

**NATIONAL APPEALS OFFICE  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL OCEANIC and ATMOSPHERIC ADMINISTRATION**

In re Application of )  
 )  
 [REDACTED] ) Appeal No. 10-0105  
 [REDACTED] )  
 Appellant ) DECISION  
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**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 is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with OAA. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the code of Federal Regulations at 50 C.F.R. § 679.43.

On November 17, 2010, [REDACTED] doing business as (dba) [REDACTED] (collectively referred to herein as Appellant), timely filed an appeal with OAA, challenging a NMFS Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated September 30, 2010.<sup>2</sup> In that determination, RAM notified Appellant that it denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP).<sup>3</sup> The basis for the denial was Appellant's lack of sufficient official logbook information during the qualifying period (2004 or 2005) as required under 50 C.F.R. § 300.67(b)(1)(ii)(A), (f)(1), and (f)(4).<sup>4</sup>

Appellant applied for a CHP on March 19, 2010.<sup>5</sup> RAM made a preliminary assessment that it seemed unlikely, based on the information in RAM's Official Charter Halibut Record (Official Record), that Appellant would qualify for a permit. RAM notified Appellant of its preliminary assessment in a Notice of Opportunity to Submit Evidence

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<sup>1</sup> Pleadings Tab, Appellant's letter of appeal dated Nov. 17, 2010 (received by OAA on Nov. 30, 2010). RAM, under the auspices of the Regional Administrator from NMFS Alaska Regional Office, is responsible for administering the CHLAP on behalf of NMFS.

<sup>2</sup> Original File Tab, IAD dated September 30, 2010.

<sup>3</sup> Regulations for issuing permits under CHLAP are published at 50 C.F.R. § 300.67.

<sup>4</sup> Original File Tab, IAD dated September 30, 2010.

<sup>5</sup> Original File Tab, Application of Charter Halibut Permit(s) for IPHS Regulatory Areas 2C and 3A dated March 19, 2010 (received by RAM on March 26, 2010).

(Notice) dated June 3, 2010.<sup>6</sup> RAM noted that the claim made on Appellant's application was different from the information contained in the Official Record and that Appellant had not provided sufficient evidence to cause RAM to change the Official Record. According to RAM, the Official Record showed Appellant did not meet the minimum requirements of having reported at least five bottomfish logbook fishing trips to the State of Alaska Department of Fish and Game (ADF&G) during the qualifying period (2004 or 2005). However, RAM informed Appellant that he could submit evidence to demonstrate his eligibility for a permit. Appellant responded to the Notice by waiving his opportunity to submit additional evidence.<sup>7</sup>

On September 30, 2010, RAM sent Appellant the IAD at issue in this case. In the IAD, RAM denied Appellant a permit because he lacked the requisite logbook trips as explained in the Notice. RAM noted that the Official Record showed that Appellant did not operate his charter fishing business in 2004 and properly recorded only two bottomfish logbook fishing trips in 2005, below the minimum number of five timely reported logbook fishing trips during one year of the qualifying period (2004 or 2005) as required by the applicable regulations.<sup>8</sup>

On November 30, 2010, Appellant's appeal to OAA was received and timely filed.<sup>9</sup> On February 16, 2011, NAO sent Appellant a letter acknowledging his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by March 18, 2011.<sup>10</sup> The record does not show that Appellant responded with additional evidence or information.

I have reviewed Appellant's appeal and the case record, and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing.<sup>11</sup> This decision follows.

## ISSUES

The broad issue in this case is whether Appellant is eligible for a permit under the CHLAP rules. To resolve that issue, I must answer the following:

Did Appellant prove by preponderance of the evidence that he timely reported to ADF&G at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005)?

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<sup>6</sup> Original File Tab, Notice of Opportunity to Submit Evidence dated June 3, 2010.

<sup>7</sup> Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated July 16, 2010 (received by RAM on July 22, 2010).

<sup>8</sup> Original File Tab, IAD dated September 30, 2010.

<sup>9</sup> Pleadings Tab, Appellant's letter of appeal dated Nov. 17, 2010 (received by OAA on Nov. 30, 2010). See 50 C.F.R. § 679.43(d).

<sup>10</sup> Appeals Correspondence Tab, NAO's letter to Appellant dated February 16, 2011.

<sup>11</sup> See 50 C.F.R. § 679.43(g)(2), (k).

If the answer to the question is “no,” Appellant is not eligible for a permit, and I must uphold the IAD.

### FINDINGS OF FACT

1. Between 2001 and 2010, with the exceptions of 2004 and 2009, Appellant operated a charter fishing business.<sup>12</sup>
2. In 2005, Appellant timely and properly reported two bottomfish logbook fishing trips to ADF&G.<sup>13</sup>
3. Appellant did not timely report all of his bottomfish logbook fishing trips for his 2005 charter trips.<sup>14</sup>
4. In 2008, the Official Record confirms that Appellant timely and properly reported seventeen halibut logbook fishing trips to ADF&G.<sup>15</sup>
5. On March 19, 2010, Appellant signed a completed application for a CHP.<sup>16</sup>

### PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued the ADF&G Business Owner License.<sup>17</sup> This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP. 50 C.F.R. § 300.67(b)(1)(ii).

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<sup>12</sup> Original File Tab, Appellant Letter submitted with Application of Charter Halibut Permit(s) for IPHS Regulatory Areas 2C and 3A dated March 19, 2010 (received by RAM on March 26, 2010). Because Appellant did not operate a charter fishing business in 2004, he cannot rely on trips from that year to establish the minimum participation needed to be eligible for a CHP.

<sup>13</sup> Original File Tab, IAD dated September 30, 2010.

<sup>14</sup> Original File Tab, Appellant Letter submitted with Application of Charter Halibut Permit(s) for IPHS Regulatory Areas 2C and 3A dated March 19, 2010 (received by RAM on March 26, 2010). Appellant explained:

Our July 5<sup>th</sup>-11<sup>th</sup> charters were not reported, probably because I failed to mail the data in on time and decided not to risk a penalty for late submission. . . . Our July 28<sup>th</sup>-30<sup>th</sup> charter was not reported, probably because we left very early in August for Tucson. . . . For our July 11<sup>th</sup>-27<sup>th</sup> charters I documented fishing time only on two days that clients actually caught fish, though . . . in all likelihood, clients did fish for halibut . . . every evening of every trip during the month of July.

<sup>15</sup> Original File Tab, IAD dated September 30, 2010.

<sup>16</sup> Original File Tab, Application of Charter Halibut Permit(s) for IPHS Regulatory Areas 2C and 3A dated March 19, 2010 (received by RAM on March 26, 2010).

<sup>17</sup> An ADF&G Business Owner License includes a business registration, a sport fish business owner license, a sport fish business license, and an ADF&G business license. 50 C.F.R. § 300.67(b)(3).

Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent publication period, namely 2008. 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

A “logbook fishing trip” means 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 limits for reporting the trip in effect at the time of the trip. 50 C.F.R. § 300.67(f)(4). The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.<sup>18</sup>

A “bottomfish logbook fishing trip” means 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. 50 C.F.R. § 300.67(f)(2).

A “halibut logbook fishing tip” 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 area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing. 50 C.F.R. § 300.67(f)(3).

“Applicant selected year” means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and non transferable permits. 50 C.F.R. § 300.67(f)(1).

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits. 50 C.F.R. § 300.67(f)(5).

## ANALYSIS

To determine whether the IAD was consistent with the CHLAP regulations, I must consider whether Appellant has shown by a preponderance of the evidence that he is eligible for a CHP. The CHLAP’s general participation requirements mandate a minimal level of participation in the industry in certain areas in waters off the Alaska coast. More precisely, an applicant must prove his charter halibut fishing participation in two periods: the qualifying period (2004 or 2005) and the recent participation period (2008). To establish that he met those participation requirements, an applicant must show that he timely reported at least five bottomfish logbook fishing trips during 2004 or 2005 and at

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<sup>18</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

least five halibut logbook fishing trips in 2008. An applicant must report each logbook fishing trip to ADF&G within the applicable time limits.

Appellant does not dispute that he did not report five or more qualifying trips in 2004 or 2005. Appellant did not operate in 2004, and Appellant properly reported only two logbook fishing trips in 2005. Therefore, he cannot qualify for a permit under 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

Appellant asks NAO to consider his circumstances and unreported trips in 2005, and based on that, issue him a permit. The reasons Appellant articulates as a basis for eligibility for a permit are not recognized in the CHLAP regulations. Rather, it is Appellant's burden to show that he timely reported to ADF&G at least five trips in a logbook with the requisite information. In an attempt to meet that burden, Appellant submitted copies of his tax returns on which he reported income he made in his business. Appellant also submitted documents from clients and a worker stating they took charter trips with Appellant in 2005. However, Appellant notes that he did not report all of those trips to ADF&G.

Merely taking trips is not sufficient to meet participation requirements. The regulations require that the trip was a) timely reported, meaning within fourteen days of a charter trip; b) in a logbook assigned to Appellant based on his business license; and c) with certain information. Appellant has not shown that he submitted appropriate logbook pages to ADF&G within fourteen days for at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005). At best, Appellant's evidence shows he took charter trips, but not that he reported them in the manner and by the deadline established by law. Given all of the evidence, I have concluded, as indicated in the Findings of Fact section of this decision, that Appellant did not timely report more than two requisite trips to ADF&G for 2005; therefore, Appellant is not eligible for a permit.

In reaching my decision in this case, I carefully reviewed the entire record. I have read Appellant's concerns about his and his wife's retirement and understand the challenges he faces. However, under the CHLAP regulations, as analyzed above and as applied to this case, Appellant does not qualify for a CHP.

#### CONCLUSIONS OF LAW

Appellant is not eligible for a permit under the CHLAP rules as he did not prove by a preponderance of the evidence that he reported at least five bottomfish logbook fishing trips during either 2004 or 2005. The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated September 30, 2010 is upheld. This decision takes effect thirty days from the date issued, August 22, 2011, 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 elects to review this decision pursuant to 50 C.F.R. § 679.43(k), (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, August 1, 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.

  
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Eileen G. Jones  
Chief Administrative Judge

Date issued: July 21, 2011