

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

In re application of)
) Appeal No. 10-0095
)
 [REDACTED])
) DECISION
)
 Appellant)
)

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, Maryland, and maintains an office in NMFS's Alaska Region. NAO is the successor to the Office of Administrative Appeals, Alaska Region (OAA), and is charged with deciding appeals that were filed with OAA. NAO decides these appeals pursuant to the procedure established in federal regulation 50 C.F.R. § 679.43.

On November 15, 2010, [REDACTED] (Appellant), filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on September 17, 2010.¹ In the IAD, RAM evaluated Appellant's application for a permit under the Charter Halibut Limited Access Program (CHLAP).²

RAM determined that Appellant met the requirements for one non-transferable charter halibut permit, endorsed for International Pacific Halibut Commission (IPHC) Regulatory Area 3A, with an angler endorsement for a maximum number of six charter vessel anglers. IPHC Regulatory Area 3A is roughly Southcentral Alaska.³

RAM determined that Appellant did not meet the participation requirement for a transferable charter halibut permit in the recent participation period (2008). The participation requirement in the recent participation period for a transferable permit is fifteen halibut logbook fishing trips with one vessel.⁴ According to the official charter

¹ Letter from Appellant to OAA (Nov. 8, 2010, received Nov. 15, 2010). Appellant also submitted a supplemental letter and attachments in January 2011. Letter from Appellant to OAA (Jan. 24, 2011).

² The Charter Halibut Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67. These regulations and the appeal regulation at 50 C.F.R. § 679.43 are available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/regs/summary.htm>.

³ For the precise coordinates of IPHC Area 3A, see 50 C.F.R. § 300.61.

⁴ 50 C.F.R. § 300.67(d)(1)(ii).

halibut record, Appellant took five halibut logbook fishing trips in the recent participation period.

Appellant contends that he should receive a transferable permit for two reasons. First, he states that he took ten additional unreported halibut fishing trips in 2008 with friends and acquaintances and should get credit for these trips based on NMFS's answer to a question in the Small Entity Compliance Guide for the CHLAP. Second, Appellant states that economic conditions created a diminished client base in 2008 and that is why he did not meet the participation requirement of fifteen reported halibut logbook fishing trips.

Appellant also states that he should receive a transferable charter halibut permit because he has been in the charter halibut fishing business for fifteen years and because his failure to receive a transferable permit substantially decreases the value of his business. Appellant can file this appeal because he is directly and adversely affected by the IAD.⁵

I have carefully considered the record in this appeal and conclude that the record contains sufficient information upon which to decide this appeal.⁶ I did not order a hearing because Appellant has not alleged facts that, if true, authorize NMFS to issue a charter halibut permit.⁷ I therefore close the record and issue this decision.

ISSUES

1. Does Appellant meet the participation requirement for a transferable permit in the recent period because he took ten unreported charter halibut trips with friends and acquaintances in 2008?
2. Does Appellant meet the unavoidable circumstance regulation with respect to his participation in 2008 based on his claim that the economic conditions diminished his client base that year?

FINDINGS OF FACT

1. Appellant has operated a charter halibut fishing business in Alaska since 1995.⁸
2. Appellant reported fifteen or more bottomfish logbook fishing trips to the Alaska Department of Fish and Game (ADF&G) in 2004.⁹
3. Appellant reported five halibut logbook fishing trips to ADF&G in 2008.¹⁰

⁵ See 50 C.F.R. § 679.43(b).

⁶ 50 C.F.R. § 679.43(g)(2).

⁷ 50 C.F.R. § 679.43(g)(3).

⁸ Letter from Appellant to OAA (Nov. 8, 2010).

⁹ IAD at 3.

4. Appellant completed ten additional halibut fishing trips with friends or acquaintances in 2008 who gave him compensation in the form of money to cover expenses or other items of substantial value.¹¹
5. Appellant did not report these ten additional trips to ADF&G because he thought at the time they did not rise to the level of being charter trips.¹²
6. Appellant submitted a timely application for a charter halibut permit on March 24, 2010.¹³

PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the CHLAP, which is codified at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67. The Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.¹⁴

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁵

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 limits for reporting the trip in 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.¹⁶

An applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005, and a recent participation period, which is the sport fishing season for halibut in 2008.¹⁷

An applicant must prove different levels of participation for a non-transferable permit and for a transferable permit. To receive a non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook

¹⁰ IAD at 3.

¹¹ Letter from Appellant to Chief Administrative Judge with attachments (Jan. 25, 2011); Letter from Appellant to NAO (May 25, 2011).

¹² Letter from Appellant to NAO (May 25, 2011).

¹³ Application (received Mar. 24, 2010).

¹⁴ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

¹⁵ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁶ 50 C.F.R. § 300.67(f)(4).

¹⁷ 50 C.F.R. § 300.67(f)(6)-(7).

fishing trips in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License.¹⁸

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License.¹⁹

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.²⁰ If an applicant meets a minimum participation trip level in the qualifying period (2004 or 2005), but not the recent participation period (2008), the applicant may meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).²¹

Similarly, if an applicant meets a minimum participation trip level in the recent participation period (2008), but neither year in the qualifying period (2004 or 2005), the applicant may meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period.²²

For the reasons that follow, I conclude that RAM correctly determined that Appellant met the requirements for one non-transferable charter halibut permit with an angler endorsement of six for IPHC Area 3A and that Appellant did not meet the requirements for a transferable charter halibut permit.

ANALYSIS

1. Does Appellant meet the participation requirement for a transferable permit in the recent period because he took ten unreported halibut trips in 2008?

According to the official charter halibut record, Appellant took five halibut logbook fishing trips in the recent participation period. The official charter halibut record is the information prepared by NMFS on participation in the charter halibut fishing industry that NMFS will use to evaluate applications for charter halibut permits.²³

¹⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B). In 2004 and 2005, ADF&G did not require participants in the charter halibut fishery to report halibut specifically but did require participants to report halibut effort as bottomfish effort. Therefore, for 2004 and 2005, the regulation evaluates an applicant's participation by bottomfish logbook fishing trips, not halibut logbook fishing trips. Beginning in 2006, ADF&G required participants to report halibut specifically. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

¹⁹ 50 C.F.R. § 300.67(d)(1).

²⁰ 50 C.F.R. § 300.67(g).

²¹ 50 C.F.R. § 300.67(g)(1).

²² 50 C.F.R. § 300.67(g)(2).

²³ 50 C.F.R. § 300.67(g)(2).

Appellant initially stated he was not disputing that he took only five halibut logbook fishing trips in 2008.²⁴ Subsequently, Appellant stated that, based on NMFS's answer to Question Seven in the Small Entity Compliance Guide that NMFS posted on the web in January 2011, he realized that he probably should have reported ten additional trips he took in 2008 with friends and acquaintances.²⁵

Appellant submitted ten pages from an ADF&G Saltwater Charter Logbook, which are fully filled out with respect to ten additional, unreported trips in 2008. These pages have the name of the anglers, their ADF&G sport fish license numbers, the statistical areas where fishing occurred, the number of halibut kept and released, and the number of boat hours that the vessel engaged in bottomfish fishing.²⁶

Appellant filled out these logbook pages during the application process for a charter halibut permit by reviewing the ship's log that he keeps for every trip of whatever nature he takes with the boat. The passengers on these trips were friends or acquaintances who gave him compensation for the trips in 2008 either in the form of money that covered expenses or other items of substantial value. He did not report them in 2008 because at the time he thought they "probably didn't rise to the level of being considered a charter."²⁷

I have found that Appellant took these trips.²⁸ The logbook pages have four categories of licenses: "R" for resident; "N" for nonresident; "X" for comped; and "C" for crew.²⁹ For these trips, Appellant listed no licenses as comped or crew. He listed all the licenses as resident or nonresident:

- June 3, 2008 – resident licenses, 1
- June 8, 2008 – resident licenses, 2
- June 21, 2008 – resident licenses, 1
- June 22, 2008 – resident license, 1
- June 23, 2008 – resident license, 1
- July 28, 2008 – resident license, 1; nonresident license, 1
- July 29, 2008 – resident license, 1; nonresident license, 1
- September 2, 2008 – nonresident license, 4
- September 10, 2008 - resident license, 1; nonresident license, 2
- December 22, 2008 – resident license, 2.

Appellant is not stating that he ever submitted these logbook pages to ADF&G. Rather, Appellant is stating that the official charter halibut record is incomplete because he actually took these trips and, even though he did not submit these trip reports to ADF&G, he wishes to report them now. Appellant argues these trips should be added to the official charter halibut record. If these trips were added to the official record,

²⁴ Letter from Appellant to OAA (Nov. 8, 2010).

²⁵ Letter from Appellant to OAA (Jan. 24, 2011).

²⁶ Attachment to Letter from Appellant to OAA (Jan. 24, 2011).

²⁷ Letter from Appellant to NAO (May 25, 2011).

²⁸ Finding of Fact 4.

Appellant would have fifteen halibut logbook fishing trips and would meet the minimum participation requirements for a transferable permit.

Appellant's argument lacks merit. Appellant did not report these trips to ADF&G within the time limits for reporting the trips. A "halibut logbook fishing trip" is a regulatory term that means "a logbook fishing trip in the recent participation period [2008] 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."³⁰ The requirement that a trip was "reported" is restated in the regulation that establishes the minimum participation criteria for a transferable permit:

- (i) *Reported* fifteen (15) bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period; and
- (ii) *Reported* fifteen (15) halibut logbook fishing trips or more from the same vessel during the recent participation period.³¹

In the proposed rule, NMFS addressed whether an applicant could add trips to the official charter halibut record if the applicant had not reported them to ADF&G when the trips occurred:

A logbook fishing trip would be an event that was reported to ADF&G in a logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. . . . If a trip was not reported within those time limits, NMFS would not consider it a logbook fishing trip for purposes of this proposed rule, and it would not serve as the basis for NMFS to issue a charter halibut permit. *Hence, a permit applicant could not add a trip to the official record years after the trip should have been reported to the State.*³²

In the commentary to the final rule, NMFS restated that proposition:

As stated above, the 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. *If a trip was not reported within those time limits, NMFS will not consider it a logbook fishing trip for purposes of a charter halibut permit application.*³³

Thus, the participation requirement is not simply that an applicant took a charter halibut trip but that the trip was reported in a logbook to ADF&G in accord with ADF&G time

³⁰ 50 C.F.R. § 300.67(f)(3)(definition of halibut logbook fishing trip); 50 C.F.R. § 300.67(f)(4)(definition of logbook fishing trip).

³¹ 50 C.F.R. § 300.67(d)(1)(i)-(ii) (emphasis added).

³² Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009) (emphasis added).

³³ Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010) (emphasis added).

limits. These trips occurred between June and December 2008. Appellant sought to report them to NMFS in January 2011.

The instructions contained in the 2008 ADF&G Saltwater Charter Logbook state that trips had to be reported weekly:

RETURN THE LOGBOOK REPORTS WEEKLY

All charter fishing activity that occurs between April 7, 2008 through December 31, 2008 must be received by ADF&G offices or postmarked per the **WEEKLY** schedule provided on the inside cover of this logbook.

Fishing activity that occurs prior to April 7, 2008, is due to ADF&G by April 14, 2008.

*A trip that consists of no paying clients, that is, all anglers are "comped", would NOT be considered a chartered trip and a logbook data sheet should not [be] completed.*³⁴

These instructions also make clear that Appellant was under an obligation to report these trips. These trips did not consist of "no paying clients." They were paying clients, although they did not pay his standard price and sometimes paid with items of value besides money.

Appellant notes that NMFS has posted on its website a Small Entity Compliance Guide that has Frequently Asked Questions.³⁵ Question Seven is: "I am a licensed guide; do I need a CHP [charter halibut permit] onboard to take friends, family, or neighbors fishing even if they are not paying me?" NMFS initially answered that a licensed guide would have to have a charter halibut permit onboard if there were any anglers catching and retaining halibut on board, whether the anglers were paying or non-paying.³⁶

NMFS revised its answer to Question Seven to state:

It depends. A CHP is required to be onboard a vessel if both of the following conditions are met: (1) one or more persons onboard are catching and retaining halibut; and (2) a person onboard is compensated in any way to provide sport fishing guide services. Each angler does not have to be individually compensating the person providing assistance. Compensation is also not strictly limited to a monetary exchange and can include a trade of goods or services in exchange for taking someone fishing. There might be circumstances where reimbursement of expenses would qualify as compensation and some where it would not. NMFS will

³⁴ 2008 Logbook Instructions at iii (italics added). The weekly schedule was on the inside cover of the book.

³⁵ Letter from Appellant to NAO (May 25, 2011).

³⁶ Small Entity Compliance Guide for CHLAP, posted on NMFS AKR website (Jan. 6, 2011), Exhibit 1 to Order Adding Documents to Record and Establishing a Deadline for Additional Argument and Evidence (May 18, 2011)

evaluate the specific circumstances of a fishing trip to determine if a charter vessel guide is receiving compensation to assist a person to take or attempt to take halibut while sport fishing.³⁷

Appellant argues that because he will need a charter halibut permit in the future to take his friends and acquaintances on a charter halibut trip where they pay for expenses, he should get credit for trips in the past where he took friends and acquaintances and they paid for expenses.³⁸ Appellant would have gotten credit for the trips he took in the past, where friends and acquaintances compensated him for the trips, if he had reported them to ADF&G in accordance with ADF&G logbook instructions.

I conclude that these trips are not “halibut logbook fishing trips,” as defined by federal regulation, because Appellant was required to report them to ADF&G and he did not. I therefore conclude that Appellant does not meet the participation requirement in the recent period for a transferable permit.

2. Does Appellant meet the unavoidable circumstance regulation with respect to his participation in 2008 based on his claim that economic conditions diminished his client base that year?

Appellant claims that the economic downturn in 2008 created a diminished client base and that is why he did not take fifteen halibut logbook fishing trips in that year. Appellant does not satisfy the unavoidable circumstance regulation for two reasons.

First, only applicants who will be excluded entirely from the charter halibut fishery may make an unavoidable circumstance claim.³⁹ The unavoidable circumstance regulation explicitly states: “This unavoidable circumstance provision cannot be used to upgrade the number of permits issued or to change a non-transferable permit to a transferable permit.”⁴⁰ Appellant meets the requirements for a non-transferable permit. Therefore, he cannot make a claim under the unavoidable circumstance regulation for a transferable permit.

Second, under the unavoidable circumstance regulation, the applicant’s intent to participate in the charter halibut fishery must have been thwarted by a circumstance that is unique to the owner of the charter halibut business.⁴¹ A nationwide economic downturn is the classic case of a circumstance that is not unique. The entire industry faced that circumstance in 2008. Therefore, even if Appellant could make a claim under the unavoidable circumstance regulation, I conclude that the circumstance he alleges is not unique to him.

³⁷ Small Entity Compliance Guide for CHLAP (revised June 29, 2011), available on NMFS Alaska Region website: <http://www.fakr.noaa.gov/sustainablefisheries/halibut/charter/faq.pdf>.

³⁸ Letter from Appellant to NAO (May 25, 2011).

³⁹ 50 C.F.R. § 300.67(g).

⁴⁰ 50 C.F.R. § 300.67(g).

⁴¹ 50 C.F.R. § 300.67(g)(1)(ii)(B).

Finally, Appellant asks that NMFS issue him a transferable permit because he has operated a charter halibut fishing business since 1995. Appellant did not operate his charter halibut fishing business in the recent period, namely the year 2008, at the level required by regulation for a transferable permit, namely fifteen halibut logbook fishing trips.⁴²

I acknowledge Appellant's concern that his business will be worth less with a non-transferable permit than a transferable permit and that he will not be able to pass on to his children a business with a transferable permit.⁴³ I do not have authority to consider these factors because the charter halibut regulation does not provide that NMFS may consider those factors in evaluating an application for a charter halibut permit.

It would be arbitrary if, on appeal, I ordered an applicant to receive a permit on the grounds that the applicant had operated a charter halibut fishing business since 1995 or the applicant wished to pass on his business to his children, when neither is a basis for a transferable permit in the charter halibut regulation. If this applicant had the opportunity to receive a transferable permit on those grounds, all other applicants should have the same opportunity. But NMFS evaluated all applications for charter halibut permits according to published regulations that were adopted by the Secretary of Commerce.

I can only order that NMFS issue a transferable charter halibut permit if Appellant shows he meets the requirements in federal regulation for such a permit. Appellant has not shown that and therefore I uphold the IAD that is the subject of this appeal.

CONCLUSIONS OF LAW

1. Appellant does not meet the requirements for a transferable permit in the recent participation period because he did not timely report at least fifteen halibut trips to ADF&G in 2008.
2. Appellant cannot make a claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), for a transferable permit because he is qualified to receive a non-transferable permit.
3. Appellant does not satisfy the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), with respect to his participation in 2008 based on his claim that he would have had fifteen reported halibut logbook fishing trips in 2008 if economic conditions had not created a diminished client base. Economic conditions are not a unique circumstance within the meaning of 50 C.F.R. § 300.67(g)(1)(ii)(B).

⁴² 50 C.F.R. § 300.67(d)(1)(ii).

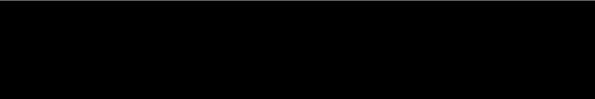
⁴³ Letter from Appellant to OAA (Nov. 8, 2010).

4. Despite Appellant's history of participation in the charter halibut fishing industry, NMFS cannot issue a permit if the applicant does not meet the requirements in the CHLAP regulations.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on November 2, 2011, unless by that date the Regional Administrator reverses, remands, or modifies 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.



Mary Alice McKeen
Administrative Judge

Date issued: October 3, 2011