

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

In re Application of )  
 )  
 [REDACTED] ) Appeal No. 11-0002  
 [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 January 10, 2011, [REDACTED] doing business as (dba) [REDACTED] (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 November 12, 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>

On April 5, 2010, Appellant applied for a CHP.<sup>5</sup> On July 7, 2010, RAM issued Appellant a Notice of Opportunity to Submit Evidence (Notice).<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

<sup>1</sup> Pleadings Tab, Appellant's letter of appeal dated January 10, 2011 (received by NAO on January 10, 2011), submitted by [REDACTED] attorney for [REDACTED]

<sup>2</sup> Original File Tab, IAD dated November 12, 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, Charter Halibut Permit Application, signed March 25, 2010, received April 5, 2010.

<sup>6</sup> Original File Tab, Notice of Opportunity to Submit Evidence dated July 7, 2010.

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 submitting additional documentation supporting his claim.<sup>7</sup>

On November 12, 2010, RAM issued Appellant an IAD. In the IAD, RAM denied Appellant a permit because he lacked the requisite logbook trips as explained in the Notice. RAM noted the Official Record showed Appellant properly recorded only three bottomfish logbook fishing trips in 2004, and that he reported no bottomfish logbook fishing trips in 2005. RAM indicated that these trips were 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 January 10, 2010, Appellant timely filed his appeal with the NAO.<sup>9</sup> On March 3, 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 April 4, 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>

## 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.

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<sup>7</sup> Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated August 1, 2010 (received by RAM on August 5, 2010).

<sup>8</sup> Original File Tab, IAD dated November 12, 2010.

<sup>9</sup> Pleadings Tab, Appellant's letter of appeal dated January 10, 2011 (received by NAO on January 10, 2011). See 50 C.F.R. § 679.43(d).

<sup>10</sup> Appeals Correspondence Tab, NAO's letter to Appellant dated March 3, 2011.

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

## FINDINGS OF FACT

1. In 2004, Appellant timely and properly reported three bottomfish logbook fishing trips to ADF&G.<sup>12</sup>
2. In 2005, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.<sup>13</sup>
3. In 2008, the Official Record indicates that Appellant timely and properly reported twenty-seven halibut logbook fishing trips to ADF&G.<sup>14</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>15</sup> This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.<sup>16</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>17</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>18</sup> The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.<sup>19</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>20</sup>

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<sup>12</sup> Original File Tab, IAD dated November 12, 2010; Printed Summary .

<sup>13</sup> Original File Tab, IAD dated November 12, 2010; Printed Summary .

<sup>14</sup> Original File Tab, IAD dated November 12, 2010.

<sup>15</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>16</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>17</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

<sup>18</sup> 50 C.F.R. § 300.67(f)(4).

<sup>19</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

<sup>20</sup> 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.<sup>21</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>22</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>23</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.

The Official Record does not indicate Appellant timely reported to ADF&G at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005). Specifically, the Official Record showed Appellant properly recorded only three bottomfish logbook fishing trips in 2004, and that he reported no bottomfish logbook fishing trips in 2005.

Appellant claims he achieved minimum participation requirements to qualify for a CHP by participating in more than five bottomfish logbook charter vessel trips during both years of the qualifying period, namely 2004 or 2005,<sup>24</sup> and that the ADF&G logbooks in 2004 and 2005 were unclear regarding how to log halibut charter vessel trips.<sup>25</sup>

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<sup>21</sup> 50 C.F.R. § 300.67(f)(3).

<sup>22</sup> 50 C.F.R. § 300.67(f)(1).

<sup>23</sup> 50 C.F.R. § 300.67(f)(5).

<sup>24</sup> Original File Tab, Addendum to Application for Charter Halibut Permit, dated April 2, 2010, received April 5, 2010.

<sup>25</sup> Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated August 1, 2010 (received by RAM on August 5, 2010).

Specifically, Appellant claims that most of the trips in which he operated a charter vessel were combined trips in which he fished salmon and halibut.

Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.<sup>26</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 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> . . .
Notes and Examples – Rods, Boat Hours	
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

<sup>26</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>.

	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).

If Appellant had followed the written instructions supplied with the 2004 Saltwater Charter Vessel Logbook, he would have properly recorded and reported his charter halibut fishing business activity.

The logbooks required individuals to record all bottomfish trips, including those in which halibut was the target. The instructions explained how an individual should record bottomfish trips targeting halibut, and Appellant correctly followed these instructions to properly record three 2004 bottomfish fishing trips that targeted halibut.<sup>27</sup> This indicates Appellant possessed the knowledge necessary to correctly record a bottomfish fishing trip in a logbook.

There were similar instructions in the 2005 ADF&G Saltwater Charter Vessel Logbook.

I recognize Appellant found the 2004 and 2005 logbook instructions confusing. Before NMFS adopted the CHLAP regulations, it considered the issue of bottomfish reporting. After reviewing 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...a bottomfish logbook fishing trip during the qualifying period.<sup>28</sup>

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. In an attempt to meet that burden, Appellant submitted client affidavits from his 2004 combination fishing trips. However, Appellant did not report all 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.

<sup>27</sup> See Original File Tab, Copy of Appellant's Logbooks received April 5, 2010.

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

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). Given all of the evidence, I have concluded that Appellant did not properly report more than three bottomfish fishing trips to ADF&G in 2004, and no bottomfish trips to ADF&G in 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 November 12, 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 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, 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 13, 2011