

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0005

DECISION

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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.<sup>1</sup>

The appeal under review was filed by [REDACTED] doing business as [REDACTED] (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 3, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup> 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 July 7, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>3</sup> In the Notice, RAM recognized that Appellant claimed eligibility for a CHP based on an unavoidable circumstance, but advised him that he did not appear to meet the requirements qualifying him for such a claim. RAM indicated that Appellant had until August 6, 2010, to submit any additional evidence in support of his claim. NAO did not receive any additional evidence from Appellant prior to the issue of the IAD.

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<sup>1</sup> 50 C.F.R. § 679.43.

<sup>2</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed February 19, 2010, received March 3, 2010.

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

On November 10, 2010, RAM sent Appellant the IAD at issue in this case.<sup>4</sup> In its IAD, RAM denied Appellant a permit because according to the Official Charter Halibut Record (Official Record) Appellant was not the individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued an ADF&G Business Owner License authorizing logbook fishing trips that met the minimum participation requirements outlined in the regulations.<sup>5</sup> RAM stated that the Official Record indicated in 2004, Appellant reported only one bottomfish logbook fishing trip, that in 2005, he reported only one such trip, and that in 2008, he reported only two such trips. RAM noted Appellant claimed eligibility for a CHP based on an unavoidable circumstance. RAM stated Appellant had the right to appeal the IAD to OAA and that any appeal must be received by January 10, 2011.

On November 19, 2010, Appellant sent a letter to RAM requesting a definition of "Mooching".<sup>6</sup> Appellant also indicated that he would be eligible for a CHP if NMFS used data from 1999 and 2002, and requested an explanation as to why data from those years was not used in determining CHP eligibility. On November 29, 2010, RAM sent Appellant a letter stating that "Mooching" is not a term used in determining eligibility for a CHP.<sup>7</sup> In response to Appellant's question regarding the selection of qualifying years used to determine eligibility for a CHP, RAM indicated both the qualifying and recent participation years were chosen in order to comply with the Magnuson-Stevens Act 303(b)(6), that 2004 and 2005 were used as the qualifying years because those were the most recent years for which charter halibut fishery participation information was available when the North Pacific Fisheries Management Council acted in early 2007, and that 2008 was used as the most recent year because it was the most recent year for which logbook data was available.

On January 10, 2011, Appellant appealed the IAD.<sup>8</sup> On March 3, 2011, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by April 4, 2011.<sup>9</sup>

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>10</sup>

## 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:

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<sup>4</sup> Original File Tab, IAD, dated November 10, 2010.

<sup>5</sup> 50 C.F.R. § 300.67 (b)(1)(ii).

<sup>6</sup> Original File Tab, type-written letter, dated November 19, 2010, received November 23, 2010.

<sup>7</sup> Original File Tab, RAM letter, dated November 29, 2010.

<sup>8</sup> Pleadings Tab, type-written letter, dated January 7, 2011, received January 10, 2011.

<sup>9</sup> Appeals Correspondence Tab, NAO letter, dated March 3, 2011.

<sup>10</sup> 50 C.F.R. § 679.43 (g)(2), (k).

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

2. If the answer to the above question is “no,” can Appellant prove by a preponderance of the evidence that he timely and properly reported to ADF&G at least five bottomfish logbook fishing trips during the one year recent participation period (2008), thereby establishing eligibility for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule?

3. If the answer to the question “2” above is “no,” Appellant is not eligible for a permit, and I must uphold the IAD.

### FINDINGS OF FACT

1. In 2004, Appellant timely and properly reported one bottomfish logbook fishing trip to ADF&G.<sup>11</sup>
2. In 2005, Appellant timely and properly reported one bottomfish logbook fishing trip to ADF&G.<sup>12</sup>
3. In 2008, Appellant timely and properly reported two halibut logbook fishing trips to ADF&G.<sup>13</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>14</sup> This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.<sup>15</sup>

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.<sup>16</sup>

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

<sup>11</sup> Original File Tab, IAD dated November 10, 2010; printed summary.

<sup>12</sup> Original File Tab, IAD dated November 10, 2010; printed summary.

<sup>13</sup> Original File Tab, IAD dated November 10, 2010; printed summary.

<sup>14</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).

<sup>15</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>16</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

Logbook within the time limits for reporting the trip in effect at the time of the trip.<sup>17</sup> 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.<sup>19</sup>

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.<sup>20</sup>

“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.<sup>21</sup>

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.<sup>22</sup>

If an applicant for a CHP cannot meet the participation requirements in one period, but does meet the participation requirements for the other period, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule.<sup>23</sup>

## ANALYSIS

The first 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.<sup>24</sup>

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<sup>17</sup> 50 C.F.R. § 300.67(f)(4).

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

<sup>19</sup> 50 C.F.R. § 300.67(f)(2).

<sup>20</sup> 50 C.F.R. § 300.67(f)(3).

<sup>21</sup> 50 C.F.R. § 300.67(f)(1).

<sup>22</sup> 50 C.F.R. § 300.67(f)(5).

<sup>23</sup> 50 C.F.R. § 300.67(g)(2).

<sup>24</sup> 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).

Appellant reported one logbook fishing trip to ADF&G in 2004, one logbook fishing trip to ADF&G in 2005, and two logbook fishing trips to ADF&G in 2008. Appellant, therefore, does not qualify for a CHP based on meeting participation requirements.

The next issue I must resolve in this appeal is whether Appellant is eligible for a CHP based on an unavoidable circumstance.

An applicant for a CHP that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period, may receive one or more charter halibut permits.<sup>25</sup> An applicant for a CHP that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period, may receive one or more permits.<sup>26</sup>

Appellant did not meet the participation requirements for either the recent participation period or for the qualifying period. As there are no provisions in the CHLAP regulations for an unavoidable circumstance claim where an applicant has not met the participation period requirements for either the recent participation period or the qualifying period, Appellant is not eligible for a CHP based on an unavoidable circumstance.

On appeal, Appellant argues it was unclear how to properly record bottomfish fishing in the logbooks, that data from 1999 and 2000 should be used in determining CHP eligibility, that he qualifies for a CHP based on his bottomfish logbook data from that time period, that in 2002, an ADF&G biologist told him that he did not need to log halibut, and that he should be allowed to correct his logbooks to more accurately reflect his charter vessel trips from 2002 to 2005. Appellant submitted letters from colleagues supporting his claim and from a former ADF&G employee indicating ADF&G gave incorrect information to charter vessel operators regarding filling out logbooks.

Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.<sup>27</sup> With respect to recording bottomfish trips, those instructions provided as follows:

BOTTOMFISH	
Primary Stat Area <b>(Incl. Halibut)</b>	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 ( <b>incl. halibut</b> ) and targeting salmon and halibut simultaneously. . . .

<sup>25</sup> 50 C.F.R. § 300.67(g)(1).

<sup>26</sup> 50 C.F.R. § 300.67(g)(2).

<sup>27</sup> 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>.

No. Boat Hours Fished	The number of boat hours that at least one rod/line was targeting bottomfish ( <b>incl. halibut</b> ) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew. . . . <b>Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected.</b> . . .
<b>NOTES AND EXAMPLES – RODS, BOAT HOURS</b>	
What species group was targeted? <b>Example 1:</b> 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. . . .
<b>Example 3:</b> 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.
<b>Example 4:</b> 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 targeting bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.
<b>SPECIAL NOTES AND INSTRUCTIONS</b>	
“Halibut”	The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to <b>record your effort</b> . 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 and 2008 logbooks. If Appellant had followed the written instructions supplied with the Saltwater Charter Vessel Logbooks, he would have properly recorded and reported his charter halibut fishing business activity. Further, some of Appellant's 2004, 2005, and 2008 logbooks were filled out completely and correctly, indicating Appellant possessed the knowledge necessary to correctly fill out a logbook.

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.<sup>28</sup>

The above NMFS statement is clear. Appellant's testimony and supporting documents regarding ADF&G misinformation are insufficient to overturn the IAD under the CHLAP regulations.

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), or the one year recent participation period (2008).

It is Appellant's burden to show that he properly reported to ADF&G at least five bottomfish fishing trips in a logbook with the requisite information during the qualifying and recent participation periods. Although Appellant claims he took at least five bottomfish fishing trips in 2004 or 2005, and in 2008, he did not properly report those trips to ADF&G in order to be eligible for CHP.

Appellant argues data from 1999 and 2000 should be used in determining CHP eligibility. When it published the Final Rule implementing the CHLAP, NMFS considered the issue of CHP eligibility requiring demonstration of historical participation in halibut charter fisheries. After due consideration of comments received on the Proposed Rule, NMFS stated:

The Council selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on

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<sup>28</sup> Final Rule, 75 Fed. Reg. 554, 592 (January 5, 2010).

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.<sup>29</sup>

[2008] was selected as the recent participation period because it is the most recent year for which NMFS has a complete record of saltwater charter vessel logbook data from the State of Alaska Department of Fish and Game (ADF&G).<sup>30</sup>

There are no provisions in the CHLAP regulations for using alternate years when determining CHP eligibility.<sup>31</sup>

In reaching my decision, I have carefully reviewed the entire record. I recognize Appellant's interest in continuing to fish for halibut. However, I am bound to follow the CHLAP regulations, and as such, Appellant does not qualify for a permit.

### 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 and 2008. Appellant is not eligible for a permit under the CHLAP unavoidable circumstance rules as he has not met the participation period requirements for either the recent participation period or the qualifying period. The IAD is consistent with CHLAP regulations.

### ORDER

The IAD dated November 10, 2010, is upheld. This decision takes effect thirty days from the date issued, December 15, 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 reverses, modifies, or remands this decision pursuant to 50 C.F.R. § 679.43 (k), (o).

<sup>29</sup> Final Rule, 75 Fed. Reg. 554, 563 (January 5, 2010).

<sup>30</sup> Final Rule, 75 Fed. Reg. 554, 555 (January 5, 2010).

<sup>31</sup> 50 C.F.R. § 300.67.

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 November 25, 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.



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Steven Goodman  
Administrative Judge

Date Issued: November 15, 2011