

On October 26, 2010, RAM released the IAD at issue in this appeal.⁴ In the IAD, RAM denied Appellant's application and reasoned that the Official Record, which RAM uses to determine applicants eligibility, indicated that Appellant only took two bottomfish fishing trips in 2004. Since the applicable Charter Halibut Limited Access Program (CHLAP) regulations require a minimum of five qualifying trips, RAM found Appellant ineligible to receive a permit.⁵

On December 24, 2010, Appellant timely appealed the IAD to OAA.⁶ In the appeal, Appellant stated he did participate and log the minimal amount of trips needed in the 2004 and 2005 season and therefore should be issued a transferable permit. Appellant also included with his appeal copies of his logbook for 2004, his fish schedule for 2005, and copies of photographs.

On March 3, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until April 4, 2011, to supplement the record.⁷ Appellant's attorney submitted another letter reiterating Appellant's points as well as additional copies of the Appellant's logbook for 2004, his fish schedule for 2005, and copies of photographs. NAO made all of Appellant's submissions part of the case record.

Upon review of Appellant's appeal and case record, I have determined that the record contains sufficient information on which to reach a final judgment. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.⁸

ISSUES

At issue in this appeal is whether Appellant is eligible for a CHP. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence that he properly recorded and reported to the Alaska Department of Fish and Game (ADF&G) the minimum amount of logbook fishing trips in 2004 or 2005?

If the answer to the question is "no," I must uphold the IAD and conclude that Appellant does not qualify for a CHP.

⁴ Original File Tab, IAD.

⁵ Original File Tab, IAD page 2.

⁶ Pleadings File Tab, Appellant's appeal letter received on January 3, 2011.

⁷ Appeals Correspondence Tab, NAO letter dated March 3, 2011.

⁸ See 50 C.F.R. § 679.43 (g) and (k).

FINDINGS OF FACT

1. In 2004, ADF&G issued Appellant a license to operate his charter fishing business.⁹
2. In 2004, Appellant reported two bottomfish logbook fishing trips to ADF&G.¹⁰
3. In 2005, ADF&G issued Appellant a license to operate his charter fishing business.¹¹
4. In 2005, Appellant did not report any logbook trips to ADF&G.¹²
5. In 2008, ADF&G issued Appellant's a license to operate his charter fishing business.¹³
6. In 2008, Appellant reported to ADF&G ten halibut logbook fishing trips.¹⁴

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if an applicant meets certain requirements. One such requirement is that the applicant is an individual, or entity, to which ADF&G issued an ADF&G Business Owner License that authorized logbook fishing trips that meet minimum participation requirements.¹⁵ Minimum participation requirements to qualify for a nontransferable 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 participation period, namely 2008.¹⁶

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.¹⁷ The time limit to submit data about logbook fishing trips was within eight to fourteen days of a qualifying trip, as delineated in the logbooks.¹⁸

⁹ Original File Tab, Application Attachment of Logbook sign out for 2004.

¹⁰ Original File Tab, IAD; Original File Tab, Print Summary, created on January 26, 2010.

¹¹ Original File Tab, Application page 3.

¹² Original File Tab, IAD; Original File Tab, Print Summary, created on January 26, 2010.

¹³ Original File Tab, Application page 3.

¹⁴ Original File Tab, IAD; Original File Tab, Print Summary, created on January 26, 2010.

¹⁵ See 50 C.F.R. § 300.67(b)(1)(ii).

¹⁶ See 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

¹⁷ See 50 C.F.R. § 300.67(f)(4).

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

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period 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.¹⁹

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to ADF&G 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.²⁰

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS used the Official Record to implement the CHLAP, including evaluating applications for charter halibut permits.²¹

ANALYSIS

The issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to be eligible for a CHP. Under CHLAP regulations, minimum participation requirements for a CHP are: five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and; five or more halibut logbook fishing trips during the recent participation period, namely 2008.²²

As indicated in the Findings of Fact, Appellant properly reported ten halibut logbook fishing trips to ADF&G for 2008. Thus, Appellant meets minimum participation requirements for 2008. However, Appellant only reported two qualifying trips to ADF&G in 2004 and none in 2005. Since the CHLAP regulations require minimum participation in both 2004 or 2005 and 2008, Appellant does not meet the minimum participation requirements for a CHP.

On appeal Appellant explains that he disagrees with RAM’s determination that he had only two qualifying trips in 2004 and 2005. Appellant contends he took qualifying trips on twenty-one days in 2004 and twenty to twenty-five days in 2005.²³ Appellant argues those are reflected on the pages in his 2004 logbook where he used the term “Butts” to refer to halibut fished during the season. Appellant states he was unaware that such a term was not proper. Appellant argues the term “Butts” is commonly used as an abbreviation for “halibut.”

¹⁹ See 50 C.F.R. § 300.67(f)(2).

²⁰ See 50 C.F.R. § 300.67(f)(3).

²¹ See 50 C.F.R. § 300.67(f)(5).

²² See 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); 50 C.F.R. § 300.67(d)(1).

²³ Pleadings File Tab, Attorney’s Letter on behalf of Appellant dated May 16, 2011.

Instructions explaining how to complete the 2004 and 2005 Saltwater Charter Vessel Logbooks²⁴ were provided in the logbooks. With respect to recording halibut those instructions provided as follows:

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 3: Two Targets Salmon <u>and</u> Bottomfish (including halibut) Simultaneously (i.e., mooching)	. . . 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.
Example 4: A combination of any of the above	. . . 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.

²⁴ ADF&G Saltwater Logbooks for the years 2001 through 2011 are displayed on the NMFS, Alaska Region, web site at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

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.

If Appellant had followed the written instructions supplied with the 2004 and 2005 ADF&G Saltwater Charter Vessel Logbooks, his charter halibut fishing business activity would have been properly recorded and reported.

Appellant also cited ADF&G's failure to inform Appellant of his errors in marking his logbook correctly as the reason for his continuous mistake. Appellant claims ADF&G improperly recorded Appellant's halibut fishing activity in 2004 and 2005. Appellant's allegation that ADF&G misled Appellant by not telling him to correct his logbook, is not a basis under the CHLAP regulations for me to find he adequately reported his logbook trips and meets the minimum participation requirements. Further, in Appellant's logbooks I discovered at least one log was filled out completely and done correctly.²⁵ That entry illustrates Appellant's knowledge of how to correctly fill out a log book.

Additionally, when it published the Final Rule implementing the CHLAP, NMFS considered the issue of bottomfish reporting, and that some participants may have received confusing or conflicting advice from ADF&G officials. After due consideration of comments received on the Proposed Rule, NMFS stated:

If a business owner did not comply with specified reporting requirements, then the fishing trip will not be counted as either a bottomfish logbook fishing trip during the qualifying period or a halibut logbook fishing trip during the recent participation period for purposes of this rule. Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.²⁶

That rationale holds equally true if ADF&G did not tell Appellant that merely writing "Butts" would not be sufficient to give him credit for a logbook trip.

Appellant also argues that he "reasonably and sufficiently complied" with the CHLAP regulations logbook reporting requirements. Fifty CFR § 300.67(f)(2) provides that applicants will be given credit for "bottomfish logbook fishing trip" if they notate 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

²⁵ Pleadings File Tab, Attachment to Attorney's Letter on behalf of Appellant dated May 16, 2011. See Logbook entry 41562 dated May 4, 2004.

²⁶ Final Rule, 75 Fed. Reg. 554, 592 (January 5, 2010).

rods used from the vessel in bottomfish fishing.²⁷ As explained by NMFS in the Final CHLAP rules:

The principle documentation necessary to prove qualifying participation in the charter halibut fishery will be limited to saltwater charter vessel logbooks issued by ADF&G...[T]he basic unit of participation for receiving a charter halibut permit will be a logbook fishing trip, which is a trip that was reported to ADF&G in a saltwater charter logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip.”²⁸

Based on the record before me, Appellant did not notate any of the pieces of information listed in the regulations to establish he took at least five halibut fishing trips in 2004. Instead there are numerous logbook entries which only indicate “butts.” There are not at least five notations concerning 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.” As a result, Appellant has failed to establish that he properly reported his logbook fishing trips.

With respect to Appellant’s misplaced 2005 logbook, Appellant states he could testify that he fished for halibut twenty to twenty-five days in 2005 and that ADF&G ‘s “compilation failed to record those halibut fishing days.”²⁹ Even if I assume that Appellant took those charter halibut fishing trips, it does not show that Appellant fully completed the logs and timely provided them to ADF&G.

In his appeal, Appellant also states a witness can testify that Appellant’s charter trips were week-long and often eight days in length. The same witness could testify that in 2004 he fished eight days with Appellant, and that Appellant is an excellent guide. Even if I assume what Appellant proffers as testimony he would present at a hearing is accurate, he nevertheless will not prevail. The CHLAP regulations not only require that in point of fact a fishing trip occurred, but that it was properly reported to ADF&G. Properly reporting includes a timely report with certain information, as outline above, in a logbook or on a logbook page. Thus, even if Appellant took at least twenty trips, that does not mean he meets the regulatory requirements of a “bottomfish logbook fishing trip” within the meaning of 50 C.F.R. § 300.67(f)(2), as more fully explained above.

In reaching my decision about this case, I have carefully reviewed the entire record. I have been mindful of Appellant’s background and experience. I recognize Appellant’s long-standing charter operations and his interests in continuing in charter halibut fishing. However, I am bound to follow the CHLAP regulations, and as such, am not authorized to provide Appellant relief under the regulations and the facts of this case.

²⁷ See 50 CFR § 300.67(f)(2).

²⁸ 75 Fed.Reg. 554, 556 (2010).

²⁹ Pleadings File Tab, Appellant’s letter dated May 16, 2011, page 2.

CONCLUSIONS OF LAW

Only noting “Butts” in a logbook does not meet the requirements of 50 C.F.R. §§ 300.67(b)(1)(ii)(A) and 300.67(f)(2).

Appellant has not established by a preponderance of the evidence that he properly recorded and reported to ADF&G at least five logbook fishing trips for 2004 or 2005.

Because Appellant did not report at least five logbook fishing trips in 2004 or 2005, he is not eligible for a CHP.

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated October 26, 2010 is upheld. This decision takes effect thirty days from the date issued, August 29, 2011,³⁰ 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) 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 the tenth day after the date of this Decision, August 8, 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 in support of the motion.

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Eileen G. Jones
Chief Administrative Judge

Date Issued: July 29, 2011

³⁰ 50 C.F.R. § 679.43(k) and (o).