

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

In re Application of)
)
)
) Appeal No. 11-0075
)
) DECISION
)
 Appellant)

STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.

The appeal under review was filed by [REDACTED] doing business as (dba) [REDACTED] (collectively referred to herein as Appellant). Appellant is appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (permit or CHP).

On March 1, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).¹ The application was filed with RAM, who is responsible for reviewing and determining whether an applicant will receive a permit or permits.

In response to Appellant's application, on May 3, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).² In the Notice, RAM advised Appellant that the Official Record showed he met the CHLAP requirements for 2008. However, RAM also stated in the Notice that Appellant did not meet the CHLAP requirements for 2004 or 2005, since he did not have at least five properly reported logbook trips to the Alaska Department of Fish and Game (ADF&G) in 2004 or 2005. RAM set a June 2, 2010 deadline for Appellant to submit evidence to show he met participation requirements in 2004 or 2005.

¹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

² Original File Tab.

On May 20, 2010, Appellant responded to the Notice by withdrawing his claim, although he subsequently requested reinstatement of his claim.³ On April 5, 2011, RAM sent Appellant the IAD which is the subject of this appeal. In the IAD RAM denied Appellant a CHP. In the IAD RAM indicated that it was accepting Appellant's letter dated April 1, 2011 as a request to re-instate his claims, and in the IAD RAM addressed the substantive basis for Appellant requesting a CHP.

In the IAD RAM reasoned that Appellant did not meet the basic participation requirements for one of two periods of participation, namely five or more qualifying charter trips in 2004 or 2005. RAM reiterated that Appellant did meet the participation requirements for 2008. RAM noted that Appellant had the right to appeal the IAD to OAA, and stated that only OAA can resolve claims based on unavoidable circumstances.

On May 17, 2011, Appellant timely filed his appeal of the IAD with OAA.⁴ In his appeal, Appellant argues he was born and raised in a small village in Alaska. Appellant states it is part of his Aleutic culture to fish. Appellant started his fishing business in 2005. If he cannot obtain a permit, he will be at a financial loss. Appellant understands he did not fill-out his logbook correctly, as it was his first year and he was confused about how to fill-out the logbooks correctly.

I have determined the information in the record is sufficient to render a decision.⁵ Accordingly, I have closed the record and issue this Decision.

ISSUES

I will decide whether Appellant is eligible under what sometimes are referred to as the "basic requirements" for eligibility for a CHP. I thus must consider:

Did Appellant prove by preponderance of the evidence that he reported to ADF&G at least five logbook fishing trips for 2004 or 2005?

If the answer to that question is "no," Appellant is not eligible for a permit under the basic requirements and I must uphold the IAD.

³ Original File Tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, signed May 17, 2010.

⁴ Pleadings Tab, letter dated November 10, 2010 with attachments.

⁵ See 50 C.F.R. § 679.43(g)(2).

FINDINGS OF FACT (FOF)

1. For 2004, Appellant reported no bottomfish logbook fishing trips to ADF&G.⁶
2. For 2005, Appellant reported no bottomfish logbook fishing trips to ADF&G.⁷
3. For 2008, Appellant reported fourteen logbook fishing trips to ADF&G.⁸
4. On March 1, 2010, Appellant timely filed for a CHP.⁹
5. On April 5, 2011, RAM denied Appellant's application for a CHP because he did not meet the minimum participation requirements in 2004 or 2005.¹⁰

PRINCIPLES OF LAW

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP, including evaluating applications for Charter Halibut Permits.¹¹

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).¹²

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. That participation is defined as at least five logbook fishing trips properly reported to ADF&G in 2004 or 2005 and 2008. This threshold criteria may be referred to as the basic participation requirements.¹³

A "logbook fishing trip" means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.¹⁴ The time limit to

⁶ Original File Tab, Print Summary created January 26, 2010.

⁷ Original File Tab, Print Summary created January 26, 2010.

⁸ Original File Tab, Print Summary created January 26, 2010.

⁹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

¹⁰ Original File Tab, IAD.

¹¹ See 50 C.F.R. § 300.67(f)(5); 75 Fed. Reg. 554, 556 (January 5, 2010).

¹² 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

¹³ See 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed. Reg. 554, 554-555 (January 5, 2010).

¹⁴ 50 C.F.R. § 300.67(f)(4).

submit data about logbook fishing trips was within eight to fourteen days of a qualifying trip, as delineated in the logbooks.¹⁵

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period (2004 or 2005) that was reported to ADF&G in a Saltwater Charter Logbook with one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.¹⁶

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period (2008) that was reported to ADF&G 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 area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.¹⁷

ANALYSIS

In order to prevail in this appeal, Appellant must first show he meets the minimum participation requirements in 2004 or 2005. In the absence of that proof, Appellant will not be eligible for a permit.

Did Appellant prove by preponderance of the evidence that he reported to ADF&G at least five logbook fishing trips for 2004 or 2005?

The Official Record shows Appellant reported no logbook fishing trips to ADF&G for 2004 or 2005. Appellant bears the burden of proving the Official Record is in error, and that in fact he did properly report at least five logbook fishing trips to ADF&G for 2004 or 2005.¹⁸ However, Appellant has not presented sufficient evidence to carry that burden of proof. Accordingly, based on the record before me, I have found Appellant reported no qualifying trips to ADF&G for 2004 or 2005. Accordingly, Appellant cannot prevail under the basic regulatory requirements for a permit.

I understand Appellant believes he should be credited with more bottomfish trips for 2005 than reflected in the Official Record. Appellant argues on appeal that as a first-year charter owner, he was confused about how to fill-out the logbook. Appellant states he actually took more trips than are reflected in the Official Record, as shown by the statements of anglers he submitted in support of his application.

¹⁵ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

¹⁶ 50 C.F.R. § 300.67(f)(2).

¹⁷ 50 C.F.R. § 300.67(f)(3).

¹⁸ See 50 C.F.R. § 300.67(a) and (b).

I cannot accept Appellant’s explanation as a basis to change the Official Record. Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.¹⁹ With respect to recording bottomfish trips, those instructions provided in pertinent part:

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 rod/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. . . .
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted? Example 1: One Target Salmon	. . . NOTE: If bottomfish are caught when targeting salmon only, record the number of bottomfish in the appropriate columns in the bottomfish section. . . .
Example 3: Two Targets Salmon <u>and</u> Bottomfish (including halibut) Simultaneously (i.e., mooching)	. . . [R]ecord 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.
Example 4: A combination of any of the above	. . . [R]ecord 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

¹⁹ ADF&G Saltwater Logbooks for the years 2001 through 2011 are displayed on the NMFS, Alaska Region, website at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

	targeting bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.
SPECIAL NOTES AND INSTRUCTIONS	
“Halibut”	The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to record your effort . Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (state area, no. rods, and boat hrs).

There were similar instructions for 2005 logbooks. If Appellant had followed the written instructions supplied with Saltwater Charter Vessel Logbooks, he would have properly recorded and reported his charter halibut fishing business activity. Merely taking trips is not sufficient to meet participation requirements. The regulations require that the bottomfish fishing trip was a) timely reported, b) in a logbook assigned to Appellant based on his business license, and c) with appropriate information. Appellant has not shown that he submitted logbook pages to ADF&G reporting at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005). Thus, even if I accept the angler statements’ attached to Appellant’s application at face value, they nevertheless are insufficient to prove that Appellant made at least five bottomfish logbook trips.

I also have read Appellant’s other concerns raised on appeal. I understand he was born and raised in a small village in Alaska. Appellant has stated fishing is part of his Aleutic culture. Appellant is also concerned that if he cannot obtain a permit, he will be at a financial loss. While I have read these concerns with care, nevertheless, I am bound to follow the CHLAP regulations as written. NAO may not deviate from NMFS’s policy, since there is nothing in the CHLAP regulations that authorizes NAO to modify regulatory requirements or act out of a sense of equity. I therefore conclude, for the reasons stated above, that Appellant has not met his burden of proving the IAD is inconsistent with applicable regulations.

CONCLUSIONS OF LAW

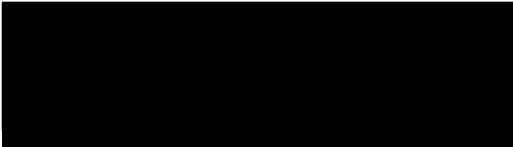
Appellant did not prove by a preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005.

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated April 5, 2011 is upheld. This decision takes effect (30) days from the date issued, January 5, 2012,²⁰ and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator reverses, modifies, or reverses this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time on 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 in support of the motion.



Eileen G. Jones
Chief Administrative Judge

Date Issued: December 6, 2011

²⁰ 50 C.F.R. § 679.43(k) and (o).