

Owners contend that the selection of 2004 and 2005 as the qualifying years is unfair and essentially deprives them of the value of the business they have built up in the last five years.⁵

Appellant can file this appeal because the IAD directly and adversely affected its interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that it meets the requirements for two transferable charter halibut permits with angler endorsements of six. I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue two transferable charter halibut permits with angler endorsements of six.⁶ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision.

ISSUES

1. Did RAM correctly determine that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of five?
2. May an applicant receive a second transferable permit because the applicant invested heavily in a second vessel in 2006 and has participated heavily in the charter halibut fishery with that vessel since 2006?
3. May an applicant receive a charter halibut permit with an angler endorsement of six because the applicant owns a vessel which has the capacity to carry six anglers?

SUMMARY

The IAD is affirmed because RAM correctly applied the charter halibut regulation in its evaluation of Appellant's application. Appellant meets the requirements for one transferable charter halibut permit with an angler endorsement of five. Appellant does not meet the requirement in the charter halibut regulation at 50 C.F.R. § 300.67(c) for a second transferable permits because it did not take at least fifteen bottomfish logbook fishing trips with a second vessel in the applicant-selected year, which was 2004. Appellant does not meet the requirement in the charter halibut regulation at 50 C.F.R. § 300.67(e) for an angler endorsement of six because Appellant did not take six anglers on any bottomfish logbook trip in 2004 or 2005. NMFS may not issue a charter halibut permit, or an endorsement on a permit, to an applicant who does not meet the requirements in the charter halibut regulation for a permit or an endorsement. An administrative judge has the responsibility to apply the regulations governing the issuance of that permit. An administrative judge cannot order NMFS to issue a permit, or an endorsement on a permit, based on factors that are not specified in the regulation.

FINDINGS OF FACT

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

⁵ Statement of Corporation Owners (Dec. 5, 2010); Letter from Corporation Owners to Chief Administrative Judge (received Mar. 22, 2011).

⁶ 50 C.F.R. § 679.43(g)(3)(iv).

1. Appellant has operated a charter fishing business that includes halibut charters since 1998.⁷
2. In 2004, Appellant took seventeen bottomfish logbook fishing trips with [REDACTED] (VESSEL 1). The highest number of anglers that Appellant took on any trip in 2004 was five.⁸
3. In 2005, Appellant took seven bottomfish logbook fishing trips with VESSEL 1. The highest number of anglers that Appellant took on any trip in 2005 was five.⁹
4. In 2006, Appellant took out a boat mortgage of \$170,000 and purchased a second, larger, vessel, [REDACTED] (VESSEL 2). This vessel has the capacity to carry six anglers. Since 2006, Appellant has heavily used VESSEL 2 in the charter halibut fishery.¹⁰
5. In 2008, Appellant reported forty halibut logbook fishing trips with VESSEL 1 and VESSEL 2.¹¹
6. Appellant filed a timely application for a charter halibut permit on March 23, 2010.¹²

APPLICABLE REGULATIONS

NMFS must issue charter halibut permits in accord with the regulations implementing the Charter Halibut Limited Access Program. These regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67.

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹³ A person can be an individual, a corporation, firm or association.¹⁴

The relevant unit of participation is a logbook fishing trip. A logbook fishing trip is either a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in

⁷ Letter from Corporation Owners to Chief Administrative Judge (received Mar. 22, 2011).

⁸ Summary of Official Record (Jan. 26, 2010). When I say that Appellant took a bottomfish or halibut logbook fishing trip, I also mean that the Appellant timely reported the trip to ADF&G in its Saltwater Charter Logbook, because the definition of logbook fishing trip includes that the trip was reported to ADF&G in accord with the time limit for reporting the trip. 50 C.F.R. § 300.67(f)(4).

⁹ Summary of Official Record for Appellant (Jan. 27, 2010).

¹⁰ Statement of Corporation Owners submitted with Application (Mar. 22, 2010); Statement of Corporation Owners (Dec. 5, 2010).

¹¹ Summary of Official Record for Appellant (Jan. 27, 2010).

¹² Application for Charter Halibut Permit(s) (dated Mar. 22, 2010, received Mar. 23, 2010).

¹³ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁴ 50 C.F.R. § 300.61 (definitions).

effect at the time of the trip except that for multi-day trips, the number of trips will be equal to the number of days of the multi-day trip, e.g., a two-day trip will be counted as two trips.¹⁵

A bottomfish logbook fishing trip is a logbook fishing trip that was reported in the qualifying period with one of the following pieces of information: the statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.¹⁶

A halibut logbook fishing trip is a logbook fishing trip that was reported in the recent participation period with one of the following pieces of information: the number of halibut kept, the number of halibut released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.¹⁷

An applicant must prove participation in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,¹⁸ and a recent participation period, which is the sport fishing season for halibut in 2008.¹⁹

An applicant must prove different levels of participation to receive a non-transferable and a transferable permit. To receive a non-transferable permit, an applicant must have taken at least five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).²⁰

To receive a transferable charter halibut permit, an applicant must have taken at least fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).²¹ The number of transferable charter halibut permits issued to an applicant will be equal to the number of vessels that met these qualifications.²²

The angler endorsement number on a charter halibut permit is the highest number of anglers reported on any trip in the qualifying period (2004, 2005), unless the highest number is less than four. If that is the case, the angler endorsement number will be four.²³

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

¹⁵ 50 C.F.R. § 300.67(f)(4).

¹⁶ 50 C.F.R. § 300.67(f)(2).

¹⁷ 50 C.F.R. § 300.67(f)(3).

¹⁸ 50 C.F.R. § 300.67(f)(6).

¹⁹ 50 C.F.R. § 300.67(f)(7).

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

²¹ 50 C.F.R. § 300.67(d)(1)(i)-(ii).

²² 50 C.F.R. § 300.67(d)(2).

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

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

ANALYSIS

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

Under the charter halibut regulation, RAM first determines if an applicant submitted a timely application.²⁴ Appellant submitted a timely application.

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

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

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

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

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

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

Step 1: RAM determined that Appellant met the participation requirements for a non-transferable permit in 50 C.F.R. § 300.67(b), namely Appellant took at least five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and at least five halibut logbook fishing trips in the recent participation period (2008).²⁵

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

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

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

²⁴ 50 C.F.R. § 300.67(b)(1)(i).

²⁵ These requirements are specifically at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

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

The applicant-selected year means the year in the qualifying period, either 2004 or 2005, that the applicant selects for NMFS to use in determining the number of applicant's permits.²⁶

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

*The applicant-selected year: 2004.*²⁷

The total number of bottomfish logbook fishing trips in 2004: 17.

The total number of bottomfish logbook fishing trips in 2004 divided by five, rounded to nearest whole number: $17 \div 5 = 3.4$, rounded to 3.

The number of vessels that made those trips: 1.

Applicant receives **the lesser** of 3 or 1. Appellant receives **1 permit**.

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

Put another way, the regulation prevents an applicant from receiving a greater number of permits than the number of boats that the applicant used in the qualifying period, with the proviso that the applicant must choose one year in the qualifying period, either 2004 or 2005, to determine the number and type of permits it receives. To receive two permits, an applicant would have had to have used two boats in the applicant-selected year and made a total of at least ten trips.

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

Step 4: RAM determined that Appellant's permit will have an angler endorsement of five, in accord with 50 C.F.R. § 300.67(e). If an applicant receives one transferable permit, the permit will have an angler endorsement of four, unless the applicant took at least one bottomfish logbook fishing trip in 2004 or 2005 with more than four anglers.²⁸ Appellant took at least one trip in 2004 or 2005 with five anglers. Therefore, Appellant's permit will have an angler endorsement of five.

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

²⁶ 50 C.F.R. § 300.67(f)(1).

²⁷ Application for Charter Halibut Permit(s) at 2 (dated Mar. 22, 2010, received Mar. 23, 2010)

²⁸ 50 C.F.R. § 300.67(e)(1), (5).

2. May an applicant receive a second transferable permit on the grounds that the applicant invested heavily in a second vessel in 2006 and has participated heavily in the charter halibut fishery with that vessel since 2006?

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

Under the charter halibut regulation, an applicant can receive two non-transferable charter halibut permits only if the applicant used two boats in the applicant-selected year (2004 or 2005) and made at least ten trips in that year.²⁹ An applicant can receive two transferable charter halibut permits only if the applicant used two boats in the applicant-selected year (2004 or 2005) and made at least fifteen logbook fishing trips with each boat in that year.³⁰

I acknowledge that Appellant deeply believes that this result is unjust, unfair and irrational. Appellant expanded its operations in 2006 and bought a second vessel for \$170,000. Appellant now has two vessels, has used two vessels since 2006, and states that it has predicated its entire operation on continuing to operate two vessels in the extremely remote location where Appellant has its lodge and charter business. Appellant has operated a charter halibut business for thirteen years and strongly objects to NMFS denying it a second permit based on only two of those thirteen years.³¹

Appellant objects to the regulation itself. I realize that Appellant does not want to hear this,³² but in deciding an appeal, my responsibility is to determine whether NMFS followed the regulation. I do not have the authority to change the regulation and order NMFS to issue a permit if an applicant does not meet the requirements in the regulation for a permit. This applicant does not meet the requirement in the regulation to receive a second permit through initial issuance. I therefore cannot order that NMFS award this applicant a second permit. Under the charter halibut regulation, the only way this applicant can get a second charter halibut permit is by transfer from a person who has a transferable permit.³³

I acknowledge that NMFS's actions seem arbitrary to Appellant, but it would actually be arbitrary if, on appeal, I ordered NMFS to award this applicant a permit based on its investment of \$170,000 in 2006. If I awarded this applicant a permit on that basis, I would have to give other applicants the same opportunity. If I took into account Appellant's investment of \$170,000, would I take into account another applicant's investment of \$50,000? Or \$10,000? Appellant invested its funds in 2006. What if an applicant invested funds in 2007? In 2008?

²⁹ 50 C.F.R. § 300.67(c).

³⁰ 50 C.F.R. § 300.67(d)(1)(i)(d)(2).

³¹ Statement of Corporation Owners submitted with Application (Mar. 22, 2010); Letter from Corporation Owners to NMFS (July 29, 2010); Statement of Corporation Owners (Dec. 5, 2010); Letter from Corporation Owners to Chief Administrative Judge (received Mar. 22, 2010).

³² Appellant stated: "[W]e expect to get the 3rd same generic meaningless appeal response from NMFS." Statement of Corporation Owners (Dec. 5, 2010).

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

Appellant invested funds in buying a second vessel. What if another applicant invested funds to upgrade its first vessel or buy equipment or buy a lodge for clients? Without a regulation specifying the amount, dates or purpose of the investment,³⁴ I would be creating the numbers and dates out of whole cloth. It would be arbitrary if I, without giving the public notice and an opportunity to comment, simply came up with my own ideas of how much money an applicant should have invested, by what date, and for what purpose, to receive a charter halibut permit.

Appellant states that it had no input into the development of this regulation.³⁵ I do not have authority to order that an applicant receive a permit because of a claim that the applicant had no input into the development of a regulation. But, for Appellant's information, I offer this brief description of the development of the charter halibut regulation.³⁶

In December 2005, the North Pacific Fishery Management Council (Council) adopted a control date of December 9, 2005, and NMFS published notice of the control date in February 2006.³⁷ The Council has authority under The Halibut Act to recommend measures to allocate harvesting privileges in halibut fisheries subject to the jurisdiction of the IPHC.³⁸ In the control date notice, NMFS explained that the Council had formed a stakeholder working group to develop alternatives for the long-term management of the charter halibut fishery and that

[b]ecause these management alternatives may limit access to the charter halibut fishery, the council set a control date of December 9, 2005, after which charter operators entering the charter halibut fishery will not necessarily be assured access to the halibut resource.³⁹

In March 2007, the North Pacific Fishery Management Council recommended that NMFS adopt a limited access program for the charter halibut fishery. In its motion, the Council stated:

A business would be limited to the number of permits equal to the highest number of vessels used in any one year during the qualifying period. *(Staff note: this means business are restricted to a maximum number of permits equal to or less than the maximum number of vessels that submitted logbooks in 2004 or 2005).*⁴⁰

In April 2009, NMFS proposed a regulation based on the Council's recommendation.⁴¹

³⁴ Cf. 50 C.F.R. § 679.4(k)(3)(iv)(E) (license holder could change the gear designation on its groundfish license from trawl gear to non-trawl or from non-trawl to trawl if it spent \$100,000 on vessel conversion or new gear by February 7, 1998, and harvested groundfish with that gear by December 31, 1998).

³⁵ Letter from Corporation Owners to NMFS (July 29, 2010).

³⁶ For a full description of the background of the charter halibut regulation, see Proposed Rule, 75 Fed. Reg. 18,178, 18,179 - 82 (Apr. 21, 2009).

³⁷ Advance notice of a proposed rulemaking; control date, 61 Fed. Reg. 6442 (Feb. 8, 2006), available at <http://alaskafisheries.noaa.gov/index/notice/notices.asp?Yr=2006>

³⁸ See 16 U.S.C. § 773c(c). The entire Halibut Act is at 16 U.S.C. § 773-773k.

³⁹ Advance notice of a proposed rulemaking; control date, 61 Fed. Reg. 6442 (Feb. 8, 2006), <http://alaskafisheries.noaa.gov/index/notice/notices.asp?Yr=2006>

⁴⁰ Council Motion on Charter Halibut Moratorium in Area 2c and 3A, Issue 10 (Mar. 31, 2007) (italics in original), available on available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

⁴¹ Proposed Rule, 75 Fed. Reg. 18,178, 18,181- 18,192 (Apr. 21, 2009)

In January 2010, the Secretary of Commerce adopted the final charter halibut regulation pursuant to its authority in section 773c of The Halibut Act.⁴² NMFS published a final rule and responded to public comments on the proposed rule, including comments that the rule was unfair to persons who got into the charter halibut fishery after 2005 or expanded operations after 2005.⁴³ Appendix 1 to this Decision contains NMFS's response to Comments 3, 4, 5, which, in combination with NMFS's response to other comments and the rest of the administrative record, explain why NMFS concluded it was permissible to award permits based, in part, on participation in 2004 and 2005.

I do not have authority to evaluate the reasons for adopting the regulation. My responsibility is to interpret, and apply, the regulation that the Secretary of Commerce, acting through NMFS, did adopt. On that question, the regulation is clear and Appellant does not meet the requirement for a second permit.

3. May an applicant receive a charter halibut permit with an angler endorsement of six because the applicant owns a vessel with the capacity to carry six anglers?

Here, too, Appellant is arguing that the regulation is wrong and that Appellant should receive an angler endorsement based on something different from the regulation specifies, namely the number of anglers that can be carried on a boat the applicant owns.⁴⁴ I cannot order that NMFS determine an angler endorsement on anything except what is specified in the regulation, namely the highest number of anglers that the applicant carried on a trip in either 2004 or 2005.⁴⁵ That number is five. Therefore, Appellant's permit should have an endorsement of five.

Appellant notes that it operates in Chenega Bay and that the community just received community charter halibut permits.⁴⁶ Community charter halibut permits are issued to a Community Quota Entity (CQE) representing an eligible community.⁴⁷ The purpose of these permits is to allow the development of a charter vessel fishery in certain rural communities that do not have a developed charter vessel industry.⁴⁸ The CQE holds the permit but can arrange with a vessel owner, on terms mutually agreeable to the vessel owner and the CQE, for a vessel owner to use the permit.

CONCLUSIONS OF LAW

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

⁴² Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

⁴³ Final Rule, 75 Fed. Reg. 554, 563 – 595 (Jan. 5, 2010) (response to public comments). Several comments touched on this subject including Comments 3, 4, 5, 45, 49, 51, 76, 108, 142, 143, 151 and 156.

⁴⁴ Statement of Corporation Owners at 3 (Dec. 5, 2010).

⁴⁵ 50 C.F.R. § 300.67(e)

⁴⁶ Letter from Corporation Owners to Chief Administrative Judge (received Mar. 22, 2011). RAM's permit website shows that NMFS has issued seven community charter halibut permits to Chenega Heritage, Inc. http://www.fakr.noaa.gov/ram/charter/apps_permits.htm.

⁴⁷ 50 C.F.R. § 300.67(k).

⁴⁸ Final Rule, 75 Fed. Reg. 554, 558 (Jan. 5, 2010).

2. NMFS cannot issue an applicant a charter halibut permit, or a particular angler endorsement on a permit, if the applicant does not meet the requirements in the charter halibut regulation for the permit or for the angler endorsement.
3. Appellant does not meet the participation requirement in the qualifying period in 50 C.F.R. § 300.67(c) for a second charter halibut permit, namely that Appellant did not take ten or more bottomfish logbook fishing trips with two vessels in the applicant-selected year (2004).
4. Appellant does not meet the participation requirement in the qualifying period in 50 C.F.R. § 300.67(d) for a second transferable charter halibut permit, namely Appellant did not take fifteen or more bottomfish logbook fishing trips with a second vessel in the applicant-selected year (2004).
5. An applicant may not receive a second transferable permit because the applicant invested heavily in a second vessel in 2006 and has participated heavily in the charter halibut fishery with that vessel since 2006.
6. Appellant does not meet the participation requirement in 50 C.F.R. § 300.67(e) for an angler endorsement of six because Appellant did not take a bottomfish logbook fishing trip with six anglers in 2004 or 2005.
7. An applicant may not receive a charter halibut permit with an angler endorsement of six because the applicant owns a vessel with the capacity to carry six anglers.
8. As an administrative judge, I must interpret and apply the regulations, as adopted, to decide an appeal.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This decision takes effect on August 11, 2011, unless by that date the Regional Administrator orders review of the Decision.

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, July 22, 2011. 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 Alide McKeen
Administrative Judge

of the non-commercial sectors exhibit relatively static growth over time such that year-to-year assumptions about their harvest prove to be correct. The charter halibut fishery has grown in recent years, however, depending on the demand for halibut by charter vessel anglers. Although this rule is not designed primarily to limit the harvest by the charter halibut fisheries, it will make existing and future harvest restrictions more effective because conservation gains from individual harvest restrictions will not be eroded by unlimited growth in the fleet of charter vessels fishing for halibut. In this manner, this rule will contribute to the achievement of the overall target harvest rate of halibut established by the IPHC.

Avoids excessive share. An excessive share of halibut fishing privilege is not defined in either the Halibut Act or in the National Standard 4 guidelines. The latter states simply that an allocation must deter any entity from acquiring an excessive share of fishing privileges, and avoid creating conditions that foster inordinate control by buyers and sellers (50 CFR 600.325(c)(3)(iii)).

This rule sets an excessive share standard of five charter halibut permits. Existing businesses that initially qualify for more than five permits will be able to continue business at levels above this excessive share standard; however, they will be prevented from acquiring more permits than their initial allocation. Transfers of a permit or permits that will result in the person, business, or other entity receiving the permit(s) holding more than five permits will not be approved by NMFS with limited exception.

Some consolidation of charter halibut permits may occur under this rule, but will be limited by the five-permit excessive share standard. Further, the number of businesses that are allowed an initial allocation of permits in excess of this standard will not increase. A 10 percent ownership criterion will apply to prevent a corporation from exceeding the excessive share standard by owning or controlling subsidiary businesses each holding the maximum number of permits. The 10 percent ownership criterion is the same as that used for implementing the American Fisheries Act and defined at 50 CFR 679.2. Under this definition, two entities are considered the same entity if one owns or controls 10 percent or more of the other. Hence, an excessive share of privileges to operate charter vessels fishing for halibut is prevented and the dominance of any businesses in the charter halibut fishery will not be allowed to increase any more than it is

at the time of initial allocation of permits.

Comments and Responses

This action was published as a proposed rule on April 21, 2009 (74 FR 18178), and public comments on it were solicited until June 5, 2009. NMFS received 166 comment submissions containing 157 unique comments. These comments were reviewed, organized into seven topical categories, and responded to as follows:

Fairness and Legal Authority

Comment 1: The proposed rule does not meet the National Standards for Fishery Conservation and Management as defined in the Magnuson-Stevens Act (16 U.S.C. 1851(a)(4)).

Response: This action is authorized by the Halibut Act at section 773c, not the Magnuson-Stevens Act. Section 773c(c) of the Halibut Act provides the requirements that must be met by the Council and the Secretary when developing and implementing regulations for halibut. The Secretary has found this rule to be consistent with this requirement of the Halibut Act as explained above under the heading "Consistency with Halibut Act."

Comment 2: The Halibut Act of 1982, (at section 773c(c)) states that rules shall be fair and equitable and they shall not discriminate among participants.

Response: The Halibut Act at the section cited actually prohibits discrimination between residents of different States. This rule does not discriminate between residents of different States as the criteria for an initial allocation of charter halibut permits applies to all applicants regardless of the State in which they reside. This action complies with the requirements of the Halibut Act, as discussed in the "Consistency with Halibut Act" section above.

Comment 3: Several comments stated that the proposed rule is not fair and equitable because it requires applicants to demonstrate participation in the halibut charter fisheries in 2004 or 2005 (historical participation period). The comments note that the historical participation requirement illegally discriminates against businesses that are currently in operation because:

- The proposed rule would impose *ex post facto* regulations, contrary to the Constitution of the United States;
- The Magnuson-Stevens Act at 16 U.S.C. 1853(b)(6) states that when implementing a limited entry program, present participation and historical practices must be considered. It does not say anything about historical

participation on which NMFS is basing this rule;

- While obtaining all relevant licenses and permits to operate a charter business, there was no notification by the licensing agencies that rules were being made that would retroactively disallow charter operators from continuing to operate their businesses;

- Many small business owners will not have the right to appeal under the unavoidable circumstances provision as the proposed rule states that an applicant must demonstrate that it had a specific intent to participate in the qualifying period; and

- The proposed rule clearly shows the Council's intention to act favorably towards the charter vessels that operated during 2004 and 2005 by excluding charter businesses that started operating between 2006 and 2009.

Response: This rule is not illegal or contrary to the U.S. Constitution. An *ex post facto* law is a law passed after the occurrence of an event or action which retrospectively changes the legal consequences of the event or action. That is not the case with this rule. This rule does not make charter halibut fishing that was legally performed after 2005 and before the effective date of this rule illegal, but instead establishes specific eligibility criteria for receiving a harvest privilege. Hence, this rule does not change the legal consequences of past participation in the charter halibut fishery. Persons who entered the fishery after 2005, however, had constructive notice, published February 8, 2006 (71 FR 6442), that they were not assured of future access to the charter halibut fishery if a management regime, such as the one implemented by this rule, were implemented.

The Council and the Secretary considered historical practices in the charter halibut fisheries in Areas 2C and 3A by looking at the number of charter vessel businesses and vessels participating in these fisheries, the range in the number of logbook fishing trips made, and the number and distribution of communities in which these fishing trips terminated in 2004 and 2005. These factors are reasonable measures of dependence on the charter halibut fisheries. See also the discussion of historical fishing practices above under the heading "Consistency with Halibut Act."

Prior to this rule, NMFS has not implemented any licensing requirements for operators of vessels with one or more charter anglers onboard. However, the Council has a long history of developing management measures for the charter halibut fishery, as described in the preamble to the

proposed rule (74 FR 18178, April 21, 2009), and the control date notice published February 8, 2006 (71 FR 6442). Persons entering the charter halibut fishery for the first time after 2005 were on notice that their future access to that fishery was not assured.

Regarding an appeal, all charter halibut permit applicants have a right to an appeal under § 300.67(h)(6) of this rule. However, if a charter vessel business was not started until 2006 or later and cannot demonstrate that it intended to participate in prior years, it will not be able to meet the criteria for the unavoidable circumstance exception. See the response to Comment 109 for a discussion of the unavoidable circumstances exception to the charter halibut permit qualification requirements.

The Council selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on participation in the charter halibut fishery when it acted in early 2007. The Council did not select a larger number of qualifying years because the normal entry and exit from the charter halibut fishery from year to year could result in more charter halibut permits than vessels participating in any one year with a qualifying period of too many years. The choice of combining minimum participation during a qualifying year and the recent participation year further serves the purpose of limiting charter halibut permits to those businesses that have demonstrated a long-term commitment to the charter halibut fishery and gives consideration to present participation and historical dependence, factors that must be considered pursuant to the Halibut Act.

Before developing eligibility criteria for the charter halibut limited access system, the Council announced a control date of December 9, 2005, to provide notice to any person contemplating entry into the charter halibut fishery after that date. A control date notice published in the **Federal Register** on February 8, 2006 (71 FR 6442), further indicated that future access to the charter halibut fishery was not necessarily assured to persons entering the fishery for the first time after that date.

Comment 4: One commenter proposed changes to the moratorium to make it fair, equitable, and non-discriminatory. These changes included revising the charter halibut permit qualification criteria to require participation only in more recent years and making all charter halibut permits transferable to allow established

businesses to grow by purchasing permits.

Response: Although alternative programs might be found to be fair and equitable and non-discriminatory, as required by the Halibut Act, this rule was developed by the Council to meet its stated objectives. The Council intended to recognize historical and recent participation by granting permits to charter businesses that demonstrate consistent participation in and dependence on the charter halibut fisheries. The Council also recommended a higher participation requirement for transferable permits than for non-transferable permits to balance its objective to reduce fishing effort and its objective to minimize disruption to the charter fishing industry. The Council's recommended qualifying criteria for transferable charter halibut permits will allow businesses to grow by purchasing additional permits up to the excessive share limit of five charter halibut permits, which is consistent with the commenter's suggestion. NMFS finds that this rule meets the requirements of the Halibut Act (see discussion above under the heading "Consistency with Halibut Act").

Comment 5: The Council does not have the authority to ban charter businesses that began operating between 2006 and 2009 from operating a guided halibut fishing business, or to include rules that merely allocate the harvest level among users rather than reduce the harvest level as required by agency goals.

Response: The Halibut Act, at section 773c(c), provides authority to the Council and the Secretary to "develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nationals or vessels of the United States or both" The Halibut Act, at 16 U.S.C. 773c(a) and (b), also provides the Secretary with general responsibility to carry out the Convention, the Halibut Act, and to adopt such regulations as may be necessary. In reviewing this rule, the Secretary has found that the Council's recommendation for this limited access system is consistent with the Halibut Act (see the discussion above under the heading "Consistency with Halibut Act").

Fishery management generally, and management of the halibut fisheries in particular, is not necessarily limited to the direct control of harvests. Allocation of fishing privileges also is specifically authorized by the Halibut Act if the regulations that allocate fishing privileges meet certain criteria. See the "Consistency with Halibut Act" section

above for further discussion of how this rule is consistent with all Halibut Act requirements.

Comment 6: A limited access program on charter vessels is not a conservation measure to protect the halibut but an attempt to limit individuals from the resource. Since halibut is a resource that belongs to all citizens, it is only reasonable that they should have the first opportunity to harvest what is rightfully theirs. Charter operators afford citizens a reasonable opportunity to catch fish. The people should have the first opportunity to gather, and the remains of the annual surplus can then be opened to commercial harvesting. Citizens should not be limited from harvesting their resource until there is a conservation concern.

Response: This rule is reasonably calculated to promote conservation as described above under the heading "Consistency with Halibut Act." NMFS agrees that halibut are a public resource; however, the limited access system established by this rule does not limit individual anglers from opportunities to access the halibut resource. This rule limits the number of charter vessels in the guided sport fishery for halibut in only two of the 10 IPHC regulatory areas. The Analysis prepared for this action (see ADDRESSES) estimates that charter vessel capacity will be sufficient to meet the demand for the number of anglers who took guided charter vessel trips in 2008 in Areas 2C and 3A (see also response to Comments 21 and 43).

Although charter vessels provide an important means of access to the halibut resource, they are not the only way that the public can access the resource. The commercial fishery provides access to halibut to those who prefer to purchase it in grocery stores or restaurants. The subsistence fishery provides access to the halibut resource by those who qualify to conduct subsistence halibut fishing. Non-guided recreational fishing also is a source of public access to the halibut resource. This rule does not constrain or limit any of these other means of public access to the halibut resource. In fact, the catch limits specified annually for the commercial halibut fishery by the IPHC for areas in and off of Alaska are set after estimated harvests by all other non-commercial removals are subtracted from the constant exploitation yield (see discussion under "Management of the Halibut Fisheries" in the preamble to the proposed rule (74 FR 18178, April 21, 2009).

Comment 7: Commenter urged you to pass the proposed rule for the guided halibut fishery. All businesses need stable, predictable regulation to plan