

applicant's Alaska Department of Fish and Game (ADF&G) Business Owner License in 2004 or 2005 with one vessel.⁵ The minimum participation requirement in the recent participation period is fifteen halibut logbook fishing trips reported under the applicant's ADF&G Business Owner License with one vessel in 2008.⁶

Appellant argues that he should receive a transferable permit because he did take fifteen trips in 2005 but the State of Alaska Department of Fish and Game (ADF&G) logbook did not contain a section where halibut could be recorded. Appellant stated that, for four trips that he reported as salmon trips, on his copy of the logbook pages he submitted to ADF&G, he crossed out the shark heading, wrote in halibut and recorded the number of halibut that were kept and released on those trips.⁷ On appeal, Appellant specifically argued that salmon trips should count as bottomfish trips if he could show, with other evidence, that anglers were trying to catch salmon and halibut.⁸

With regard to 2008, Appellant states that he took a trip on August 24, 2008, which he submitted to ADF&G as a salmon trip but the clients also tried to catch halibut and he overlooked recording the State statistical area where this occurred or the number of boat hours for this effort.⁹

Before RAM, Appellant also stated that he took two additional trips in 2005 and 2008 with friends so they could catch halibut meat but did not report those trips to ADF&G.¹⁰

Appellant can file this appeal because he is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that he meets the requirements for a transferable charter halibut permit. I did not hold a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue a transferable charter halibut permit.¹¹ I conclude that the record contains sufficient information upon which to decide the merits of this appeal.¹² I therefore close the record and issue this decision.

For reasons which follow, I conclude that RAM correctly determined that Appellant meets the requirements for one non-transferable charter halibut permit and does not meet the requirements for that permit to be designated a transferable permit.

⁵ 50 C.F.R. § 300.67(d)(1)(i). The applicant selects which year – 2004 or 2005 – NMFS should use to determine the applicant's number of permits and whether any of the permits will be transferable. 50 C.F.R. § 300.67(f)(1). Appellant selected 2005. Application at 2. RAM would have used 2005 in any event because Appellant would not receive any permits based on 2004.

⁶ 50 C.F.R. § 300.67(d)(1)(ii).

⁷ Statement of Appellant with Application (Mar. 30, 2010).

⁸ Appellant's Appeal (Nov. 23, 2010).

⁹ Statement of Appellant with Application (Mar. 30, 2010).

¹⁰ Statement of Appellant with Application (Mar. 30, 2010).

¹¹ 50 C.F.R. § 679.43(g)(3)(i), (iv).

¹² 50 C.F.R. § 679.43(g)(2).

ISSUES

1. Has Appellant shown that the official record is incorrect and he took fifteen or more bottomfish logbook fishing trips in 2005? Specifically, has Appellant shown that trips he reported as salmon trips are bottomfish logbook fishing trips because anglers caught, or tried to catch, halibut on those trips?
2. Has Appellant shown that the official record is incorrect and he took fifteen or more halibut logbook fishing trips in 2005?

FINDINGS OF FACT

1. Appellant began operating a charter business in Alaska in 1984 and expanded in to saltwater chartering in 1991.¹³
2. Appellant reported three bottomfish logbook fishing trips in 2004 from [REDACTED] (VESSEL).¹⁴
3. Appellant reported eleven bottomfish logbook fishing trips from VESSEL in 2005 on the following dates: May 23, May 28, June 1, June 26, June 28, July 3, July 8, July 9, August 1, August 16, September 12. These are the dates of the trips in the logbook trip reports submitted in ADF&G Logbook 50448 where appellant reported one or more of the following pieces of information regarding the trip: the statistical area or stat area where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing and the number of rods used from the vessel in bottomfish fishing.¹⁵
4. Appellant reported trips in 2005 on June 29, July 7, August 2 and August 3 and reported the following information regarding salmon fishing on those trips: stat areas, number of boat hours, number of rods. For those trips, Appellant did not report any of the following pieces of information regarding bottomfish fishing: stat areas where bottomfish fishing occurred, boat hours that the vessel engaged in bottomfish fishing or the number of rods used in bottomfish fishing.¹⁶

¹³ Letter from Appellant to NMFS (Apr. 3, 2010). The record does not show Appellant's level of participation in the saltwater charter halibut fishery in any years before 2004.

¹⁴ Official Charter Halibut Record for Appellant attached to email from NMFS Computer Specialist to Mary Alice McKeen (Aug. 24, 2011). A bottomfish logbook fishing trip 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(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." 50 C.F.R. § 300.67(f)(2).

¹⁵ RAM File: email from Dora Sigurdsson, ADFG, to Tracy Buck, RAM (Jun 1, 2010) with copies of logbook pages from Logbook 50448. These pages are date-stamped as "Received ADFG – SF/RTS." RTS stands for Research and Technical Services.

¹⁶ RAM File: Logbook 50448 pages from 2005. The definition of bottomfish logbook fishing trip is quoted in note 10.

5. On some trips where clients targeted salmon, they also tried to catch halibut.¹⁷ For example, on the July 7, 2005 trip where Appellant reported salmon data, a client on that trip stated: "We were primarily seeking salmon but as explained by [Appellant] in years past, we could catch bottom fish as well. The day ended with 2 salmon kept and as luck would have it we landed 7 halibut and released 3 of them."¹⁸
6. Appellant reported fourteen halibut logbook fishing trips from VESSEL in 2008 on the following dates: May 10, May 26, May 29, June 4, June 6, June 17, July 15, July 20, August 9, August 22, August 23, August 25, August 26, September 11. These are the dates of the trips contained in the logbook trip reports submitted to ADF&G for Logbook 82558 in 2008. For these trips, Appellant reported one or more of the following pieces of information: the number of halibut kept, the number of halibut released, the statistical areas where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish.¹⁹
7. Appellant submitted to ADF&G a logbook trip report from Logbook 82558 for a trip on August 24, 2008. For that trip, Appellant reported salmon data: the number of salmon caught, stat area and the number boat hours. For that trip, Appellant did not report any of the following items: the number of halibut kept, the number of halibut released, the statistical areas where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish.²⁰
8. During his appeal, Appellant submitted a copy of the page for the August 24, 2008 trip with bottomfish information filled in: the statistical area and the number of boat hours. The page submitted to ADF&G for that trip did not have those items filled in and Appellant did not assert that he submitted that page to ADF&G with that information.²¹
9. Appellant explained regarding the August 24, 2008 trip: "For 2008, my log book record shows one charter on which I failed to include an area in that space

¹⁷ Statement of ██████████ (April 2, 2010) ("I have fished with [Appellant] many times in saltwater, every time we went out for fish, I expected to fish for both Salmon and Halibut. I never went on a salt water charter expecting to fish for just Salmon.")

¹⁸ Statement of ██████████ (received Apr. 3, 2010).

¹⁹ Appellant submitted copies of the trip reports from these dates. Submission of Additional Materials by Attorney for Appellant (Jan. 7, 2011). NMFS's records agree that Appellant reported halibut logbook trips these dates. Email from Mukhya Khalsa, NMFS Computer Specialist, to Mary Alice McKeen (Aug. 24, 2011). A 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: The number of halibut that was kept, the number of halibut that was released, the statistical areas where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing." 50 C.F.R. § 300.67(f)(3).

²⁰ Submission of Additional Materials by Attorney for Appellant (Jan. 7, 2011). The definition of halibut logbook fishing trip is quoted in note 15.

²¹ RAM File: email from Dora Sigurdsson, ADFG, to Tracy Buck, RAM (Jun 1, 2010) with page from Logbook 82558 for August 24, 2008 trip.

designated for fishing bottomfish. This was a trip on which we fished for bottomfish. On this trip we didn't catch any halibut. It is much more common that we do, as a review of my records shows. I wasn't always complete when filling in all of the blanks thus the missing bottom fishing area information.”²²

10. The deadline for reporting logbook fishing trips to ADF&G for any charter halibut fishing activity between January 1, 2008, and April 6, 2008, was April 14, 2008. The deadline for reporting logbook fishing trips to ADF&G for any charter halibut fishing activity between October 7, 2008 and December 31, 2008, was eight days after the last day of the week.²³
11. Appellant took two trips in 2005 (July 14 and July 19) and two additional trips in 2008 (August 22 and September 6) with friends where they caught halibut. Appellant not report those trips to ADF&G because the purpose of the trips was to obtain halibut and other species for consumption by him and his friends.²⁴
12. Appellant submitted a timely application for a charter halibut permit on April 3, 2010.²⁵

PRINCIPLES OF LAW

In March 2007, 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.²⁶ 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.²⁷ The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. NMFS may issue charter halibut permits only to applicants that meet the requirements in the charter halibut regulation.

²² Statement by Appellant submitted with Application (received Apr. 3, 2010).

²³ The 2008 Saltwater Charter Logbook is on the NMFS Alaska Region website, Administrative Appeals: http://www.fakr.noaa.gov/appeals/adfg_logbooks/2008.pdf.

²⁴ Letter from Appellant to NMFS (Apr. 3, 2010); Letter from Appellant to NMFS (Aug. 8, 2010)(states he took trips on July 14 and July 19, 2005 and July 22 and September 6, 2008 with friends for personal consumption); Attachments to Letter from Appellant to NMFS (Apr. 3, 2010): Handwritten notations on Appellant's Calendars from 2005 and 2008; Affidavit of Joseph Skrha (Aug. 5, 2010)(trip with Appellant on July 24, 2005 and August 22, 2008); Statement by [REDACTED] (“non-charter meat trip” on Sep. 6, 2008).

²⁵ Application (received Apr. 3, 2010). The application period was February 4 – April 5, 2010. Notice of application period. 75 Fed. Reg. 1595 (Jan. 12, 2010).

²⁶ 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.

²⁷ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.²⁸ 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).²⁹ If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.

To receive a charter halibut permit, 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 2005,³⁰ and a recent participation period, which is the sport fishing season for halibut in 2008.³¹

To receive a non-transferable charter halibut permit, an applicant must have “reported” a minimum of five “bottomfish logbook fishing trips” to ADF&G 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).³²

To receive a transferable charter halibut permit, an applicant must have “reported” a minimum of fifteen “bottomfish logbook fishing trips” to ADF&G with the same vessel in one year in the qualifying period (2004, 2005), and fifteen “halibut logbook fishing trips” with the same vessel in the recent participation period (2008).³³

The charter halibut regulation expressly defines “bottomfish logbook fishing trip” as follows:

a logbook fishing trip in the qualifying period that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.³⁴

Thus, to be a bottomfish logbook fishing trip, the trip must not only have occurred but must have been reported to ADF&G with one of three pieces of information regarding the bottomfish fishing that occurred on the trip: statistical areas or stat areas, boat hours or the number of rods.

The charter halibut regulation expressly defines “halibut logbook fishing trip” as follows:

²⁸ 50 C.F.R. § 300.67(f)(5).

²⁹ Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

³⁰ 50 C.F.R. § 300.67(f)(6).

³¹ 50 C.F.R. § 300.67(f)(7).

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

³³ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

³⁴ 50 C.F.R. § 300.67(f)(2)(emphasis added).

a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical areas where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.³⁵

Thus, to be a halibut logbook fishing, the trip must not only have occurred but must have been reported to ADF&G with one of four pieces of information regarding the fishing that occurred on the trip: the number of halibut caught, the number of halibut released, the stat areas where bottomfish fishing occurred and the number of boat hours that the vessel engaged in bottomfish fishing.

As an administrative judge, I must interpret and apply the regulations, as adopted by the Secretary of Commerce, to decide an appeal.

ANALYSIS

- 1. Has Appellant shown that he took fifteen or more bottomfish logbook fishing trips in 2005? Specifically, has Appellant shown that trips he reported as salmon trips are bottomfish logbook fishing trips because anglers caught, or tried to catch, halibut on those trips?**

According to the official record, Appellant reported eleven bottomfish logbook fishing trips with the same vessel in 2005. Appellant seeks credit for at least four more bottomfish logbook fishing trips in 2005 to meet the fifteen-trip requirement in the qualifying period for a transferable permit.³⁶

On appeal, Appellant argues that some trips he reported as salmon trips in 2005 should be counted as bottomfish logbook fishing trips because anglers on those trips targeted both salmon and halibut and caught halibut. But Appellant states that he did not report halibut caught on those trips because ADF&G did not require vessel operators to report halibut specifically in 2005 and Appellant did not understand that he was supposed to report halibut fishing in the bottomfish fishing sections of the logbook pages.³⁷ Appellant therefore argues that NMFS should give him credit for a bottomfish logbook fishing trip trips where he reported salmon data and can offer testimony and other evidence that, in fact, anglers caught halibut on those trips.

I conclude that the charter halibut regulation does not give me the authority to evaluate why an applicant did not report bottomfish data on a trip in the qualifying period, determine whether the reason was valid, determine whether halibut fishing actually

³⁵ 50 C.F.R. § 300.67(f)(3).

³⁶ 50 C.F.R. § 300.67(d)(1)(i).

³⁷ Appellant's Appeal (dated Nov. 23, 2010).

occurred on the trip and credit some unreported trips and not others. I base this conclusion on the clear and unambiguous language of the definition of bottomfish logbook fishing trip, the regulatory history of the definition, the ADF&G instructions for 2005 and the Council Motion and Analysis.

A. Definition of bottomfish logbook fishing trip in 50 C.F.R. § 300.67(f)(2).

The regulation specifically requires that NMFS award permits based on specified numbers of "bottomfish logbook fishing trips" that were "reported" in the qualifying period.³⁸ The regulation is clear and unambiguous. At 50 C.F.R. § 300.67(f)(2), the regulation defines "bottomfish logbook fishing trip" as a trip that was reported to ADF&G with one of three pieces of information: stat area where bottomfish fishing occurred, number of rods used in bottomfish fishing or number of boat hours spent in bottomfishing. It does not have any exceptions.

B. Regulatory history of definition of bottomfish logbook fishing trip.

Appellant is correct that, in 2004 and 2005, charter operators did not have to report the number of halibut kept and the number of halibut released. But ADF&G did require vessel operators to report information about halibut fishing under bottomfish data in those years. That is why the regulation has a requirement for "bottomfish logbook fishing trips" in 2004 and 2005 and "halibut logbook fishing trips" in 2008. NMFS explained in the proposed rule:

This action proposes additional definitions for a "bottomfish logbook fishing trip" and a "halibut logbook fishing trip." To document participation in 2004 and 2005, an applicant must prove bottomfish logbook fishing trips, and to prove participation in the recent participation year an applicant must prove halibut logbook fishing trips. The [North Pacific Fishery Management] Council anticipated the distinction between these terms in its moratorium motion. The reason for this distinction is that in 2004 and 2005, ADF&G did not require businesses to report the number of halibut that were kept, or kept and released, for each logbook fishing trip. ADF&G required businesses to report bottomfish effort for each logbook fishing trip. The bottomfish effort data was (1) the State statistical area where bottomfish fishing occurred, (2) the boat hours that the vessel engaged in bottomfish fishing and (3) the number of rods used from the vessel in bottomfish fishing. ADF&G attached instructions to each logbook that stated that bottomfish fishing effort included effort targeting halibut. Therefore, for purposes of this action, NMFS would count any of these three types of bottomfish information about a trip in the qualifying period as a bottomfish logbook fishing trip for purposes of qualifying for one or more permit(s). . . .

³⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A).

In 2006, ADF&G changed its required logbook report to specify halibut data for each logbook fishing trip. The required logbook data included the number of halibut kept, the number released, and the boat hours that the vessel engaged in bottomfish fishing. Because these data will be more specific to halibut in the recent participation year, NMFS intends to rely on the halibut logbook data as proof of an applicant's participation during the recent participation year.³⁹

In response to public comment on the proposed rule, NMFS affirmed the use and validity of the 2004 and 2005 bottomfish data as a basis for issuing charter halibut permits. Comment 146 stated that there was confusion in 2004 and 2005 as to how to report halibut. NMFS responded:

During the qualifying period of 2004 and 2005, participation will be measured by bottomfish logbook fishing trips because ADF&G did not require halibut kept or released to be reported as a distinct species. Halibut were considered to be bottomfish during that period. ADF&G attached instructions to each logbook that stated that bottomfish fishing effort included effort targeting halibut. Reporting of any one of three types of bottomfish effort data would qualify a trip as a bottomfish logbook trip for purposes of this rule.⁴⁰

Comment 148 concerned the adequacy of the bottomfish data for 2004 and 2005:

Comment 148. NMFS lacks sufficient information to establish a moratorium because there was no accurate logbook data on charter halibut harvests by charter vessels in 2004 and 2005.

Response: The limited access system established by this rule does not rely on an accurate accounting of halibut harvests by charter vessel anglers during 2004 and 2005. During those years, ADF&G did not require charter vessel business [sic] to report the number of halibut that were kept or released. Instead, businesses were required to report bottomfish effort for each logbook fishing trip. ADF&G attached instructions to each logbook stating that bottomfish fishing effort included effort targeting halibut. Hence, the bottomfish logbook fishing trip data are sufficiently accurate as evidence of participation in the fishery for purposes of this rule. . . .⁴¹

In the final rule, NMFS made no change in the definition of, and the requirement for, "bottomfish logbook fishing trips" in the qualifying period to receive a charter

³⁹ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

⁴⁰ Final Rule, 75 Fed. Reg. 554, 592 (Jan. 5, 2010).

⁴¹ Final Rule, 75 Fed. Reg. 554, 593 (Jan. 5, 2010).

halibut permits.⁴² This supports the conclusion that I do not have the authority to make that change for individual applicants through the appeal process.

C. ADF&G Logbook Instructions.

ADF&G's instructions explaining how to complete the Saltwater Charter Vessel Logbooks for the years 2002 through 2011 are displayed on the NMFS Alaska Region website.⁴³ With respect to recording 2005 bottomfish trips, those instructions provided as follows:⁴⁴

BOTTOMFISH	
Primary Stat Area (Incl. Halibut)	The 6-digit area code where you caught most of the bottomfish on this trip. If you fished for bottomfish, but caught none, write the 6-digit code for the location fished the most time on this date and trip.
Maximum Rods Fished	The maximum number of rods/lines fished when targeting bottomfish (incl. halibut) and targeting salmon and halibut simultaneously. . . .
No. Boat Hours Fished	The number of boat hours that at least one line was targeting bottomfish (incl. halibut) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew . . . Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected . Halibut kept and released data is collected through established survey programs.
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted? Example 1: One Target Salmon Example 2: One Target Bottomfish (including	

⁴² Final Rule, 75 Fed. Reg. 554, 595 – 597 (Jan. 5, 2010)(changes in final rule). In Change 17, NMFS noted that it did change the definition of “halibut logbook fishing trip” because the proposed rule had mistakenly omitted the first information element, namely “the statistical area(s) where bottomfish fishing occurred.” Final Rule, 75 Fed. Reg. at 596.

⁴³ ADF&G Saltwater Logbooks for the years 2002 through 2011 are displayed on the NMFS, Alaska Region, website at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

⁴⁴ 2005 ADF&G Saltwater Charter Vessel Logbook Instructions at iv (emphasis in original)

<p>halibut)</p> <p>Example 3: Two Targets Salmon <u>and</u> Bottomfish (including halibut) Simultaneously (i.e., mooching)</p>	<p>After completing the first five columns, record the maximum number of rods and boat hours spent fishing simultaneously for salmon and bottomfish in the appropriate columns in BOTH the salmon and bottomfish sections.</p> <p>For example, if mooching for 4 hours with up to 4 rods, record 4 hours and 4 rods in the salmon effort columns, and 4 hours and 4 rods in the bottomfish effort columns.</p>
<p>Example 4: A combination of any of the above</p>	<p>After completing the first five columns, record the maximum number of rods and boat hours spent targeting salmon AND targeting both salmon and bottomfish (including halibut) simultaneously in the appropriate columns in the salmon section, and the maximum number of rod and boat hours spent bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.</p>
SPECIAL NOTES AND INSTRUCTIONS	
<p>“Halibut”</p>	<p>The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to record your effort. Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (stat areas, no. rods, and boat hrs).</p>

The general instructions under “Bottomfish” tell the operators to include halibut effort when recording stat area, rods and boat hours. Example 3 and Example 4 specifically address the situation of a charter operator targeting salmon and bottomfish, including halibut, and instruct the operator to record that effort under salmon *and* bottomfish.

D. Council Motion and Analysis.

When the North Pacific Fishery Management Council took final action on a moratorium on entry into charter halibut fishing, it specifically recommended the use of bottomfish logbook data to determine participation: “Issue 9: Evidence of participation is ADF&G saltwater logbook entry with bottomfish statistical area, rods or boat hours.”⁴⁵ The

⁴⁵ North Pacific Fishery Management Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007)(footnote omitted), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

Council and NMFS analyzed comprehensively the Council's preferred alternative in an Environmental Assessment/ Regulatory Impact Review.⁴⁶ It would be a significant departure from what the Council recommended, and from what the Council and NMFS analyzed, if applicants through the appeal process could receive charter halibut permits based on reported salmon logbook trips accompanied by unreported halibut fishing.

I conclude that Appellant's trips in 2005 where he reported salmon fishing information (salmon caught, stat areas, boat hours, number of rods) but not any information about bottomfish fishing (stat areas, boat hours, number of rods) are not bottomfish logbook fishing trips. I therefore conclude that NMFS – either in its initial review of an application or in the appeal process – cannot count these trips toward a participation requirement for a charter halibut permit. I conclude that Appellant has not shown that the official record is incorrect and that he took fifteen bottomfish logbook fishing trips in 2005.

2. Has Appellant shown that he took fifteen or more halibut logbook fishing trips in 2008?

RAM credited Appellant with fourteen halibut logbook fishing trips with VESSEL in 2008. Appellant seeks credit for one or more additional trips so he would meet the fifteen-trip requirement for a transferable permit.

A halibut logbook fishing trip is a trip in 2008 that was reported to ADF&G with one of four pieces of information regarding the fishing that occurred on the trip: the number of halibut caught, the number of halibut released, the stat areas where bottomfish fishing occurred and the number of boat hours that the vessel engaged in bottomfish fishing.⁴⁷

In 2008, unlike 2004 and 2005, vessel operators had to specifically report halibut caught and halibut released.⁴⁸ In 2008, like 2004 and 2005, if anglers targeted halibut by itself, or targeted halibut and salmon, the vessel operator had to report the statistical areas where that fishing occurred and the number of boat hours that the vessel engaged in bottomfish fishing.⁴⁹

Appellant states that he took a trip on August 24, 2008, that he reported the trip in Logbook 82558 with salmon data, that anglers fished for bottomfish on that trip, including halibut, that they did not catch any halibut and that he did not report the stat

⁴⁶ Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A, National Marine Fisheries Service (lead agency) (Nov. 6, 2009), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/analyses/halibut/earirfrfa_charter_vessel_moratorium110609.pdf Table 37 at page 138 analyzes the maximum number of permits.

⁴⁷ 50 C.F.R. § 300.67(f)(3).

⁴⁸ Proposed Rule, 74 Fed Reg. 18,178, 18,185 (Apr. 21, 2009)(beginning in 2006).

⁴⁹ 2008 ADF&G Logbook Instructions at iv.

area where the bottomfish fishing occurred or the number of boat hours of bottomfish fishing.⁵⁰

As with the claimed 2005 trips, I do not have authority to order NMFS to credit a trip as a “halibut logbook fishing trip” if the applicant did not report the trip with one of the pieces of information required by the definition of the term: halibut kept, halibut released, stat area for bottomfish fishing, number of rods used in bottomfishing fishing.⁵¹ The regulation specifically requires fifteen “halibut logbook fishing trips” in the recent period to receive a transferable permit.⁵² The regulation specifically defines halibut logbook fishing trips.

I conclude that the charter halibut regulation does not authorize me to examine why an operator did not report the specified information on a trip and, based on that examination, order that NMFS credit some trips as halibut logbook fishing trips and not others. I conclude that Appellant’s trip on August 24, 2008 is not a halibut logbook fishing trip, as defined by 50 C.F.R. § 300.67(f)(3). I conclude that Appellant did not show that he took fifteen or more halibut logbook fishing trips in 2008.

I note that before RAM, Appellant stated that he took trips in 2005 and 2008 where he took friends fishing who caught halibut for personal consumption. Appellant states that he did not report these trips at all because he did not consider them charter trips. Appellant did not renew his claim regarding these trips on appeal. But the same arguments apply to these trips.

Appellant’s personal trips in 2005 are not bottomfish logbook fishing trips because they were not reported to ADF&G with the stat areas where bottomfish fishing occurred, the boat hours the vessel engaged in bottomfish fishing or the number of rods used in bottomfish fishing.⁵³ Appellant’s personal trips in 2008 are not halibut logbook fishing trips because they were not reported to ADF&G with the number of halibut caught, the number released, the stat area where the fishing occurred or the number of rods used in bottomfish fishing.⁵⁴

Appellant has not shown that he meets the participation requirement in the qualifying period or the recent period to receive a transferable permit. Appellant does meet the participation requirement in the qualifying period and the recent period for a non-transferable permit. I therefore affirm the IAD that is the subject of this appeal.

⁵⁰ Statement by Appellant with Application (Mar. 30, 2010).

⁵¹ 50 C.F.R. § 300.67(f)(3),

⁵² 50 C.F.R. § 300.67(d)(1)(ii)

⁵³ 50 C.F.R. § 300.67(f)(2).

⁵⁴ 50 C.F.R. § 300.67(f)(3).

CONCLUSIONS OF LAW

1. Appellant's trips in 2005 where he reported salmon fishing (salmon caught, stat areas and boat hours) are not bottomfish logbook fishing trips as defined by 50 C.F.R. § 300.67(f)(2).
2. Appellant does not meet the minimum participation requirement in the qualifying period for a transferable charter halibut permit, 50 C.F.R. § 300.67(d)(1)(ii).
3. Appellant's trip on August 24, 2008, where he reported salmon fishing (salmon caught, stat area and boat hours) is not a halibut logbook fishing trip as defined by 50 C.F.R. § 300.67(f)(3).
4. Appellant does not meet the minimum participation requirement in the recent period for a transferable charter halibut permit, 50 C.F.R. § 300.67(d)(1)(ii).

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on January 5, 2012, unless by that date the Regional Administrator 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 December 16, 2011, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.



Mary Alice McKeen
Administrative Judge

Date issued: December 6, 2011