Appellant testified that, through the check mark on page 2 of his 2008 Logbook, he was reporting that the anglers on July 8, 2008, fished for halibut in the same area that they fished for salmon. Appellan explained that it was a habit he developed: "I've been in business for many, many years and when it's a duplication, why I'll just use a check mark instead of putting a ditto mark. Why I'll use a check mark."<sup>45</sup>

I conclude that Appellant has shown that the official record is incorrect. I conclude that Appellant reported statistical area 112120 as the statistical area where bottomfish fishing occurred on the trip on July 8, 2008. I conclude that Appellant's charter trip on July 8, 2008, is a halibut logbook fishing trip, as defined by 50 C.F.R. § 300.67(f)(3). I therefore conclude that Appellant took fifteen halibut logbook fishing trips in 2008 and meets the requirements for a transferable charter halibut permit.

#### CONCLUSIONS OF LAW

1. Appellant's charter trips on July 14, July 15, July 21 and July 22 are not halibut logbook fishing trips, as defined by 50 C.F.R. § 300.67(f)(3), because, with respect to these trips, Appellant did not report in a logbook any of the following: halibut caught, halibut released, the stat areas where bottomfish fishing occurred or the number of hours of bottomfish fishing.
2. Appellant's trip on July 8, 2008, is a halibut logbook fishing trip, as defined by 50 C.F.R. § 300.67(f)(3), because Appellant, through the check mark on page 2 of Appellant's 2008 Logbook, reported the statistical area where bottomfish fishing occurred on that trip, namely statistical area 112120.
3. Appellant meets the participation requirement in the recent period for a transferable permit: fifteen halibut logbook fishing trips with one vessel in 2008.

#### ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue a transferable charter halibut permit, endorsed for six anglers, for use in IPHC Regulatory Area 2C to Appellant. This decision takes effect on May 18, 2012, 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, April 30, 2012. 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

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<sup>45</sup> Testimony of Appellant at 10 min. (Oct. 31, 2011).

[REDACTED]  
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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.

[REDACTED]

Mary Alice McKeen  
Administrative Judge

Date Issued: April 18, 2012