

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

In re Application of

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Appellant

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Appeal No. 10-0103

DECISION

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 Headquarters in Silver Spring, Maryland, and maintains an office in NMFS's Alaska Regional Office. NAO is the successor to the Office of Administrative Appeals, Alaska Region (OAA), and is charged with processing appeals that were filed with OAA. The undersigned is the administrative judge assigned to review and decide this appeal pursuant to federal regulation 50 C.F.R. § 679.43.

On November 15, 2010, ██████████ on behalf of ██████████ filed a timely appeal of an Initial Administrative Determination (IAD), dated September 29, 2010, issued by the Restricted Access Management Program (RAM) under the Charter Halibut Limited Access Program.¹ ██████████ is a partnership of ██████████ and three other persons. When I refer to Appellant, I will be referring to ██████████.

In the IAD, RAM determined that Appellant met the requirements for five transferable charter halibut permits endorsed for International Pacific Halibut Commission (IPHC) Regulatory Area 2C. RAM subsequently determined that four of Appellant's 2C permits will have an angler endorsement of six and one will have an angler endorsement of four.² Area 2C is roughly Southeast Alaska.³ Appellant does not appeal any aspect of RAM's determination regarding his permits for Area 2C.

This appeal concerns Appellant's application for charter halibut permits endorsed for use in IPHC Area 3A. Area 3A is roughly Southcentral Alaska.⁴ This appeal is about fishing done by Appellant in "the boundary area," an area that straddles the boundary between IPHC Area 2C and IPHC Area 3A. The boundary area is outside of Cross Sound. The appendix to this decision marks the "boundary area" as the shaded area on

¹ Letter from ██████████ on behalf of ██████████ to OAA (dated Nov. 22, 2010, received Nov. 26, 2010). ██████████ is the appellant and is the entity to which RAM should issue the permits.

² Notice of Opportunity to Provide Evidence, Revised Computation of Angler Endorsements for Charter Halibut Limited Access Program (Oct. 19, 2010). RAM was implementing the revised angler endorsement rule in 50 C.F.R. § 300.67(e). See Final Rule, 75 Fed. Reg. 56,903 (Sep. 17, 2010).

³ For the precise coordinates of IPHC Area 2C, see 50 C.F.R. § 300.61.

⁴ The precise coordinates of IPHC Area 3A are in 50 C.F.R. § 300.61.

the Pelican/Cross Sound Vicinity map that the Alaska Department of Fish and Game (ADF&G) distributed with saltwater sport fishing charter trip logbooks in 2005.

In the IAD, RAM denied Appellant any permits for IPHC Area 3A because it determined that Appellant did not meet the participation requirement in the qualifying period. An applicant selects a year in the qualifying period – 2004 or 2005 – for NMFS to use to determine the number and type of permits that an applicant may receive.⁵ Appellant chose 2005.⁶

The minimum participation requirements for a non-transferable permit for Area 3A are five bottomfish logbook fishing trips in the qualifying period (2004 or 2005) in Area 3A and five halibut logbook fishing trips in Area 3A in the recent period (2008).⁷ The minimum participation requirements for a transferable permit for Area 3A are fifteen bottomfish logbook fishing trips with one vessel in 2004 or 2005 in Area 3A and fifteen halibut logbook fishing trips reported with one vessel in 2008 in Area 3A⁸

According to the official charter halibut record, Appellant had one bottomfish logbook fishing trip in Area 3A in 2005 and twenty-two halibut logbook fishing trips with four vessels in 2008, with no single vessel making fifteen halibut logbook fishing trips. Therefore, according to the official record, Appellant met the minimum participation requirement in the recent period (2008) for one or more non-transferable permits for Area 3A but did not meet the participation requirement in the qualifying period for any permits for Area 3A.

In connection with his application, Appellant stated: “Over the year all five of our charter vessels fished in 3A waters,” but he seeks on appeal two permits for Area 3A based on fishing by [REDACTED] in the boundary area.⁹ Appellant states that he fished in the boundary area, that he reported the trips in State statistical area 114212 because ADF&G had not assigned the boundary area a bottomfish statistical reporting area, that a number of these trips actually occurred in Area 3A and that, on appeal, the official charter halibut record should be corrected to state the IPHC Area where the fishing occurred.

I reviewed the appeal and, pursuant to 50 C.F.R. § 300.67(g)(2)-(3), I concluded that the record was insufficient for me to decide the appeal.¹⁰ I held a hearing on October 4 and October 24, 2011. Appellant participated in person with his counsel on October 4, 2011. Appellant and counsel participated by telephone on October 24, 2011. I have added to the record two emails from ADF&G staff on the subject of ADF&G statistical area maps of the boundary area.¹¹ I have carefully considered the entire record in this

⁵ 50 C.F.R. § 300.67 (f)(1) (definition of “applicant-selected year”).

⁶ Letter from Appellant to RAM (June 6, 2010).

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

⁸ 50 C.F.R. § 300.67(d)(1)(ii).

⁹ Letter from Appellant to RAM (June 6, 2010); Appellant’s Counsel Statement at Hearing (Oct. 4, 2011).

¹⁰ Order Scheduling Hearing (Sep. 19, 2011).

¹¹ Email from Bob Powers, ADF&G Research Analyst, to Administrative Judge Phil Smith (July 30, 2010). These were from another appeal. I have provided them to Appellant.

appeal and conclude that the record now contains sufficient information upon which to decide this appeal.¹² I therefore close the record and issue this decision.

In this Decision, I will refer to the following persons and vessels as indicated:

■ [REDACTED] is Appellant. [REDACTED] is also a licensed charter captain and operated [REDACTED], VESSEL [REDACTED], in 2005.¹³

■ [REDACTED] is a licensed charter captain and operated F/V [REDACTED], VESSEL [REDACTED], in 2005. I refer to [REDACTED] as Captain of VESSEL [REDACTED].¹⁴

■ Dora Sigurdsson is Sport Fish Biologist with Research and Technical Services, Division of Sport Fish, Alaska Department of Fish and Game (ADF&G. Ms. Sigurdsson is the ADF&G Staffperson in charge of the ADF&G charter logbook program and decides policy questions regarding the charter logbook program. I will refer to Ms. Sigurdsson as ADF&G Staffperson 1.

■ Bob Powers is Research Analyst with the Division of Sport Fish, ADF&G, and works under Ms. Sigurdsson. Mr. Powers is the computer data person for the ADF&G charter logbook program. I will refer to Mr. Powers as ADF&G Staffperson 2.

■ Appellant has five vessels that provide charter trips to Lodge guests:

- [REDACTED] VESSEL [REDACTED];
- [REDACTED], VESSEL [REDACTED];
- [REDACTED], VESSEL [REDACTED];
- [REDACTED], VESSEL [REDACTED];
- [REDACTED], VESSEL [REDACTED].

These are the numbers by which these vessels are identified in NMFS's official charter halibut record.¹⁵

For the reasons that follow, I conclude that Appellant has shown by a preponderance of evidence that the official charter halibut record is incorrect and that he meets the

¹² 50 C.F.R. § 679.43(g)(2).

¹³ Testimony of Appellant (Oct. 4, 2011).

¹⁴ Affidavit of [REDACTED] (Jan. 10, 2011); Testimony of Appellant (Oct. 4, 2011).

¹⁵ Official Record List of Trips by Appellant, attached to email from NMFS Computer Specialist, Information Services Division (ISD), Alaska Region, NMFS (Sep. 1, 2011). This is the source of all numbers of trips by Appellant's vessels cited in this decision, unless I note otherwise. The record also contains this same list of trips with the vessels identified by name. Email from NMFS Computer Specialist, ISD (Nov. 11, 2011).

participation requirements for two non-transferable permits for use in Area 3A, each with an angler endorsement of four. I reach this conclusion because Appellant reported at least ten bottomfish logbook fishing trips by [REDACTED] in statistical area 114212 in 2005 that occurred in Area 3A.

ISSUE

The issue is whether Appellant has shown by a preponderance of evidence in the record that he meets the requirements for a charter halibut permit or permits for use in IPHC Area 3A. This requires a four-step inquiry:

1. Does Appellant meet the minimum participation requirements for a non-transferable charter halibut permit for Area 3A?
2. Does Appellant meet the minimum participation requirements for any additional non-transferable charter halibut permits for Area 3A? If so, how many?
3. Does Appellant meet the minimum participation requirements for any of his permits for Area 3A to be transferable?
4. What is the proper angler endorsement on Appellant's permits for Area 3A?

FINDINGS OF FACT

1. Appellant's business is a lodge that provides charter fishing to sport fishermen. The lodge was established in [REDACTED]. Appellant bought it in [REDACTED] and operates it as a partnership with his wife, his sister and his brother-in-law.¹⁶
2. The lodge is located in [REDACTED] Alaska, a small, remote town in [REDACTED] Alaska, which is located approximately [REDACTED] and [REDACTED].¹⁷
3. The boundary area is an area that straddles the boundary between IPHC Area 2C and IPHC Area 3A. The boundary area is marked as the shaded area on the map that is the appendix to this decision.¹⁸

¹⁶ Testimony of Appellant (Oct. 4, 2010). The State of Alaska Division of Corporations website shows the partnership was formed in [REDACTED]. <http://commerce.alaska.gov> [REDACTED]

¹⁷ Testimony of Appellant (Oct. 4, 2010); Letter from Appellant to RAM (June 6, 2010). Cape Spencer Light is at a lighthouse that was built in 1932. The light still functions. United States Coast Guard, Historic Light Station information: [placeshttp://www.uscg.mil/history/web/lighthouses/LHAK.asp](http://www.uscg.mil/history/web/lighthouses/LHAK.asp). For the precise coordinates of Area 2C and 3A, see 50 C.F.R. § 300.61.

¹⁸ The appendix to this decision is a Pelican/Cross Sound Vicinity map distributed by ADF&G, Division of Sport Fish, with saltwater charter vessel trip logbooks in 2005, Exhibit 1, with the boundary area noted as the shaded area.

4. Appellant has commercially fished in Alaska since 1989 and has fished in and around the boundary between IPHC Area 2C and IPHC 3A as a commercial fisherman.¹⁹
5. Appellant has held Quota Share for halibut for Area 2C and 3A under the Individual Fishing Quota (IFQ) Program since the program's inception in 1995. He has also held Quota Share for sablefish for Southeast Alaska since 1995.²⁰
6. The boundary area contains productive fishing grounds for charter fishing for halibut. The area has names known to charter captains. The top part of the boundary area is known as "Spencer Flats," because it is due west of Cape Spencer Light. The middle part is known as "Elephant Ear" or "the Ear" because of the shape of the fishing area within the boundary area. The bottom part is known as "the Nose" because of the shape of the fishing area within the boundary area.²¹
7. The depth and bottom structure of the boundary area is productive for charter fishing because it is relatively shallow, which is necessary so anglers can put down their rods and reel them back in within a reasonable period of time.²²
8. The boundary area has many areas where depths are between 30 to 50 fathoms, which is 180 to 300 feet.²³
9. To construct the official charter halibut record, NMFS used logbook data from ADF&G organized by logbook fishing trip.²⁴ One field of the data was the bottomfish statistical area where fishing for bottomfish was reported as occurring on the trip.²⁵
10. The data, as received from ADF&G, did not have the IPHC Area where the trip occurred. NMFS categorized the trip as occurring in IPHC Area 2C or Area 3A and added the IPHC Area to the official charter halibut record.²⁶

¹⁹ Testimony of Appellant (Oct. 4, 2011).

²⁰ Testimony of Appellant (Oct. 4, 2011). RAM's permit website confirms this testimony. It lists Quota Share holders from 1995 to the present. <http://www.fakr.noaa.gov/ram/ifqreports.htm#qspools>.

²¹ Testimony of Appellant (Oct. 4, 2011); Exhibit 6, United States Geological Service Charts, # 17300, # 17302 (areas marked by Appellant).

²² Testimony of Appellant at 28 – 31, 35 min. (Oct. 4, 2011).

²³ Exhibit 6, USCG Chart 17302 (chart has soundings in fathoms). One fathom is six feet.

²⁴ Proposed Rule, 75 Fed. Reg. 18,178, 18,184 (Apr. 21, 2009).

²⁵ Official Record Listing of Trips by Appellant (Sep. 1, 2011).

²⁶ Email from NMFS Computer Specialist, ISD, NMFS Alaska Region (Sep. 26, 2011).

Facts Related to 2005

11. Every year ADF&G distributes a map with State statistical areas for reporting salmon fishing and for reporting bottomfish fishing and with instructions for reporting.²⁷ The State statistical areas for bottomfish and salmon are largely, although not entirely, the same.²⁸
12. In 2005, the "boundary area" was not within a bottomfish statistical area on the ADF&G map that ADF&G distributed to charter vessel operators.²⁹ As of 2005, ADF&G had not assigned the boundary area to a bottomfish statistical area.³⁰
13. During the appeal, at the request of Appellant, ADF&G Staffperson 1, the staffperson in charge of implementing the logbook program, provided the 2005 ADF&G map and a revised 2010 map with this explanation:

I am attaching the 2005 Saltwater Statistical map used by southeast operators to denote statistical areas fished on their logbook data pages (**Northern SE [Southeast].pdf** and **SE Stat Areas1.GIF**), All operators were provided with this map upon distribution of the logbooks. This map clearly does not define the 2C/3A boundary adequately, such that many operators who operated in both 2C and 3A during any given trip would have been challenged to provide the accurate statistical areas when fishing 3A.

Since that time however, and recognizing the need to clarify the boundary, we improved the Northern SE map which clearly shows the 2C/3A boundary and simplifies the statistical area assignment for the operators within their logbook trip sheets (**Northern SE revised.pdf**). This map did not become available until 2010.³¹

14. When Appellant took anglers fishing for halibut in the boundary area with VESSEL ██████ in 2005, he reported the primary statistical area where bottomfish fishing occurred as bottomfish statistical area 114212.³²

²⁷ ADF&G Logbook and Instructions from 2002 to 2011, <http://www.fakr.noaa.gov/appeals/default.htm>.

²⁸ Email from ADF&G Staffperson 2 to Administrative Judge Phil Smith ("Yes the charter logbook program used different statistical areas than the ADF&G groundfish statistical areas. They are loosely based on salmon statistical areas, but even here there's a bit of a difference.") .

²⁹ Testimony of Appellant (Oct. 24, 2011); Email from Dora Sigurdsson, ADF&G Staffperson 1 (Dec. 28, 2010)(first and second map attached to email).

³⁰ Email from ADF&G Staffperson 2 to Administrative Judge Phil Smith (July 29, 2010)("Before 2008, we didn't have statistical areas assigned to the area outside of Cross Sound.")

³¹ Email from ADF&G Staffperson 1 Dec. 28, 2010)(emphasis in original), first and second map attached to email; email from Appellant to ADF&G Staffperson 1(Dec. 28, 2010).

³² I base this finding on the preponderance of evidence in the entire record including the testimony of Appellant on October 4, 2011.

15. When Captain of VESSEL [REDACTED] took anglers fishing for halibut in the boundary area with VESSEL [REDACTED] in 2005, he reported the primary statistical area where bottomfish fishing occurred as statistical area 114212.³³
16. Appellant, as captain of VESSEL [REDACTED], and Captain of VESSEL [REDACTED] reported fishing for halibut in the boundary area in bottomfish statistical area 114212 because the boundary area was not within any bottomfish statistical area, they wished to comply with the ADF&G instructions to report a bottomfish statistical area, the boundary area was adjacent to statistical area 114212 and if the line of statistical area 114212 is extended in Cross Sound seaward, it contains the boundary area.³⁴
17. Appellant reported ten bottomfish logbook fishing trips in 2005 by VESSEL [REDACTED] in bottomfish statistical area 114212. NMFS categorized one of those trips as occurring in Area 3A: a trip on July 31. NMFS categorized the other nine trips as occurring in Area 2C.³⁵
18. Of the ten trips by VESSEL [REDACTED] that were reported in bottomfish statistical area 114202 in 2005, one-half of those trips occurred in Area 3A: five trips.³⁶
19. Appellant reported eighteen bottomfish logbook fishing trips by VESSEL [REDACTED] in statistical area 114212 in 2005. NMFS categorized all of those trips as occurring in Area 2C.
20. Of the eighteen trips by VESSEL [REDACTED] that were reported in statistical area 114202 in 2005, one-half of those trips occurred in Area 3A: nine trips.³⁷

³³ I base this finding on the preponderance of evidence in the entire record including the affidavit of Captain of VESSEL [REDACTED].

³⁴ Testimony of Appellant (Oct. 4, Oct 24, 2011); Affidavit of Appellant (Jan 11, 2011); Letter of Appellant to OAA (Nov. 22, 2010); Appendix to Decision.

³⁵ It is not clear why Information Services Division (ISD) categorized the July 31 trip as occurring in Area 3A. It may be because the logbook data shows that Appellant reported 116110 as the statistical area where salmon were caught on the July 31, trip but this is inconsistent with ISD's explanation that, in its tables for converting statistical areas to IPHC areas, [1] statistical area 114202 was in Area 2C, [2] ISD only looked at the salmon area if the bottomfish area was blank and [3] statistical area 116110 was in Area 2C, which is an incorrect assumption but, if ISD was relying on that, it would not have put this trip Area 3A. But nonetheless the presence of statistical area 116110 in the salmon data on this trip might be why ISD categorized the July 31, 2005 trip as a 3A trip in the official record. I did not need to resolve why ISD categorized the July 31 trip as a 3A trip because the balance of evidence in this appeal supports the characterization of the July 31 trip in the official record as a 3A trip. I have no basis to disturb it.

³⁶ I base this finding on the preponderance of evidence in the entire record. I explain the basis for this finding at pages 13 – 15 *infra*.

³⁷ I base this finding on the preponderance of evidence in the entire record. I explain the basis for this finding at pages 13 - 15 *infra*.

Facts Related to 2008

21. On May 28, 2008, NMFS adopted a regulation that an angler could only catch and retain one halibut per day in IPHC Area 2C. The “one-halibut rule” did not apply to Area 3A. The effective date of the rule was June 1, 2008.³⁸
22. The one-halibut rule for the first time required that a vessel operator report in an ADF&G logbook the IPHC area where anglers caught and retained halibut: IPHC Area 2C or 3A.³⁹
23. On June 10, 2008, a federal district court ruled that NMFS could not give effect to the one-halibut provision but did not disturb the new information-collection requirements.⁴⁰
24. In the official charter halibut record for 2008, NMFS credited Appellant with twenty-two halibut logbook fishing trips in Area 3A:
 - 12 halibut logbook fishing trips by VESSEL [REDACTED];
 - 4 halibut logbook fishing trips by VESSEL [REDACTED];
 - 4 halibut logbook fishing trips by VESSEL [REDACTED];
 - 2 halibut logbook fishing trips by VESSEL [REDACTED]
25. In the official charter halibut record for 2008, NMFS categorized three halibut logbook fishing trips by Appellant with VESSEL [REDACTED] as occurring in Area 2C: May 28, June 8 and June 22.
26. On the logbook pages for the trips on May 28, June 8 and June 22, 2008, with VESSEL [REDACTED], the captain reported the primary bottomfish statistical area where bottomfish fishing occurred as statistical area 116110. Statistical area 116110 is in Area 3A. The captain circled 3A as the IPHC area where halibut were caught on these trips.⁴¹
27. The fishing for halibut on the trips on May 28, June 8 and June 22, 2008, occurred in Area 3A.⁴²
28. In 2010, ADF&G assigned the boundary area that is within three miles from shore into bottomfish statistical area 116110, which is in Area 3A, and bottomfish statistical

³⁸ Final Rule, 73 Fed. Reg. 30,504 (May 28, 2008).

³⁹ Final Rule, 73 Fed. Reg. at 30,524 *adopting* 50 C.F.R. § 300.67(d)(2)(iv)(B)(4).

⁴⁰ Final Rule, 73 Fed. Reg. 52,795, 52-795 - 96 (Sep. 11, 2008). NMFS withdrew the one-halibut rule that had been published in May 2008 and proposed a new one-halibut rule in December 2008. Proposed Rule, 73 Fed. Reg. 78,276 (Dec. 22, 2008). The Secretary of Commerce adopted the new one-halibut rule in May 2009 with an effective date of June 5, 2009. Final Rule, 74 Fed. Reg. 21,194 (May 6, 2009).

⁴¹ Exhibit 5B: Logbooks [REDACTED], pages for trips on May 28, June 8, and June 22.

⁴² I base this on Finding of Fact 26.

area 113910, which is in Area 2C.⁴³ ADF&G assigned the boundary area that is outside the three-mile State limit into groundfish statistical areas 365801 and 365731.⁴⁴

PRINCIPLES OF LAW

In March 2007, pursuant to section 773c(c) of The Halibut Act, the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.⁴⁵

In January 2010, pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).⁴⁶ The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. The following is a 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 charter halibut fishing that NMFS used to implement the CHLAP.⁴⁷ NMFS based the official charter halibut record on participation data in saltwater charter logbooks submitted to the Alaska Department of Fish and Game (ADF&G).⁴⁸ If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.⁴⁹

An applicant may apply for permits endorsed for use in IPHC Area 2C and permits endorsed for use in IPHC Area 3A. An applicant must meet the participation requirements for a permit endorsed for Area 2C with logbook fishing trips that occurred in Area 2C. An applicant must meet the participation requirements for a permit endorsed for Area 3A with logbook fishing trips that occurred in Area 3A.⁵⁰

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 2008.⁵¹

⁴³ Email from ADF&G Staffperson 2 to Administrative Judge Phil Smith (July 29, 2010) with ADF&G 2010 map; email from ADF&G Staffperson 1 (Dec. 28, 2010) with ADF&G 2010 map.

⁴⁴ The groundfish statistical area map for Southeast Alaska is Chart 5 available at http://www.adfg.alaska.gov/static/fishing/PDFs/commercial/chart05_seak_qf.pdf

⁴⁵ Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

⁴⁶ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

⁴⁷ 50 C.F.R. § 300.67(f)(5).

⁴⁸ Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

⁴⁹ See 50 C.F.R. § 300.67(h)(3)& (4).

⁵⁰ 50 C.F.R. § 300.67(b).

⁵¹ 50 C.F.R. § 300.67(f)(6)-(7).

In the qualifying period, the required unit of participation was a “bottomfish logbook fishing trip,” which is a trip that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: the statistical area 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.⁵²

In the recent period, the required unit of participation was a “halibut logbook fishing trip,” which is a trip that was reported to the State of Alaska in a Saltwater Charter Logbook 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 where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.⁵³

NMFS determines the number, type and angler endorsement on an applicant’s permits through four steps.

Step 1: Applying 50 C.F.R. § 300.67(b), does the applicant meet the participation requirement for one non-transferable permit? To receive one non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips in its applicant selected year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).⁵⁴

Step 2: Applying 50 C.F.R. § 300.67(c), does the applicant meet the participation requirement for any additional non-transferable permits? An applicant receives the number of non-transferable permits based on the number of bottomfish logbook fishing trips that the applicant made in its applicant-selected year and the number of vessels that the applicant used in that year.

To receive two non-transferable permits, an applicant must have reported ten or more bottomfish logbook fishing trips with two vessels in its applicant-selected year. To receive three non-transferable permits, an applicant must have reported fifteen or more bottomfish logbook fishing trips with three vessels in its applicant-selected year. An applicant cannot receive a number of non-transferable permits that is greater than the number of vessels the applicant used in its applicant-selected year.

It is an interesting feature of the system that the participation requirement in the recent period (2008) for one, *or more than one*, non-transferable permit is the same: five halibut logbook fishing trips. The applicant does not have to report any more trips in the recent period to receive two non-transferable permits than one non-transferable permit.

⁵² 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 kept and halibut released but did require participants to report data regarding fishing where halibut was the target (statistical area, boat hours and the number of rods) under these data for bottomfish fishing. 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).

⁵³ 50 C.F.R. § 300.67(f)(3).

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

Step 3: Applying 50 C.F.R. § 300.67(d), does the applicant meet the participation requirements for any of its permits to be transferable? To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with one vessel in its applicant-selected year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008). To receive a second transferable permit, an applicant must have reported fifteen or more bottomfish logbook fishing trips with a second vessel in its applicant-selected year and fifteen or more bottomfish logbook fishing trips with a second vessel in 2008.

Step 4: Applying 50 C.F.R. § 300.67(e), what is the angler endorsement on the applicant's permit or permits? Subject to a minimum angler endorsement of four, the angler endorsement on an applicant's first permit is the highest number of anglers that the applicant reported on any bottomfish logbook fishing trip in the qualifying period with one vessel. If an applicant receives a second permit, the angler endorsement on the second permit will be the highest number of anglers that the applicant reported on any bottomfish logbook fishing trip in the qualifying period with a second vessel. The same rule applies to additional permits.

ANALYSIS

Has Appellant shown by a preponderance of evidence in the record that he meets the requirements for a charter halibut permit or permits for use in IPHC Area 3A?

The charter halibut regulation states: "A charter halibut permit for IPHC regulatory area 3A must be based on meeting participation requirements *in area 3A*."⁵⁵ Appellant states that he meets the participation requirements for a permit endorsed for Area 3A based on trips that he reported in bottomfish statistical area 114212 that occurred in Area 3A.⁵⁶

In the IAD, RAM denied Appellant's application for Area 3A permits because statistical area 114212 is located in Area 2C.⁵⁷ RAM did not evaluate Appellant's claim that a number of trips that he reported in bottomfish statistical area 114212 actually occurred in Area 3A. RAM did not have the benefit of the evidence that is in the appeal record, in particular statements from the two key ADF&G staffpersons for the logbook program that the area where Appellant fished was actually not located within an ADF&G bottomfish statistical area in 2005.⁵⁸ RAM also is not authorized to hold hearings and thus could not obtain Appellant's sworn testimony regarding his fishing in Area 3A.

⁵⁵ 50 C.F.R. § 300.67(b)(emphasis added).

⁵⁶ Letter from Appellant to RAM (June 6, 2010).

⁵⁷ IAD at 3.

⁵⁸ Email from ADF&G Staffperson 1 (Dec. 28, 2010); emails from ADF&G Staffperson 2 to Phil Smith (July 30, 2010).

The IAD states that all of Appellant's logbook fishing trip data, except for one trip, during the qualifying years "was reported as IPHC regulatory area 2C."⁵⁹ It is true that statistical area 114212 was in Area 2C on the 2005 ADF&G map. But neither Appellant nor any captain employed by him reported any trips in stat area 114212 as occurring in Area 2C or 3A in 2005. In 2005, a vessel operator did not report a bottomfish logbook fishing trip as occurring in Area 2C or Area 3A.⁶⁰ It was the NMFS Information Services Division that, in creating the official record, went back to the 2005 data and assigned Appellant's trips to Area 2C.⁶¹

Therefore when NMFS created the official charter halibut record for 2005 and assigned trips to Area 2C or Area 3A, NMFS could not use the IPHC Area where the vessel operator reported the trip because the vessel operator did not report the IPHC Area in 2005. NMFS had to deduce the IPHC Area for a trip from other information that the vessel operator did report about the trip.

ADF&G asked operators to report the bottomfish statistical area where bottomfish fishing occurred, which included halibut fishing.⁶² A bottomfish statistical area was located either in Area 2C or Area 3A. If the vessel operator reported a bottomfish statistical area, it was completely reasonable that, in constructing the official record, NMFS adopted a general rule that assigned all trips in a bottomfish statistical area to the IPHC Area where the bottomfish statistical area was located.

But an applicant can seek to show that the official record is incorrect.⁶³ And Appellant has shown that this is a situation where the general rule for constructing the official record could have introduced error into the official record because Appellant was fishing in an area where ADF&G had not assigned a bottomfish statistical area. I conclude that, with respect to trips that Appellant reported as occurring in statistical area 114212 in 2005, if Appellant can show by a preponderance of evidence in the record that a sufficient number of those trips occurred in Area 3A to meet the participation requirement in Area 3A for a permit or permits, Appellant should be issued that permit or permits.

I apply the four-step analysis to the evidence in the record.

Step 1. Does Appellant meet the minimum participation requirements for a non-transferable charter halibut permit for Area 3A?

For Appellant to receive a non-transferable charter halibut permit for Area 3A, he must show that he made at least five bottomfish logbook fishing trips in Area 3A in his applicant-selected year, 2005, and five halibut logbook fishing trips in Area 3A in the recent period, 2008.

⁵⁹ IAD at 3.

⁶⁰ ADF&G Logbook and Instructions for 2005: <http://www.fakr.noaa.gov/appeals/default.htm>

⁶¹ Email from NMFS Computer Specialist to Mary Alice McKeen (Sep. 26, 2010).

⁶² ADF&G Logbook and Instructions for 2005: <http://www.fakr.noaa.gov/appeals/default.htm>

⁶³ See 50 C.F.R. § 300.67(h)(3) & (4).

Appellant meets the participation requirement in the recent period with twenty-two halibut logbook fishing trips in 2008. According to the official record, he took only one bottomfish logbook fishing trip in 2005 in Area 3A and that was with VESSEL [REDACTED]. Therefore, to receive one non-transferable permit for Area 3A, Appellant must show that the official record is incorrect and that he made at least four more bottomfish logbook fishing trips in 2005.

In 2005, Appellant reported ten trips with VESSEL [REDACTED] in statistical area 114212. I found that one-half of those trips, or five trips, occurred in Area 3A.⁶⁴

In 2005, Appellant reported eighteen trips with VESSEL [REDACTED]. I found that one-half of those trips, or nine trips, occurred in Area 3A.⁶⁵

Thus, I found that Appellant took fourteen bottomfish logbook fishing trips with two vessels in 2005 in Area 3A. Appellant meets the participation requirement for one non-transferable permit: five bottomfish logbook trips that occurred in Area 3A. Appellant therefore also meets the participation requirement for two non-transferable permits: ten trips with two vessels in 2005.

Since these are the crucial factual findings in this appeal, I will explain the basis for them. I found that Appellant did fish in the boundary area, that the boundary area was not within any bottomfish statistical area on ADF&G maps for 2005, and that Appellant reported fishing in the boundary in statistical area 114212 to comply with ADF&G reporting instructions.⁶⁶

I relied on the following evidence: the ADF&G statistical area map for 2005 did not designate a bottomfish statistical area for the boundary area;⁶⁷ Appellant's consistent written statements and testimony that he and the captains working for him reported trips in the boundary area in stat area 114212 because there was no statistical area on the ADF&G map for the boundary area and, faced with that problem, they reported the trips in stat area 114212 as the most reasonable and logical stat area to use for reporting trips in the boundary area;⁶⁸ the affidavit from the captain of VESSEL [REDACTED] that "[u]pon filling out the ADF&G sport fishing charter logbook I used statistical area 114212 when fishing around Cape Spencer. Area 114212 was used when fishing in areas of 2C and 3A where the ADF7G map did not designate an area."⁶⁹ the nautical charts that show suitable depths for charter fishing in the portion of the boundary area that is in Area 3A and where Appellant states that he fished;⁷⁰ the acknowledgment by the key ADF&G staff person for the logbook program that the 2005 map "clearly does not define the

⁶⁴ Finding of Fact 18.

⁶⁵ Finding of Fact 20.

⁶⁶ Findings of Fact 11 – 16.

⁶⁷ First and second map attached to email from ADF&G Staffperson 1 (Dec. 28, 2010).

⁶⁸ Letter from Appellant to RAM (June 6, 2010); Letter from Appellant to OAA (Nov. 22, 2010); Letter from Appellant to NMFS (Jan. 12, 2011); Affidavit of Appellant (Jan. 11, 2011); Testimony of Appellant (Oct. 4, 2011).

⁶⁹ Affidavit of Captain of VESSEL [REDACTED] (Jan. 10, 2011).

⁷⁰ Appellant's Exhibit 6: USGS Charts 17300, 17301, 17302.

2C/3A boundary adequately, such that many operators who operated in both 2C and 3A during any given trip would have been challenged to provide the accurate statistical areas when fishing 3A,"⁷¹ and the general credibility of Appellant's position given the location of the Lodge so close to the boundary line between 2C and 3A.

It is relevant that Appellant and the captains that worked for him reported fishing in the boundary area in statistical area 114212 in order to comply with their obligation to report the location of their fishing to the State of Alaska: "Basically what we did there is because an area that we fished a lot didn't have a stat area assigned to it and we needed an area for the logbook, we just continued that line seaward between 114212 and 114211. It made the most sense to us."⁷²

The next question is, based on the preponderance of evidence in the record, how many bottomfish logbook fishing trips by VESSEL [REDACTED] and VESSEL [REDACTED] occurred in Area 3A. Statistical area 114212 extends to inland waters of Cross Sound. A significant portion of stat area 114212 is not the boundary area and is in Area 2C. I found that one-half of the ten trips by VESSEL [REDACTED] in stat area 114212 in 2005 occurred in Area 3A and one-half of the eighteen trips by VESSEL [REDACTED] in stat area 114212 in 2005 occurred in Area 3A.⁷³

I relied on Appellant's consistent testimony that much of stat area 114212 is too deep for charter fishing. Appellant testified:

Appellant: This is areas that we fish that are in 3A. Spencer Flats, Old Man's Nose, the Ear. That's what the guys refer to these. Obviously, you can see the nose on the chart, the elephant's ear, here. So that's how those got their names. These are all shallow areas that are very productive halibut areas. A lot of this area here is far too deep. It's this big trench coming out here.^[74] So we don't fish halibut in any of this area because it's too deep. It's a thousand feet deep here. Its 12 [sic: 120] fathoms. This is all stuff we can fish with a rod and reel.^[75]

Attorney: For example, right here at the bottom of The Nose is thirty fathoms.

Appellant: Correct, 180 feet deep.

Administrative Judge: So would this [the deeper part] be an area where you could commercially try to catch halibut? Is it because of the rod and reel nature of charter fishing?

⁷¹ Email from ADF&G Staffperson 1 (Dec. 28, 2010).

⁷² Testimony of Appellant at 13 min. (Oct. 4, 2011).

⁷³ Findings of Fact 17 – 20.

⁷⁴ Appellant is referring to Exhibit 3, chart 17302, the area labeled by Appellant as stat area 114212.

⁷⁵ Appellant is referring to Exhibit 3, chart 17302, the area marked by Appellant with the names of VESSEL [REDACTED] and VESSEL [REDACTED].

Appellant: Yes. You can catch halibut in these deep areas commercially. It's just not feasible. With the tides and the depths, 1000 feet, people would have to reel for fifteen minutes just to [indecipherable]. It's just not feasible to fish that. So we what we do is we target the shallow areas.⁷⁶

Appellant's prior written statement made the same point:

I have drawn the 3A/2C line on some of the copies [of NOAA charts] to show where the line sits in reference to Cape Spencer, Cross Sound, ADF&G statistical area 114212 and lack of a statistical area in the year 2005.

Also of significance are the depths and bottom structure, which are both conducive to halibut, and halibut sport fishing. These charts show the 3A/2C line traveling through an area that we fish for halibut on a regular basis.

Due to the proximity to Elfin Cove and the fact that the majority of Cross Sound is too deep to sport fish for halibut, makes the area in question a popular fishing location.⁷⁷

Appellant's testimony was supported by the depth soundings on the USGS charts in Appellant's Exhibit 6.⁷⁸

In assessing the evidence, I found Appellant's testimony credible for a number of reasons. First, his oral testimony was consistent with his five prior written statements.⁷⁹ Second, when Appellant knew something, he testified without hesitation and with details. His testimony about picking up the logbooks for 2008 had these characteristics, as did his explanation of why the fishing in statistical area 114212 would have been in the part with relatively shallow depths. Third, he was not given to overstatement. His testimony that "most of the area we fished in would be 3A" is an example of that. Fourth, he sought and provided documents to resolve questionable points. Appellant sought out confirmation from ADF&G staff of the problem with the maps and requested that ADF&G staff provide that information directly to this Office, which occurred. Fifth, if Appellant did not know something, he stated that. An example of that is that he did not remember how he had come into possession of Exhibit 7, the ADF&G map with the handwritten number for a stat area for the boundary area on a 2008 map. Finally, Appellant has extensive experience fishing in the boundary area between Area 3A and 2C, as a commercial fisherman since [REDACTED] and as a charter captain since [REDACTED]. This was the basis for his testimony as to where vessels fished.

⁷⁶ Testimony of Appellant (Oct. 4, 2011) 31 min.

⁷⁷ Letter from Appellant to NMFS (Jan. 12, 2011).

⁷⁸ Exhibit 6: USGS Charts 17300, 17301, 17302.

⁷⁹ Statement by Appellant with Application (Mar. 19, 2010); Letter from Appellant to RAM (June 6, 2010); Letter from Appellant to OAA (Nov. 22, 2010); Letter from Appellant to NMFS (Jan. 12, 2011); Affidavit of Appellant (Jan. 11, 2011).

Thus, I found that Appellant took fourteen bottomfish logbook fishing trips with two vessels in 2005: five with VESSEL [REDACTED] and nine with VESSEL [REDACTED].⁸⁰ This means that Appellant took at least five bottomfish logbook fishing trips in Area 3A in 2005. There was no dispute that Appellant took five or more halibut logbook fishing trips in Area 3A in 2008. Appellant therefore is eligible for one non-transferable charter halibut permit for Area 3A.

Step 2. Does Appellant meet the participation requirement for any additional non-transferable permits for Area 3A?

Applying 50 C.F.R. § 300.67(c), the participation requirement for two non-transferable permits is at least ten trips with two vessels in the applicant-selected year, which is 2005. I found that Appellant took fourteen bottomfish logbook fishing trips with two vessels in 2005. Therefore Appellant meets the participation requirement for two non-transferable permits for use in Area 3A.

Step 3. Should any of Appellant's permits for Area 3A be transferable?

For one permit to be transferable, Appellant must show that he made fifteen bottomfish logbook fishing trips with a single vessel in 2005. Appellant claims to meet that requirement with VESSEL [REDACTED].

To receive a transferable permit, I would have to find that, of the eighteen trips reported by VESSEL [REDACTED] in 2005 in stat area 114212, fifteen trips (or five-sixths of the trips) occurred in Area 3A. The preponderance of evidence in the record does not support a finding that almost all of the fishing by VESSEL [REDACTED] in stat area 114212 occurred in Area 3A. Appellant's testimony was that he believed a majority of the trips in stat area 114212 occurred in Area 3A:

Attorney: Can you explain to the hearing officer how you are confident that some or all of those trips [trips by VESSEL [REDACTED] reported in stat area 114212] occurred in 3A?

Appellant: The majority of those trips I'm confident occurred in 3A that we labeled stat area 114212 for the reason as shown in this chart here we extended the line to an area that didn't have a stat area designated to it.⁸¹

Appellant did not state that it was a supermajority or almost all of the trips. He was measured in his testimony and earlier in the hearing, he had testified: "We definitely fished right on the line. But most of the area that we fished would be in 3A."⁸² And while some of stat area 114212 is too deep for charter fishing, some of stat area 114212 is suitable, the part near the line between Area 3A and Area 2C. The fishing grounds on both sides of the line have similar depths. This means that some of the charter halibut trips reported in stat area 114212 did occur in Area 2C.

⁸⁰ Findings of Fact 18 and 20.

⁸¹ Testimony by Appellant at 44 min. (Oct. 4, 2011).

⁸² Testimony by Appellant at 14 min. (Oct. 4, 2011).

Therefore, I conclude that Appellant has not shown by a preponderance of evidence in the record that he took fifteen bottomfish logbook fishing trips with VESSEL ██████ in Area 3A. I conclude that neither of Appellant's permits for 3A should be transferable.

I acknowledge that I found that Appellant showed that he should be credited with three additional trips in Area 3A by vessel ██████ in 2008, in addition to the twelve trips for VESSEL ██████ already in the official record.⁸³ With these three additional trips, Appellant has fifteen trips with VESSEL ██████ in 2008 and meets the participation requirement in the recent period for a transferable permit for Area 3A. But since Appellant does not meet the participation requirement in the qualifying period – fifteen trips with one vessel in 2005 – he does not qualify for a transferable permit. Therefore, Appellant's two charter halibut permits for Area 3A remain non-transferable.

Step 4. What is the proper angler endorsement on Appellant's permits for Area 3A?

The angler endorsement on Appellant's permits for Area 3A will be four unless he shows that he took a bottomfish logbook fishing trip in Area 3A in the 2004 or 2005 with more than four anglers.⁸⁴ I conclude that Appellant should not receive an angler endorsement of more than four on either permit because Appellant has not shown that he took more than four anglers on a bottomfish logbook fishing trips in Area 3A with any vessel in 2004 or 2005.

With VESSEL ██████, Appellant took a bottomfish logbook fishing trip on May 19, 2004, in stat area 114212 with six anglers. With VESSEL ██████, Appellant took a bottomfish logbook fishing trips on June 12, 2005, in stat area 114212 with five anglers.⁸⁵

But Appellant has not shown that it is more likely than not that either of those trips occurred in Area 3A. Although Appellant offered general testimony that some trips reported by all five of his vessels in stat area 114212 occurred in Area 3A, he offered no specific testimony or evidence regarding the fishing pattern of VESSEL ██████ and VESSEL ██████. As noted, even if a vessel reported fishing in stat area 114212, a portion of that fishing likely did occur in Area 2C.

With respect to VESSEL ██████, it was used to take six anglers on a number of bottomfish logbook fishing trips in 2004 and 2005 in statistical areas other than stat area 114212. But it took four anglers on the July 31, 2005 trip identified in the official record as occurring in Area 3A. As for the other nine trips in 2005 that were reported in stat area 114212, none of those trips had six anglers and only one trip had five anglers. Appellant has not shown that it is more likely than not that the five-angler trip with VESSEL ██████ occurred in Area 3A.

⁸³ Findings of Fact 25-27.

⁸⁴ 50 C.F.R. § 300.67(e)(3) & (4).

⁸⁵ Supplemental Argument and Evidence (Oct. 11, 2011); Exhibit 10 submitted with Argument, redesignated as Exhibit 10A.

With respect to VESSEL [REDACTED], the highest number of anglers on any of the eighteen trips in 2005 reported in stat area 114212 is four.

Therefore, I conclude that the angler endorsement on each of Appellant's permits for use in Area 3A should be four.

Overall, I conclude that Appellant has shown by a preponderance of evidence in the record that he meets the requirements to receive two non-transferable permits for use in Area 3A, each with an angler endorsement of four.

It is possible that this conclusion could have affected one or more of Appellant's Area 2C permits, if Appellant were relying on the same trips for an Area 3A permit and an Area 2C permit. NMFS does not even potentially run afoul of this problem. Even if NMFS categorized every trip in statistical area 114212 with VESSEL [REDACTED] and VESSEL [REDACTED] in 2005 as occurring in Area 3A, Appellant has fifteen or more trips by each of these vessels in Area 2C in stat areas other than stat area 114212.⁸⁶ Thus, Appellant's receipt of two non-transferable permits for Area 3A does not call into question NMFS's determination that Appellant meets the requirements for five transferable permits for Area 2C.

To summarize the results of this Analysis:

Step 1: applying 50 C.F.R. § 300.67(b), does the applicant meet the participation requirements for a non-transferable permit for Area 3A? Yes. Appellant reported a minimum of five bottomfish logbook fishing trips in 3A in 2005 and a minimum of five halibut logbook fishing trips in 3A.

Step 2: applying 50 C.F.R. § 300.67(c), does the applicant meet the participation requirements for any additional permits for Area 3A? Yes. Appellant reported a minimum of ten bottomfish logbook fishing trips in 3A in 2005 with two vessels and a minimum of five halibut logbook fishing trips in 3A in 2008.

Step 3: applying 50 C.F.R. § 300.67(d)(1) & (2), does the applicant meet the participation requirements for any of his permits for Area 3A to be transferable? No. Appellant reported fifteen or more halibut logbook fishing trips in 3A with one vessel in 2008 but did not report fifteen or more bottomfish logbook fishing trips in 3A with one vessel in 2005.

Step 4: applying 50 C.F.R. § 300.67(e)(1) – (5), does the applicant meet the participation requirement for an angler endorsement greater than four on any of its permits endorsed for Area 3A? No. Appellant did not show

⁸⁶ Official Record List of Trips by Appellant (Sep. 1, 2011). VESSEL [REDACTED] has twenty-three trips in Area 2C in 2005, in addition to eighteen trips reported in stat area 114212. VESSEL [REDACTED] has twenty-eight trips in Area 2C in 2005, in addition to ten trips reported in stat area 114212.

that he took more than four anglers on a bottomfish logbook fishing trip in 2004 or 2005 in Area 3A.

CONCLUSIONS OF LAW

1. Appellant meets the requirements in 50 C.F.R. § 300.67 to receive two non-transferable permits for use in IPHC Area 3A each with an angler endorsement of four.
2. Appellant's receipt of two non-transferable permits for use in IPHC Area 3A, each with an angler endorsement of four, does not affect Appellant's eligibility to receive five transferable permits for use in IPHC Area 2C, four permits with an angler endorsement of six and one permit with an angler endorsement of four.

ORDER

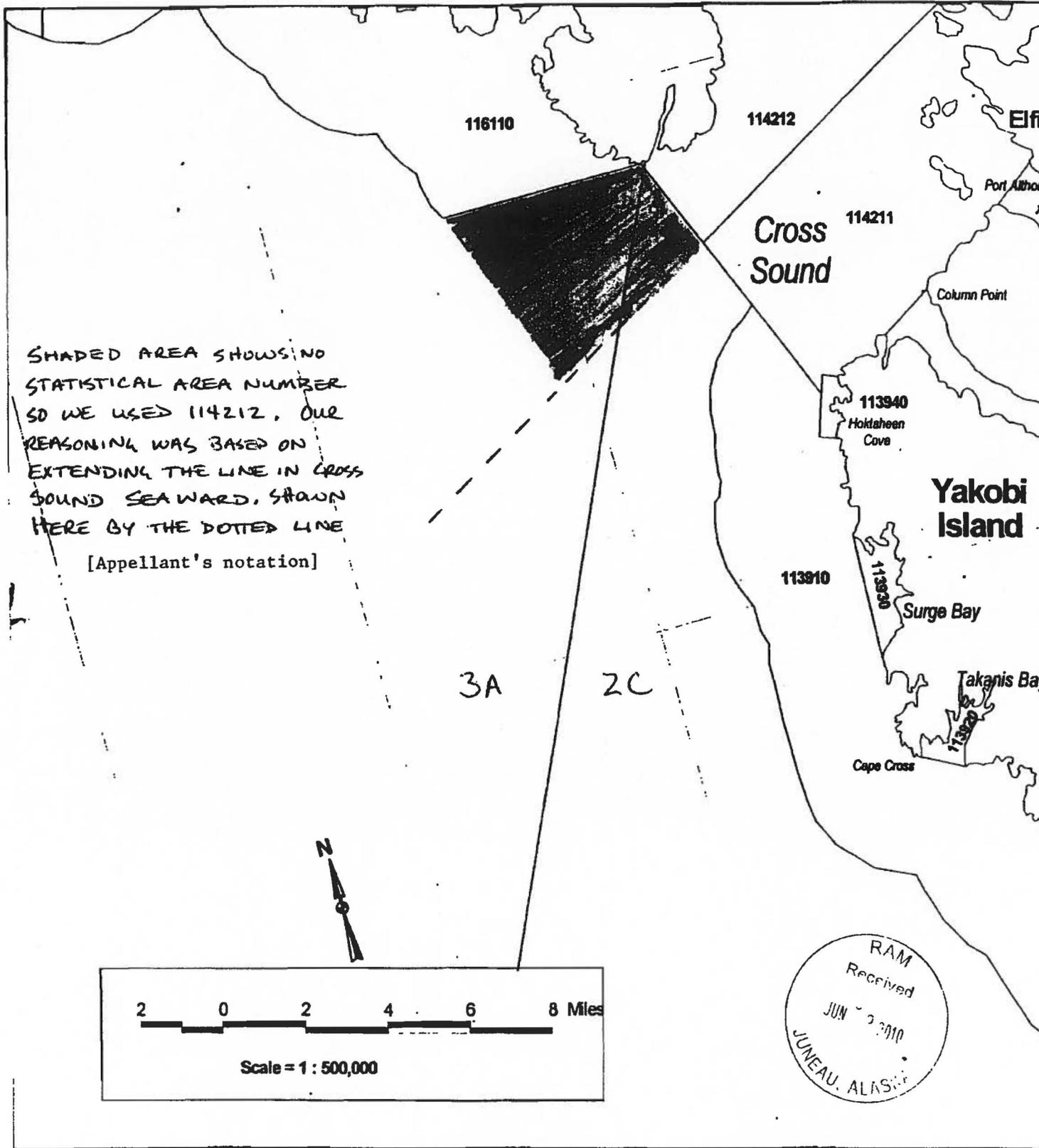
The IAD that is the subject of this appeal is VACATED with respect to permits for use in IPHC Regulatory Area 3A. RAM is directed to issue two non-transferable charter halibut permits, endorsed for four anglers, for use in IPHC Regulatory Area 3A to Appellant. This decision takes effect on July 2, 2012, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43 (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, June 11, 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 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: June 1, 2012

137° 136°45' 136°30' 58°15'



SHADED AREA SHOWS NO
 STATISTICAL AREA NUMBER
 SO WE USED 114212. OUR
 REASONING WAS BASED ON
 EXTENDING THE LINE IN CROSS
 SOUND SEAWARD, SHOWN
 HERE BY THE DOTTED LINE
 [Appellant's notation]