

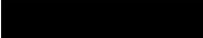
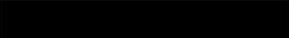
NATIONAL APPEALS OFFICE  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL OCEANIC and ATMOSPHERIC ADMINISTRATION

In re Application of	)	
	)	
	)	Appeal No. 10-0111
	)	
	)	DECISION
Appellant	)	
	)	

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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 7 C.F.R. § 679.43.

In an Initial Administrative Determination (IAD) issued to  doing business as (dba)  (collectively referred to herein as Appellant), NMFS's Restricted Access Management program (RAM) denied Appellant a permit to operate a charter halibut business in certain waters off the coast of Alaska.<sup>1</sup> That denial was made pursuant to regulations for issuing permits under the Charter Halibut Limited Access Program (CHLAP) published at 50 C.F.R. § 300.67. The basis for the denial was Appellant's lack of an appropriate business license and sufficient official logbook information for 2004 or 2005, and 2008, as required under 50 C.F.R. § 300.67(b)(1)(i) and (ii) and 50 C.F.R. § 300.67(f)(4).

The facts that led to the IAD begin with Appellant applying for a charter halibut permit (CHP or permit) on March 11, 2010.<sup>2</sup> RAM made a preliminary assessment that it seemed unlikely, based on the information in the Official Record, that Appellant would qualify for a permit. RAM notified Appellant of its preliminary assessment in a Notice of Opportunity to Submit Evidence (Notice) dated July 13, 2010.<sup>3</sup> According to RAM, the Official Record showed Appellant recorded no qualifying bottomfish logbook trips in 2004 and 2005 and only two halibut logbook trips for 2008.<sup>4</sup> Since Appellant would

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<sup>1</sup> RAM administers the CHLAP.

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

<sup>3</sup> Original File Tab, Notice of Opportunity to Submit Evidence dated July 13, 2010.

<sup>4</sup> Original File Tab, Notice of Opportunity to Submit Evidence dated July 13, 2010; Original File Tab, Print Summary created January 26, 2010.

need five trips in 2004 or 2005 and in 2008, it did not appear that Appellant would qualify for a permit. However, RAM informed Appellant that he could submit evidence to show that the Official Record was wrong.

By letter dated August 10, 2010, Appellant responded to RAM's Notice.<sup>5</sup> In six numbered paragraphs, Appellant argued in his response: one, he was unaware of the CHLAP when he was issued a guide and business license; two, RAM was not authorized to issue preliminary decisions in the form of the Notice; three, the CHLAP rules were not fair because of his participation in the charter fishing industry; four, NMFS violated the Halibut Act and Magnuson-Stevens Fishery Conservation and Management Act by enacting the CHLAP; five, NMFS may not develop community development quotas in Areas 2C and 3A under existing law, and; six, NMFS is providing incentives for permit holders to not support non-permit holders in their efforts to obtain permits.

On October 13, 2010, RAM sent Appellant the IAD at issue in this case. In the IAD RAM denied Appellant a permit, because he lacked the requisite logbook trips as explained in the Notice and as reiterated in the IAD. RAM noted the Official Record showed no such trips for 2004 or 2005 and only two for 2008.<sup>6</sup>

On December 9, 2010, Appellant timely filed an appeal with OAA.<sup>7</sup> On February 16, 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 March 18, 2011.<sup>8</sup> By letter dated March 17, 2011, Appellant responded to NAO's February 16, 2011 correspondence.<sup>9</sup>

In his appeal correspondence, Appellant takes issue with RAM's conclusion that he was not the "individual or...entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business License Owner Licenses that authorized the logbook fishing trips that met all the minimum participation requirements outlined in 50 CFR 300.67(b)(1)(ii)(A) and (B)."<sup>5</sup> Appellant is also appealing because if denied a permit, he feels he would unjustly lose his business because he relies on chartering income to meet his expenses. Appellant also feels he is being discriminated against and that the government is engaging in a redistribution without due process. Appellant believes he is being denied a permit even though he has historically been involved in the halibut charter industry while others are getting permits without history in the industry, including certain villages. For similar reasons, Appellant thinks the CHLAP violates his constitutional rights to equal protection. Appellant explains that using 2004/2005 and 2008 as benchmark years is arbitrary and capricious. Appellant states in 2002 he began planning to start a charter fishing business. Appellant began his charter fishing operation in 2007, but had he known of the CHLAP, he would probably

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<sup>5</sup> Original File Tab, Appellant's letter dated December 8, 2010.

<sup>6</sup> Original File Tab, IAD dated October 13, 2011. .

<sup>7</sup> Pleadings Tab, Appeal letter dated December 8, 2010.

<sup>8</sup> Appeals Correspondence Tab, letter dated February 16, 2011.

<sup>9</sup> Pleadings Tab, Appellant's letter dated March 17, 2011.

have started sooner. Appellant does not believe NMFS gave adequate notice of the program. Appellant believes he can show historical participation in the industry based on his logbook records from 2008, 2009, and 2010.

Appellant does not like NMFS's response to a comment he made to the Final Rule because in the comment NMFS suggested that instead of halibut Appellant could target other species of fish. Appellant claims NMFS intentionally misled the public by stating CHPs were expected to be available for approximately \$5,000. According to Appellant, had NMFS disclosed the true value of a CHP, the harm the CHLAP would cause would have been obvious and precluded the agency from circumventing the Regulatory Impact Review. Appellant states that the private market value of a CHP is between \$100,000 and \$195,000, an amount he can ill afford. Appellant thinks it is unfair that he faces buying a permit at such high cost. Appellant also thinks NMFS knowingly falsified the economic impact of the regulations because with a 40% reduction in the fleet of charters, there are not enough charter boats to accommodate the demand for charter fishing trips. Appellant thinks overall the CHLAP regulations violate his constitutional right to due process.

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:

Did Appellant prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005?

If the answer to Question 1 is "no," Appellant is not eligible for a permit and I must uphold the IAD.

## FINDINGS of FACT

1. Appellant did not hold an ADF&G Business Owner License for 2004 or 2005.<sup>11</sup>
2. Appellant did not report any qualifying logbook fishing trips to ADF&G for 2004 or 2005.<sup>12</sup>

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

<sup>11</sup> Original File Tab, Print Summary created on January 26, 2010. I also base this finding on lack of affirmative evidence in the record proving Appellant did in fact hold such a license.

<sup>12</sup> Original File Tab, IAD dated October 13, 2010; Original File Tab, Print Summary created January 26, 2010.

3. In 2007, Appellant sought an ADF&G Business Owner License.<sup>13</sup>
3. Appellant reported two qualifying logbook fishing trips to ADF&G for 2008.<sup>14</sup>
4. On March 11, 2010, Appellant applied to NMFS for a CHP.<sup>15</sup>
5. On Appellant's application for a CHP, Appellant indicated he took two qualifying logbook trips in 2008 and twenty-two logbook trips in 2009.<sup>16</sup>

### PRINCIPLES of LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or non-individual entity, to which ADF&G issued an ADF&G Business Owner License that authorized logbook fishing trips that meet minimum participation requirements.<sup>17</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 participation period, namely 2008.<sup>18</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 [ADF&G] in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.<sup>19</sup> 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.<sup>20</sup>

A "bottomfish logbook fishing trip" means a logbook fishing trip in the qualifying period that was reported to the State of Alaska [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.<sup>21</sup>

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<sup>13</sup> Pleadings Tab, Appellant's letter dated March 17, 2011.

<sup>14</sup> Original File Tab, IAD dated October 13, 2010; Original File Tab, Print Summary created January 26, 2010.

<sup>15</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>16</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>17</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>18</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

<sup>19</sup> 50 C.F.R. § 300.67(f)(4).

<sup>20</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

<sup>21</sup> 50 C.F.R. § 300.67(f)(2).

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to the State of Alaska [ADF&G] 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>22</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 nontransferable permits.<sup>23</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>24</sup>

## ANALYSIS

### **Did Appellant prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005?**

To be eligible for a CHP, one of the most basic requirements is proof of participation in the charter halibut industry. To be more precise and as pertaining to the particular regulatory requirements relevant to the case before me, an appellant must prove his charter halibut fishing participation in two periods: one, known as the qualifying period, which occurred in 2004 or 2005; two, known as the recent participation period, which occurred in 2008. To establish that he met those participation requirements, an applicant must show that for 2004 or 2005 he timely reported at least five bottomfish logbook fishing trips and for 2008 he timely reported at least five halibut logbook fishing trips. To be a qualifying trip, it must have been timely reported to ADF&G in a logbook issued pursuant to an appellant’s ADF&G Business Owner Licensee.

Appellant does not dispute he did not report five or more qualifying trips in 2004 or 2005. Indeed, on Appellant’s application for a CHP and attached “Letter to accompany Charter Halibut Limited Entry Permit application...,” Appellant indicated his halibut trips occurred in 2008 and 2009. Further, Appellant notes in his appeal paperwork that in “2007 I decided to go ahead and get the business going.”<sup>25</sup> Appellant states that “I

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<sup>22</sup> 50 C.F.R. § 300.67(f)(3).

<sup>23</sup> 50 C.F.R. § 300.67(f)(1).

<sup>24</sup> 50 C.F.R. § 300.67(f)(5).

<sup>25</sup> Pleadings tab, Appellant’s letter dated March 17, 2011.

have been actively participating in the charter halibut fishery 2008, 2009, and 2010.”<sup>26</sup> Appellant’s statements are confirmed by the Official Record which shows Appellant reported no qualifying trips in 2004 and 2005, and just two for 2008.

Since Appellant would need at least five qualifying trips in 2004 or 2005 and in 2008, he does not meet the basic participation requirements for a CHP. As such, NMFS followed CHLAP regulations in denying Appellant a permit.

In reaching this Decision, I have carefully reviewed the entire record, including Appellant’s contentions presented on appeal. I will address Appellant’s central arguments. First, Appellant takes issue with RAM’s conclusion that he was not the “individual or...entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business License Owner Licenses [sic] that authorized the logbook fishing trips that met all the minimum participation requirements outlined in 50 CFR 300.67(b)(1)(ii)(A) and (B).” As indicated previously, by his own admission and based on the Official Record, Appellant did not seek an ADF&G Business Owner License until 2007. Further, without such a license in 2004 and 2005, Appellant did not report logbook fishing trips.

Second, Appellant is appealing because if denied a permit, he feels he would unjustly lose his business because he relies on chartering income to meet his expenses. Although I have read Appellant’s concern with care, the CHLAP regulations do not provide relief based on perceived unfairness. CHLAP eligibility criteria is based on history in the industry as outlined previously, and under that criteria, Appellant is not eligible for a permit.

Third, Appellant feels he is being discriminated against and that the government is engaging in a redistribution without due process. Appellant believes he is being denied a permit even though he has historically been involved in the halibut charter industry while others are getting permits without history in the industry, including certain villages. For similar reasons, Appellant thinks the CHLAP violates his constitutional rights to equal protection. Appellant has been provided due process. NMFS provided notice of the administrative process and multiple and meaningful opportunities to be heard, including the application process, the Notice, the IAD and administrative appeal which also included a letter from NAO providing Appellant with an opportunity to submit additional information after he had filed his appeal paperwork. To the extent Appellant feels he is being treated differently from other Appellants or applicants, the record does not support his claim. Further, this appeal concerns Appellant, not the records or situations of other applicants or appellants.

Fourth, Appellant explains that using 2004/2005 and 2008 as benchmark years is arbitrary and capricious. Appellant states in 2002 he began planning to start a charter fishing business. Appellant began his charter fishing operation in 2007, but had he known of the CHLAP, he would probably have started sooner. Appellant does not

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<sup>26</sup> Pleadings tab, Appellant’s letter dated March 17, 2011.

believe NMFS gave adequate notice of the program. Appellant believes he can show historical participation in the industry based on his logbook records from 2008, 2009, and 2010.

NMFS chose the years 2004/2005 and 2008 based on the best objective data that was available at the time the program and regulations were being developed.<sup>27</sup> As explained by NMFS:

The [North Pacific Fishery Management] Council determined the level of minimum participation in both years—the historical, 2004 or 2005, and present participation, 2008—indicated a reasonable dependence on the charter fishing industry...[C]harter halibut businesses that participated only in the recent period but not in the historical period likely entered the fishery after the control date [December 9, 2005].<sup>28</sup>

NMFS also explained that the North Pacific Fishery Management Council “selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on participation in the charter halibut fishery when it acted in early 2007.”<sup>29</sup> The year 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” ADF&G.<sup>30</sup> Further, in several places in the preamble to the Final Rule, NMFS explained why it used 2004/2005 and 2008 for the participation periods. For example:

The [North Pacific Fishery Management] 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 the 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.<sup>31</sup>

Fifth, Appellant does not like NMFS’s response to a comment he made to the Final Rule because in the comment NMFS suggested that instead of halibut Appellant could target other species of fish. Under the provisions of the CHLAP regulations, that argument is not a basis to overturn the IAD.

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<sup>27</sup> 75 Fed. Reg. 554, 591-593 (January 5, 2010).

<sup>28</sup> 75 Fed. Reg. 554, 560, 564 (January 5, 2010). NMFS explained in the preamble to the Final Rule that businesses that entered into the fishery after the control date were “discouraged from entry by announcing that their participation would not necessarily be recognized (71 FR 6442, February 8, 2006).” 75 Fed. Reg. 554, 560 (January 5, 2010).

<sup>29</sup> 75 Fed. Reg. 554, 564 (January 5, 2010).

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

<sup>31</sup> 75 Fed. Reg. 554, 564 (January 5, 2010).

Sixth, Appellant claims NMFS intentionally misled the public by stating CHPs were expected to be available for approximately \$5,000. According to Appellant, had NMFS disclosed the true value of a CHP, the harm the CHLAP would cause would have been obvious and precluded the agency from circumventing the Regulatory Impact Review. Appellant states that the private market value of a CHP is between \$100,000 and \$195,000, an amount he can ill afford. Appellant thinks it is unfair that he faces buying a permit at such high cost.

In response to Appellant's concerns about the cost of permits, I note that other than his own statements, Appellant did not present evidence to support his argument that at the time the CHLAP was being developed, NMFS's inappropriately under-valued the anticipated future market value of a permit. Nor has Appellant cited a provision of the CHLAP regulations that support the proposition that based on the current value for a CHP, he should be deemed eligible for a permit even though he does not meet the substantive requirements for one.

Seventh, Appellant thinks NMFS knowingly falsified the economic impact of the regulations because with a 40% reduction in the fleet of charters, there are not enough charter boats to accommodate the demand for charter fishing trips. While I do not doubt Appellant's opinion, the record does not show that Appellant's concern in point of fact exists. In any event, even if accurate, the CHLAP regulations do not support Appellant's claim as a basis for overturning the IAD.

Lastly, Appellant thinks overall the CHLAP regulations violate his constitutional right to due process. As indicated above, Appellant has been provided notice and an opportunity to be heard throughout a fair and impartial administrative process. I find Appellant has not been denied due process of law.

To summarize, I have carefully considered Appellant's concerns raised in the appeal. However, under the CHLAP regulations, as analyzed above and as applied to this case, Appellant does not qualify for a CHP.

## CONCLUSION

Appellant did not prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005 and 2008.

Appellant is not eligible for a permit under the CHLAP rules.

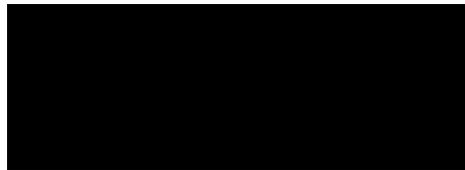
The IAD is consistent with CHLAP regulations.

Appellant was not denied due process of law throughout the administrative process.

ORDER

The IAD dated October 13, 2010 is upheld. This decision takes effect thirty (30) days from the date issued, November 18, 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 31, 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.



Eileen G. Jones  
Chief Administrative Judge

Date issued: October 19, 2011