

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

In re Application of)
) Appeal No. 11-0032
)
) DECISION
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 Appellant)

STATEMENT OF THE CASE

This appeal is before 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 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, Alaska Region (OAA), and is charged with processing appeals that were filed with OAA. The undersigned is the administrative judge assigned to review and decide this appeal pursuant to federal regulation 50 C.F.R. § 679.43.

On February 11, 2011, [REDACTED] on behalf of [REDACTED] filed a timely appeal of an Initial Administrative Decision (IAD) issued by the Restricted Access Management (RAM) Program on December 15, 2010.¹ [REDACTED] has acted on behalf of [REDACTED], in all matters related to the corporation's application for charter halibut permits. When I refer to Appellant, I mean either [REDACTED]

In the IAD, RAM evaluated Appellant's application for a charter halibut permit under the Charter Halibut Limited Access Program.² RAM determined that Appellant met the minimum participation requirements for one transferable charter halibut permit for use in International Pacific Halibut Commission Area 3A: fifteen bottomfish logbook fishing trips with one vessel in the applicant-selected year in the qualifying period (2004 or 2005) and fifteen halibut logbook fishing trips in the recent period (2008).³

¹ Appeal of Initial Administrative Determination (dated Feb. 11, 2011, received Feb. 11, 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 50 C.F.R. § 300.67(d)(1). For an Area 3A permit, all trips must occur in Area 3A. 50 C.F.R. § 300.67(b). Area 3A is roughly Southcentral Alaska. All trips that I discuss occurred in Area 3A. For the coordinates of Area 3A, see 50 C.F.R. § 300.61.

The applicant chooses which year in the qualifying period – 2004 or 2005 – that NMFS should use to determine the number and type of applicant’s permits.⁴ Appellant’s “applicant-selected year” is 2005.⁵

RAM determined that the angler endorsement on the permit should be five.⁶ Appellant does not challenge the angler endorsement on its permit.

RAM made the determination that Appellant should receive one transferable permit with an angler endorsement of five based on participation by [REDACTED] (VESSEL 1). VESSEL 1 made fifteen or more bottomfish logbook fishing trips in 2005 and fifteen or more halibut logbook fishing trips in 2008. All trips were made and reported under an Alaska Department of Fish & Game (ADF&G) Business Owner License issued to Appellant.⁷

RAM denied Appellant’s application for a second transferable permit.⁸ Appellant stated that he met the participation requirement in 2005 for a second transferable permit with fifteen or more bottomfish logbook fishing trips by [REDACTED] (VESSEL 2). RAM determined that Appellant could not use trips by VESSEL 2 toward its application for a second transferable permit because [REDACTED] (Contractor) took and reported trips by VESSEL 2 under the ADF&G Business Owner License issued to Contractor.

Appellant contracted with Contractor to take guests from Appellant’s lodge on charter trips. Appellant paid Contractor for each trip and the amount varied by number of persons on the trip. Contractor provided the vessel, a licensed captain and took the anglers on the trips.⁹

Appellant took and reported fifteen halibut logbook fishing trips by [REDACTED] (VESSEL 3) in 2008 under an ADF&G Business Owner License issued to Appellant.¹⁰ Therefore, Appellant meets the participation requirement in the recent period (2008) for a second transferable permit.

The issue on appeal is whether Appellant meets the participation requirement in the qualifying period for a second transferable permit.

⁴ 50 C.F.R. § 300.67(f)(1).

⁵ Appellant’s Application for Charter Halibut Permits at 2.

⁶ IAD at 1. The angler endorsement is based on the highest number of anglers reported on a trip in either 2004 or 2005. 50 C.F.R. § 300.67(e). NMFS does not use the applicant-selected year to determine angler endorsements. It uses the applicant-selected year to determine the number and type of permits.

⁷ RAM File. In the Official Record, Appellant is Person [REDACTED]. It was not clear to me from the IAD and the RAM file whether Appellant had two vessels that each made fifteen halibut logbook fishing trips in 2008. I confirmed that was the case. Email from Ed Hoch, Information Technology (IT) Specialist, to Mary Alice McKeen (Dec. 19, 2010) with Official Record List of Trips by Appellant. I provided a copy to counsel for Appellant. Email from Mary Alice McKeen to Counsel for Appellant (Dec. 20, 2010). I will refer to this as Official Record List of Trips by Appellant (Dec. 19, 2010).

⁸ Initial Administrative Determination at 3 – 4.

⁹ Letter from Appellant to RAM (Feb. 4, 2010): Contract between Appellant and Contractor (Mar. 31, 2005). Appellant and Contractor had the same contract in 2004. Contract between Appellant and Contractor (Jan. 28, 2004).

¹⁰ Official Record List of Trips by Appellant (Dec. 19, 2010).

Appellant can file this appeal because he is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that he meets the requirements for a transferable charter halibut permit. I did not hold a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue a transferable charter halibut permit.¹¹ I conclude that the record contains sufficient information upon which to decide the merits of this appeal.¹² I therefore close the record and issue this decision.

For reasons which follow, I conclude that Appellant does not meet the participation requirement in the applicant-selected year of the qualifying period (2005) for a second transferable permit.

ISSUE

Did Appellant establish by a preponderance of the evidence that he met the minimum participation requirement in the qualifying period for a second transferable permit?

FINDINGS OF FACT

1. In 2005, Appellant took fifteen bottomfish logbook fishing trips with VESSEL 1 under an ADF&G Business Owner License issued to Appellant.¹³
2. In 2005, Appellant entered into a contract with Contractor where Appellant paid Contractor, by the trip, to take anglers that were referred by Appellant on a charter trip. The trips last nine hours of charter time. The payment increased with the number of anglers on the trip. Contractor provided the vessel, a licensed captain, fishing gear, beverages and lunches for the clients.¹⁴
3. Contractor took anglers on bottomfish logbook trips with VESSEL 2 and reported the trips under Contractor's ADF&G Business Owner License in a logbook issued to Contractor.¹⁵
4. In 2005, Appellant paid Contractor to take anglers referred by Appellant on fifteen or more charter trips on VESSEL 2.¹⁶ Appellant paid three other charter operators to take anglers on charter trips in 2005.¹⁷

¹¹ 50 C.F.R. § 679.43(g)(3)(i), (iv).

¹² 50 C.F.R. § 679.43(g)(2).

¹³ Official Record List of Trips by Appellant (Dec. 19, 2010). The definition of "bottomfish logbook fishing trip" and "halibut logbook fishing trip" includes that the trip was reported to the State of Alaska and ADF&G is the State agency which received logbook trip reports. 50 C.F.R. § 300.67(f)(2) & (f)(3).

¹⁴ Letter from Appellant to RAM (Feb. 4, 2010): Contract between Appellant and Contractor (Mar. 31, 2005) The payments are: 1 – 3 persons ██████; 4 persons ██████ 5 persons ██████ 6 persons ██████ .

¹⁵ IAD at 4; Letter from Appellant to RAM (Feb. 4, 2010): Bookkeeping Statement (1/1/05 to 12/31/05) showing six payments from Appellant to Contractor totaling ██████. Since ██████ is the highest amount per trip, this payment represents payments for more than fifteen trips.

5. Appellant did not report any bottomfish logbook fishing trips by VESSEL 2 under its ADF&G Business Owner License for 2005.¹⁸
6. In 2008, Appellant reported fifteen or more halibut logbook fishing trips with VESSEL 1 under an ADF&G Business Owner License issued to Appellant.¹⁹
7. In 2008, Appellant reported fifteen halibut logbook fishing trips with VESSEL 3 under an ADF&G Business Owner License issued to Appellant.²⁰

PRINCIPLES OF LAW

In March 2007, pursuant to section 773c(c), the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.²¹ Pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).²²

The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. NMFS may issue charter halibut permits only to applicants that meet the requirements in the charter halibut regulations. The following is a description of the features of the CHLAP that are relevant to this appeal.

The official charter halibut record is the information prepared by NMFS on participation in the charter halibut fishery that NMFS used to implement the CHLAP.²³ NMFS based the official charter halibut record on participation data in saltwater charter logbooks submitted to the Alaska Department of Fish and Game (ADF&G).²⁴ If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.

¹⁶ Letter from Appellant to RAM (Feb. 4, 2010): Bookkeeping Statement (1/1/05 to 12/31/05) showing seven payments from Appellant to Contractor totaling \$17,500. Since \$1000 is the highest amount per trip, this payment represents payments for more than fifteen trips. I did not make a finding whether the trips by Contractor were charter halibut trips or charter salmon trips because the contract between Appellant and Contractor was not specific to halibut trips, nor was the payment ledger. I assume, for purposes of this appeal, that Contractor's trips with anglers referred by Appellant met the definition of a halibut logbook fishing trip in 50 C.F.R. § 300.67(f)(3) for Contractor.

¹⁷ Letter from Appellant to RAM (Feb. 4, 2010): Bookkeeping Statement (1/1/05 to 12/31/05). It shows seventeen payments totaling [REDACTED] to four charter operators in 2005, including the seven payments totaling [REDACTED] to Contractor.

¹⁸ Appellant does not allege that it did. Appeal of Initial Administrative Determination (Feb. 11, 2010).

¹⁹ Official Record List of Trips by Appellant (Dec. 19, 2010).

²⁰ Official Record List of Trips by Appellant (Dec. 19, 2010).

²¹ Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

²² Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

²³ 50 C.F.R. § 300.67(f)(5).

²⁴ Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

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.²⁵

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 2005,²⁶ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁷

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 fishing trips in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License for that year.²⁸

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.²⁹

An administrative judge must interpret and apply the regulations, as adopted by the Secretary of Commerce, to decide an appeal of the denial of a charter halibut permit.³⁰

ANALYSIS

Did Appellant establish by a preponderance of the evidence that he met the minimum participation requirement in the qualifying period for a second transferable permit?

Appellant argues that he should be credited with trips taken by Contractor and reported under Contractor's ADF&G Business Owner License for three reasons.

First, he argues that the trips by Contractor with VESSEL 3 were "marketed, booked, and facilitated" by Appellant and should count toward Appellant's application for a charter halibut permit.³¹ Appellant states that it "has operated with a minimum of two boats each season since 1994. Whether these boats were operated under a contract,

²⁵ 50 C.F.R. § 300.67(f)(4). For a definition of bottomfish logbook fishing trip, see 50 C.F.R. § 300.67(f)(2). For halibut logbook fishing trip, see 50 C.F.R. § 300.67(f)(3).

²⁶ 50 C.F.R. § 300.67(f)(6).

²⁷ 50 C.F.R. § 300.67(f)(7).

²⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

²⁹ 50 C.F.R. § 300.67(d)(1).

³⁰ Pursuant to 50 C.F.R. § 679.43, the decision of an appellate becomes final agency action thirty days after it is issued, subject to the authority of the Regional Administrator for the Alaska Region to reverse, remand or modify it. 50 C.F.R. § 679.43 (k), (o).

³¹ Appeal of Initial Administrative Determination at 3.

as with [Vessel 2] in 2004/2005, or were owned by Appellant, as with [VESSEL 1] in both periods and [VESSEL 2] in 2008, the fact remains that the logbook fishing trips reported for these vessels were made on behalf of [Appellant].³² Appellant states that he is the “real party in interest” with respect to these trips.³³

Appellant does not state that RAM denied Appellant credit for any trips that were taken in 2008 pursuant to Appellant’s ADF&G Business Owner License. Appellant seeks credit for trips that Contractor took with VESSEL 2 in 2008, and reported under Contractor’s ADF&G Business Owner License, because Appellant believes that, based on the facts of the trips, it is fair that Appellant gets credit for these trips toward a charter halibut permit.

RAM correctly concluded that NMFS can only credit trips to an applicant if the trips were reported under the applicant’s ADF&G Business Owner License.³⁴ I analyze the language of the regulation construed in light of the history and purpose of the regulation.

The charter halibut regulation at 50 C.F.R. § 300.67(b) begins by describing who receives charter halibut permits. The language of the regulation is clear:

NMFS will issue a charter halibut permit to a person who . . . [is the] individual or non-individual entity **to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner License that authorized logbook fishing trips that meet the minimum participation requirements described** in paragraphs (b)(1)(A) and (b)(1)(ii)(B) of this section for one or more charter halibut permits, unless the person is applying as a successor-in-interest.³⁵

The language of the regulation strongly supports the conclusion that NMFS may only issue a charter halibut permit to an applicant based on trips that were taken, and reported, pursuant to the applicant’s ADF&G Business Owner License.

The regulatory history reinforces this conclusion. It shows that the purpose of this regulation is to award permits to business owners, as determined by the business owner that held the ADF&G Business Owner Licenses pursuant to which the required number of trips were taken and reported. In the proposed rule, NMFS explained:

Licensed business owner. Charter halibut permits would be issued to the ADF&G licensed business owner. The Council’s moratorium recommendation and this action propose eligibility for a charter halibut permit to be limited to the holder of an ADF&G business owner license because information on participation in the charter vessel fishery for halibut is organized by this license. Hence, a person would not meet this

³² Appeal of Initial Administrative Determination at 3.

³³ Appeal of Initial Administrative Determination at 3.

³⁴ IAD at 4. RAM also states that the trips by VESSEL 2 were reported in logbooks issued to Contractor, not logbooks issued to Appellant. This appeal does not present the situation of a trip reported under an applicant’s ADF&G Business Owner License but in a logbook issued to someone other than the applicant.

³⁵ 50 C.F.R. § 300.67(b)(1)(ii)(emphasis added).

standard and qualify for a charter halibut permit if he or she held only a guide license or owned a charter vessel but did not hold an ADF&G business owner license during the qualifying and recent participation years.

Issuing charter halibut permits only to qualified holders of ADF&G business owner licenses is appropriate for several reasons. First, the owner of the charter vessel fishing business had to obtain a business owner license from ADF&G. Second, the business owner was required to register with ADF&G the vessel to be used as a charter vessel. Third, the ADF&G business owner license number was required to be recorded on each sheet of the logbook because this license authorized the guide to provide fishing guide services to the charter vessel anglers. Finally, the business owner was responsible for submitting the logbook sheets to ADF&G within the required time limits. **In summary, every charter vessel fishing trip was authorized by, and made pursuant to, an ADF&G business owner license.** This license has been variously referred to as a sport fishing operator license, a sport fish business owner license, an ADF&G sport fish business license, or simply an ADF&G business license. This action proposes the term “ADF&G business owner license” exclusively to refer to this license issued by ADF&G.³⁶

Further, if NMFS had authority to determine on a trip-by-trip basis who was “the real party interest” with respect to a trip, and who should get credit for a trip, the regulation would likely specify that authority and, in some way, address factors to make that determination.

Appellant believes the facts in its favor mean that he should get credit for trips by VESSEL 2 in 2005. He marketed, booked and facilitated these trips. But the Contractor obtained the ADF&G Business Owner License pursuant to which these trips were taken and reported. Contractor owned the vessel, maintained the vessel and provided the licensed captain. The regulation does not in any way address factors for NMFS to use in determining who gets credit for a trip because the regulation establishes a bright line that determines who gets credit for a trip: the person who held the ADF&G Business Owner License pursuant to which the trip was taken and reported.³⁷

Second, Appellant states that Contractor has not applied for a charter halibut permit and is not claiming credit for these trips.³⁸ Therefore, Appellant argues, awarding him credit for these trips would not run afoul of the prohibition against crediting the same trip or trips to two applicants.³⁹

³⁶ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009)(emphasis added).

³⁷ 50 C.F.R. § 300.67(b)(1)(ii).

³⁸ Appeal of Initial Administrative Determination at 2 – 3.

³⁹ 50 C.F.R. § 300.67(b)(2)(i): “One logbook fishing trip shall not be credited to more than one applicant.”

The only exception is that if more than one applicant claims to be a successor-in-interest to a non-individual entity, such as a corporation, NMFS awards the permit to all the competing claimants. 50 C.F.R. § 300.67(b)(1)(iv).

Under the regulation, NMFS must not only **not** credit the same trips to two applicants. It must credit trips to the right applicant. And the right applicant, under the charter halibut regulation, is the person that met the participation requirements in both periods with trips taken pursuant to that person's ADF&G Business Owner Licenses.

Third, Appellant argues that the charter halibut regulation at 50 C.F.R. § 300.67(c) allows him to continue to use two vessels because subsection (2) of this regulation provides an alternate basis for awarding him a second permit. That regulation provides:

(c) *Number of permits.* An applicant that meets the participation requirements in paragraph (b) of this section [to receive at least one non-transferable charter halibut permit] will be issued the number of charter halibut permits **equal to the lesser of the number of permits** determined by paragraphs (c)(1) or (c)(2) of this section as follows:

(1) The **total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business License** in the applicant-selected year divided by five, and rounded down to a whole number; **or**

(2) The **number of vessels** that made the bottomfish logbook fishing trips in the applicant-selected year. [emphasis added]⁴⁰

Appellant argues based on subsection (2) of this regulation:

The regulation thus establishes alternate criteria for determining the number of CHPs [charter halibut permits] to be issued. One is the number [of] bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business License. [Appellant] recognizes that it does not technically qualify for a second CHP under this criterion, since the trips on [VESSEL 2] by [Appellant's] clients were reported in a saltwater charter vessel logbook issued to [Contractor] pursuant to [Contractor's] ADF&G Business License. But the second criterion, in subsection (2), is not limited to trips made pursuant to a specific ADF&G Business License, and instead depends on the number of vessels that made trips. [Appellant] qualifies for a second CHP [charter halibut permit] under this criterion because two vessels made bottomfish logbook fishing trips on its behalf in 2004 and 2005, [VESSEL 1] and [VESSEL 2].⁴¹

This interpretation is without merit. Subsection (1) and (2) do not provide "alternate" criteria. The first sentence of this regulation provides that an applicant receives the number of permits equal to "**the lesser**" of the number that results from subsection (1) or subsection (2). Applying subsection (2), the number of vessels that Appellant used to make bottomfish logbook fishing trips in its applicant-selected year (2005) is one. Therefore, Appellant can receive only one permit.

⁴⁰ 50 C.F.R. § 300.67(c).

⁴¹ Appeal of Initial Administrative Determination at 2.

Appellant cannot receive a second *transferable* permit because it did not make fifteen trips in 2005 with a vessel other than VESSEL 1. Appellant cannot receive a second *non-transferable* permit because it did not make *any* trips in 2005 with a vessel other than VESSEL 1.⁴²

CONCLUSIONS OF LAW

1. Appellant did not establish by a preponderance of evidence in the record that it meets the participation requirement in the qualifying period for a second transferable permit or a second non-transferable permit.
2. An applicant may only receive credit for trips toward a charter halibut permit if the applicant made and reported the trips pursuant to an ADF&G Business Owner License issued to the applicant.

ORDER

The IAD that is the subject of this appeal is affirmed. This decision takes effect on March 22, 2012, 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 March 2, 2012, 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.



Mary Alice McKeen
Administrative Judge

Date issued: February 21, 2012

⁴² Appellant took fifteen bottomfish logbook trips in 2005 with VESSEL 1. If Appellant had used two vessels to take those trips, he would have met the participation requirement for a second permit which would have been non-transferable. See 50 C.F.R. § 300.67(c)(number of charter halibut permits).