

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

In re Application of	)	
	)	
	)	Appeal No. 10-0035
	)	
Appellant	)	DECISION
	)	

---

**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.<sup>1</sup>

On August 16, 2010, , doing business as (dba)  (collectively referred to herein as Appellant), timely filed an appeal with NAO, challenging a NMFS Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated June 17, 2010.<sup>3</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>4</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>5</sup>

On March 26, 2010, Appellant applied for a CHP.<sup>6</sup> On May 3, 2010, RAM issued Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>7</sup> On June 17, 2010, RAM issued Appellant an IAD.<sup>8</sup> 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 properly record any bottomfish logbook fishing trips in 2004 or 2005. RAM indicated that these trips were below the minimum

---

<sup>1</sup> 50 C.F.R. § 679.43.

<sup>2</sup> Pleadings Tab, Appellant's letter of appeal dated August 16, 2010 (received by NAO on August 16, 2010).

<sup>3</sup> Original File Tab, IAD dated June 17, 2010.

<sup>4</sup> Regulations for issuing permits under CHLAP are published at 50 C.F.R. § 300.67.

<sup>5</sup> Original File Tab, IAD dated June 17, 2010.

<sup>6</sup> Original File Tab, Charter Halibut Permit Application, signed March 25, 2010, received March 26, 2010.

<sup>7</sup> Original File Tab, Notice of Opportunity to Submit Evidence dated July 7, 2010.

<sup>8</sup> Original File Tab, IAD dated June 17, 2010.

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>9</sup>

On August 16, 2010, Appellant timely filed his appeal with the NAO.<sup>10</sup> In his appeal, Appellant indicated that he has been a halibut guide for twenty-five years and that without a CHP the future of his business will be severely impacted.<sup>11</sup> On August 20, 2010, 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.<sup>12</sup> On October 13, 2010, NAO sent Appellant an Order Scheduling a Hearing.<sup>13</sup>

On November 10, 2010, Appellant testified during his scheduled hearing that in 2005, he was not aware that he needed to record his halibut charter vessel trips in his logbook during the qualifying period, and that an official from ADF&G told him that he did not need to record such trips in his logbook.<sup>14</sup> On November 16, 2010, NAO received a fax from Appellant including documentation supporting his claim.<sup>15</sup> Appellant's fax contained signatures from boat operators stating that they received instructions from ADF&G employees from 2002 to 2005, indicating there was no need for them to log guided halibut trips.<sup>16</sup>

I have determined that the information in the record is sufficient to render a decision.<sup>17</sup> I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

## 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)?

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

---

<sup>9</sup> Original File Tab, IAD dated June 17, 2010.

<sup>10</sup> Pleadings Tab, Appellant's letter of appeal dated August 16, 2010 (received by NAO on August 16, 2010). See 50 C.F.R. § 679.43(d).

<sup>11</sup> Pleadings Tab, Appellant's letter of appeal dated August 16, 2010 (received by NAO on August 16, 2010).

<sup>12</sup> Pleadings Tab, Initial Order.

<sup>13</sup> Pleadings Tab, Order Scheduling Hearing.

<sup>14</sup> Audio recording of November 10, 2010, scheduling hearing.

<sup>15</sup> Evidence Tab, fax cover sheet.

<sup>16</sup> Evidence Tab, faxed signatures.

<sup>17</sup> 50 C.F.R. § 679.43(g) (2).

## FINDINGS OF FACT

1. In 2004 and 2005, Appellant reported no bottomfish logbook fishing trips to ADF&G.<sup>18</sup>
2. In 2008, the Appellant met the minimum participation requirements.<sup>19</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>20</sup> This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.<sup>21</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>22</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 Logbook within the time limits for reporting the trip in effect at the time of the trip.<sup>23</sup> The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.<sup>24</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>25</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

---

<sup>18</sup> Original File Tab, IAD dated June 17, 2010.

<sup>19</sup> Original File Tab, IAD dated June 17, 2010; printed summary.

<sup>20</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>21</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>22</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

<sup>23</sup> 50 C.F.R. § 300.67(f)(4)

<sup>24</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

<sup>25</sup> 50 C.F.R. § 300.67(f)(2).

was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.<sup>26</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>27</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>28</sup>

### ANALYSIS

To determine whether the IAD was consistent with the CHLAP regulations, I must consider whether Appellant has established 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 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 claims he achieved minimum participation requirements to qualify for a CHP by participating in more than five bottomfish logbook fishing trips in one of the qualifying period, namely 2005. Specifically, Appellant claims he achieved minimum participation but did not report his applicable halibut charter vessel trips that year because he was unaware in 2005 that he needed to record those trips in his logbook. Appellant also claims an official from ADF&G told him that he did not need to record such trips in his logbook.

Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.<sup>29</sup> With respect to recording bottomfish trips, including halibut, 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

<sup>26</sup> 50 C.F.R § 300.67(f)(3).

<sup>27</sup> 50 C.F.R. § 300.67(f)(1).

<sup>28</sup> 50 C.F.R. § 300.67(f)(5).

<sup>29</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>.

	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. . . .
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 ( <b>including halibut</b> ) 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 in the 2005 ADF&G Saltwater Charter Vessel Logbook.

If Appellant had followed the written instructions supplied with the 2005 Saltwater Charter Vessel Logbook, he would have properly recorded and reported his charter halibut fishing business activity.

ADF&G required individuals to record all bottomfish trips, including those in which halibut was the target, in the logbooks. The instructions explained how an individual should record bottomfish trips targeting halibut.

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>30</sup>

In his appeal, Appellant claims that an official from ADF&G told him that he did not need to record halibut charter vessel trips in his logbook. Appellant submitted signatures from boat operators stating that they received similar instructions from ADF&G employees from 2002 to 2005. The above NMFS statement, however, is clear and Appellant's testimony and supporting signatures regarding statements made by ADF&G personnel are insufficient to overturn the IAD under the CHLAP regulations.

Although Appellant claims he was unaware in 2005, that he needed to record his halibut charter vessel trips in his logbook, there are no provisions in the applicable regulations authorizing a waiver of the CHLAP regulatory requirements due to a lack of knowledge.

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 2004 or 2005 qualifying period. Although Appellant claims he took at least five bottomfish fishing trips in 2005, Appellant did not report any of those trips as bottomfish fishing trips to ADF&G.

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

---

<sup>30</sup> Final Rule, 75 Fed. Reg. 554, 592 (January 5, 2010).

2005). Given all of the evidence, I have concluded that Appellant did not properly report any bottomfish fishing trips to ADF&G in 2004 or 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 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 June 17, 2010 is upheld. This decision takes effect thirty days from the date issued, November 2, 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).

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, October 13, 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.



Steven Goodman  
Administrative Judge

Date issued: October 3, 2011