

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

In re Application of

Appellant

)
)
)
)
)
)

Appeal No. 10-0057

DECISION

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 Headquarters in Silver Spring, Maryland and maintains an office in the NMFS 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 at 50 C.F.R. § 679.43.

On March 8, 2011, [REDACTED] filed a timely appeal of an Initial Administrative Decision (IAD) issued by the Restricted Access Management (RAM) Program on January 19, 2011.¹ [REDACTED] has acted on behalf of [REDACTED], in all matters related to the corporation's application for charter halibut permits. [REDACTED] is also the charter vessel operator on behalf of the corporation. When I refer to Appellant, I mean [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 two non-transferable permits for use in International Pacific Halibut Commission Area 3A: a total of at least ten bottomfish logbook fishing trips with two vessels in the qualifying period (2004 or 2005) and five halibut logbook fishing trips in the recent period (2008).³

¹ Appeal of Initial Administrative Determination (dated Mar. 8, 2011, received Mar. 8, 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(b)(1)(ii)(A)&(B); 50 C.F.R. § 300.67(c). 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.

RAM determined that the angler endorsement on each permit should be four. RAM based this on the official charter halibut record, which shows that in 2004 and 2005, the highest number of anglers that Appellant took on a bottomfish logbook fishing trip with either of his two vessels was four.⁴

RAM determined that Appellant did not meet the participation requirements for either permit to be a transferable permit.⁵ The minimum participation requirement in the qualifying period (2004, 2005) for a transferable permit is fifteen bottomfish logbook fishing trips reported under the applicant's Alaska Department of Fish and Game (ADF&G) Business Owner License in 2004 or 2005 with one vessel.⁶ The minimum participation requirement in the recent participation period is fifteen halibut logbook fishing trips reported under the applicant's ADF&G Business Owner License with one vessel in 2008.⁷

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.⁸ Appellant's "applicant-selected year" is 2005.⁹ According to the official charter halibut record, Appellant took ten bottomfish logbook fishing trips with two vessels in 2005. According to the official charter halibut record, Appellant took thirty-one halibut logbook fishing trips with ██████████ (VESSEL 1) in 2008 and fourteen halibut logbook fishing trips with ██████████ (VESSEL 2) in 2008.¹⁰

Appellant argues that he should receive two transferable permits because he did take fifteen trips with VESSEL 1 and fifteen trips with VESSEL 2 in 2005. Appellant submits that during the qualifying period (2004, 2005), he took numerous fishing trips where anglers tried to catch salmon *and* halibut but he only reported the trip with salmon data.¹¹ Appellant argues that he did not report these trips as halibut trips because ADF&G logbook reporting requirements were confusing during that period.¹²

With respect to 2008, Appellant contends that he submitted a logbook trip report for a trip on July 6, 2008 by submitting page 3 of Logbook ██████████¹³ ADF&G states that it did not receive page 3. If this trip were credited toward his application, Appellant would have fifteen halibut logbook fishing trips in the recent period (2008) with VESSEL 2.

Appellant also contends that one of his permits should have an angler endorsement of six, not four. He contends, on appeal, that if his salmon fishing trips are counted as

⁴ Initial Administrative Determination at 7.

⁵ Initial Administrative Determination at 3 – 4.

⁶ 50 C.F.R. § 300.67(d)(1)(i).

⁷ 50 C.F.R. § 300.67(d)(1)(ii).

⁸ 50 C.F.R. § 300.67(f)(1).

⁹ Appellant's Application for Charter Halibut Permits at 2.

¹⁰ Official Record Summary (Jan. 26, 2010). The Summary has January 26, 2010 as "date created."

¹¹ Appellant's Statement re Evidence Submitted in Support of application for Charter Halibut Permit (July 10, 2010); Appeal of Initial Administrative Determination (Mar. 8, 2011).

¹² Appellant's Statement re Evidence Submitted in Support of application for Charter Halibut Permit (July 10, 2010); Appeal of Initial Administrative Determination (Mar. 8, 2011).

¹³ Supplemental Statement of Appellant (May 23, 2011).

bottomfish logbook fishing trips, he took six clients on a number of trips in 2004 or 2005.¹⁴ Alternatively, Appellant submits that even if those salmon trips are not considered bottomfish logbook fishing trips, the language of the regulation supports calculating the angler endorsement by looking at the number of clients on any logbook trip during the qualifying period, including salmon trips.¹⁵

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.¹⁶ I conclude that the record contains sufficient information upon which to decide the merits of this appeal.¹⁷ I therefore close the record and issue this decision.

For reasons which follow, I conclude that Appellant meets the requirements for two non-transferable charter halibut permits with an angler endorsement of four. I conclude that Appellant does not meet the requirements for either permit to be transferable and does not meet the requirement for an angler endorsement greater than four on either permit.

ISSUES

In this appeal, the broad issue is whether Appellant qualifies for two transferable charter halibut permits, one with an angler endorsement of six. To resolve that issue, I must answer the following:

1. Has Appellant shown that he took fifteen or more bottomfish logbook fishing trips on a single vessel in 2005?
2. Did Appellant show that either of his permits should be endorsed for six anglers?

FINDINGS OF FACT

1. In 2004, Appellant reported a total of two bottomfish logbook fishing trips. For these trips, Appellant reported one of the following pieces of information: statistical area where bottomfish fishing occurred on the trip, number of hours that the vessel engaged in bottomfish fishing or the number of rods used in bottomfish fishing.¹⁸

¹⁴ Appeal of Initial Administrative Determination (Mar. 8, 2011).

¹⁵ Appeal of Initial Administrative Determination (Mar. 8, 2011).

¹⁶ 50 C.F.R. § 679.43(g)(3)(i), (iv).

¹⁷ 50 C.F.R. § 679.43(g)(2).

¹⁸ Official Record Summary (Jan. 26, 2010). See 50 C.F.R. § 300.67(f)(2) (“*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.”).

2. In 2005, ADF&G issued Appellant Logbook [REDACTED] for VESSEL 1.¹⁹
3. In 2005, Appellant reported eight bottomfish logbook fishing trips in Logbook [REDACTED] with VESSEL 1.²⁰
4. In 2005, ADF&G issued Appellant Logbook [REDACTED] for VESSEL 2.²¹
5. In 2005, Appellant reported two bottomfish logbook fishing trips in Logbook [REDACTED] with VESSEL 2.²²
6. In 2004 and 2005, the highest number of clients that Appellant reported on any bottomfish logbook fishing trip was four.²³
7. In 2004 and 2005, Appellant took numerous trips on VESSEL 2 where Appellant reported salmon data (salmon kept, salmon released, the statistical area fished, the number of rods, the number of boat hours) but did not report any bottomfish data.²⁴
8. In 2008, ADF&G issued Appellant Logbook [REDACTED] for VESSEL 1.²⁵
9. In 2008, Appellant reported thirty-one halibut logbook fishing trips in Logbook [REDACTED] with VESSEL 1.²⁶
10. In 2008, ADF&G issued Appellant Logbook [REDACTED] for VESSEL 2.²⁷
11. In 2008, Appellant reported fourteen halibut logbook fishing trips in Logbook [REDACTED] with VESSEL 2.²⁸
12. Appellant submitted a timely application for a charter halibut permit on March 9, 2010.²⁹

¹⁹ Official Record List of Trips for 2005 (Jan. 26, 2010). The Official Record Summary is followed by a list of trips by year. I attribute the date of the Official Record Summary to the lists of trips.

²⁰ Official Record List of Trips for 2005 (Jan. 26, 2010).

²¹ Official Record List of Trips for 2005 (Jan. 26, 2010).

²² Official Record List of Trips for 2005 (Jan. 26, 2010).

²³ Official Record Summary (Jan. 26, 2010).

²⁴ 2004 Saltwater Charter Vessel Logbook [REDACTED] 2005 Saltwater Charter Vessel Logbook [REDACTED] Exhibits 2 and 3 to Appellant's Statement re Evidence Submitted in Support of Application for Charter Halibut Permits (July 10, 2010).

²⁵ Official Record List of Trips for 2008 (Jan. 26, 2010).

²⁶ Official Record Summary (Jan. 26, 2010). See 50 C.F.R. 300.67(f)(3) ("Halibut logbook fishing trip 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.").

²⁷ Official Record List of Trips for 2008 (Jan. 26, 2010).

²⁸ Official Record Summary (Jan. 26, 2010).

²⁹ Application (received Mar. 9, 2010).

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.³⁰ Pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).³¹ 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 official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.³² 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).³³ If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.

To receive a charter halibut permit, 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 2005,³⁴ and a recent participation period, which is the sport fishing season for halibut in 2008.³⁵

To receive a non-transferable charter halibut permit, an applicant must have “reported” a minimum of five “bottomfish logbook fishing trips” to ADF&G 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).³⁶

To receive a transferable charter halibut permit, an applicant must have “reported” a minimum of fifteen “bottomfish logbook fishing trips” to ADF&G with the same vessel in one year in the qualifying period (2004, 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).³⁷

The regulation expressly defines “bottomfish logbook fishing trip” as follows:

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,

³⁰ 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.

³¹ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

³² 50 C.F.R. § 300.67(f)(5).

³³ Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

³⁴ 50 C.F.R. § 300.67(f)(6).

³⁵ 50 C.F.R. § 300.67(f)(7).

³⁶ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

³⁷ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.³⁸

Thus, to be a bottomfish logbook fishing trip, the trip must not only have occurred but must have been reported to ADF&G with one of three pieces of information regarding bottomfish fishing that occurred on the trip: statistical areas or stat areas, boat hours or the number of rods.

Regardless of whether a permit is transferable or non-transferable, the angler endorsement on an applicant's first permit is the highest number of charter vessel anglers reported on any bottomfish logbook fishing trip during the qualifying period with a vessel.³⁹ If the applicant receives a second permit, the angler endorsement on the applicant's second permit is the highest number of charter vessel anglers reported on any bottomfish logbook fishing trip during the qualifying period with another vessel.⁴⁰ These rules are subject to the requirement that no charter halibut permit will have an angler endorsement less than four.⁴¹

ANALYSIS

1. Has Appellant shown he took fifteen or more bottomfish logbook fishing trips on a single vessel in 2005?

According to the official record, in 2005, Appellant reported eight bottomfish logbook fishing trips with VESSEL 1 and two bottomfish logbook fishing trips with VESSEL 2.

Appellant states that he meets the fifteen-trip participation requirement with VESSEL 1 and with VESSEL 2 in 2005. Appellant argues that the official record for 2005 is incorrect and he should be credited with at least five additional bottomfish logbook fishing trips with VESSEL 1 and at least thirteen additional bottomfish logbook trips with VESSEL 2.⁴²

The basis for Appellant's claim is as follows. Appellant states that anglers on his fishing trips routinely fished for salmon and halibut. Appellant argues that ADF&G's reporting requirements during 2004 and 2005 were confusing because, during 2004 and 2005, ADF&G did not require charter vessel operators to report halibut kept and halibut released. Appellant argues that this confusion caused him to report trips with salmon fishing data when, in fact, these were trips where anglers also tried to catch halibut. As proof of this contention, Appellant shows that, in 2000 and 2006, when ADF&G did require him to report halibut kept and halibut released, he reported well over fifteen trips with VESSEL 2.⁴³ And in 2008, when ADF&G did require him to report halibut kept and

³⁸ 50 C.F.R. § 300.67(f)(2)(emphasis added).

³⁹ 50 C.F.R. § 300.67(e)(1) & (3).

⁴⁰ 50 C.F.R. § 300.67(e)(2) & (4).

⁴¹ 50 C.F.R. § 300.67(e)(5).

⁴² Appeal of Initial Administrative Determination (Mar. 8, 2011).

⁴³ 2000 Logbook [REDACTED] for VESSEL 2, submitted with Appellant's Submission of Additional Evidence (Aug. 1, 2011); 2006 Logbook [REDACTED] for VESSEL 2, submitted with Appellant's Statement re Evidence Submitted in Support of application for Charter Halibut Permit (July 10, 2010).

halibut released, he reported thirty-one halibut logbook fishing trips with VESSEL 1 and, by the official record, fourteen trips with VESSEL 2.⁴⁴ Appellant claims that his pattern of fishing in 2004 and 2005 was similar to his pattern of fishing in 2000, 2006 and 2008.

Although Appellant does not frame the issue this way, the issue is one of regulatory interpretation. To qualify for a transferable charter halibut permit, an applicant must have “[r]eported fifteen (15) bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period.”⁴⁵ The regulation defines a bottomfish logbook fishing trip as “a logbook fishing trip in the qualifying period that was reported 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.”⁴⁶

At base, Appellant offers to prove *why* he did not report any bottomfish fishing information on a number of trips where he did report salmon fishing information. But the question is whether the regulation authorizes NMFS to evaluate why an applicant did not report bottomfish information on a trip in the qualifying period, determine whether the reason was valid, determine whether anglers on the trip actually did fish for halibut and, based on that evaluation, credit some trips but not others.

RAM concluded that it did not have the authority to do that.⁴⁷ I conclude that an appellate officer does not have authority to do that either. I base this conclusion on the clear and unambiguous language of the definition of bottomfish logbook fishing trip, the regulatory history of the definition, the ADF&G instructions for 2005 and the Council Motion and Analysis.

A. Definition of bottomfish logbook fishing trip in 50 C.F.R. § 300.67(f)(2).

The regulation specifically requires that NMFS award permits based on specified numbers of “bottomfish logbook fishing trips” that were “reported” in the qualifying period.⁴⁸ At 50 C.F.R. § 300.67(f)(2), the regulation defines “bottomfish logbook fishing trip” as a trip that was reported to ADF&G with one of three pieces of information: stat area where bottomfish fishing occurred, number of rods used in bottomfish fishing or number of boat hours spent in bottomfishing. The language of the regulation is clear and unambiguous. The trip must have been reported and it must meet the regulatory definition of a bottomfish logbook fishing trip. The regulation does not have any exceptions.

B. Regulatory history of definition of bottomfish logbook fishing trip.

Appellant is correct that, in 2004 and 2005, charter operators did not have to report the number of halibut kept and the number of halibut released. But, if anglers targeted

⁴⁴ Official Record Summary (Jan. 26, 2010). Appellant states that the official record for 2008 for VESSEL 2 is incorrect and is missing one reported trip. Supplemental Statement by Appellant (May 18, 2011).

⁴⁵ 50 C.F.R. § 300.67(d)(1)(i).

⁴⁶ 50 C.F.R. § 300.67(f)(2).

⁴⁷ Initial Administrative Determination at 7.

⁴⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A).

halibut on a trip, ADF&G required vessel operators to report the three pieces of data about that fishing under bottomfishing fishing: the stat area where bottomfish fishing occurred, the number of rods used in bottomfish fishing or the number of boat hours that the vessel engaged in bottomfish fishing. That is why the regulation requires “bottomfish logbook fishing trips” in 2004 and 2005 and “halibut logbook fishing trips” in 2008. NMFS explained in the proposed rule:

This action proposes additional definitions for a “bottomfish logbook fishing trip” and a “halibut logbook fishing trip.” To document participation in 2004 and 2005, an applicant must prove bottomfish logbook fishing trips, and to prove participation in the recent participation year an applicant must prove halibut logbook fishing trips. The [North Pacific Fishery Management] Council anticipated the distinction between these terms in its moratorium motion. The reason for this distinction is that in 2004 and 2005, ADF&G did not require businesses to report the number of halibut that were kept, or kept and released, for each logbook fishing trip. ADF&G required businesses to report bottomfish effort for each logbook fishing trip. The bottomfish effort data was (1) the State statistical area where bottomfish fishing occurred, (2) the boat hours that the vessel engaged in bottomfish fishing and (3) the number of rods used from the vessel in bottomfish fishing. ADF&G attached instructions to each logbook that stated that bottomfish fishing effort included effort targeting halibut. Therefore, for purposes of this action, NMFS would count any of these three types of bottomfish information about a trip in the qualifying period as a bottomfish logbook fishing trip for purposes of qualifying for one or more permit(s). . . .

In 2006, ADF&G changed its required logbook report to specify halibut data for each logbook fishing trip. The required logbook data included the number of halibut kept, the number released, and the boat hours that the vessel engaged in bottomfish fishing. Because these data will be more specific to halibut in the recent participation year, NMFS intends to rely on the halibut logbook data as proof of an applicant’s participation during the recent participation year.⁴⁹

In response to public comment on the proposed rule, NMFS affirmed the use and validity of the 2004 and 2005 bottomfish data as a basis for issuing charter halibut permits. Comment 146 stated that there was confusion in 2004 and 2005 as to how to report halibut. NMFS responded:

During the qualifying period of 2004 and 2005, participation will be measured by bottomfish logbook fishing trips because ADF&G did not require halibut kept or released to be reported as a distinct species. Halibut were considered to be bottomfish during that period. ADF&G attached instructions to each logbook that stated that bottomfish fishing effort included effort targeting halibut. Reporting of any one of three types

⁴⁹ Proposed Rule, 74 Fed Reg. 18,178, 18,185 (Apr. 21, 2009).

of bottomfish effort data would qualify a trip as a bottomfish logbook trip for purposes of this rule.⁵⁰

Comment 148 concerned the adequacy of the bottomfish data for 2004 and 2005:

Comment 148. NMFS lacks sufficient information to establish a moratorium because there was no accurate logbook data on charter halibut harvests by charter vessels in 2004 and 2005.

Response: The limited access system established by this rule does not rely on an accurate accounting of halibut harvests by charter vessel anglers during 2004 and 2005. During those years, ADF&G did not require charter vessel business [sic] to report the number of halibut that were kept or released. Instead, businesses were required to report bottomfish effort for each logbook fishing trip. ADF&G attached instructions to each logbook stating that bottomfish fishing effort included effort targeting halibut. Hence, the bottomfish logbook fishing trip data are sufficiently accurate as evidence of participation in the fishery for purposes of this rule. . . .⁵¹

In the final rule, NMFS made no change in the definition of, and the requirement for, “bottomfish logbook fishing trips” in the qualifying period to receive a charter halibut permits.⁵²

If I allowed Appellant to prove a “bottomfish logbook fishing trip” by a trip where he did not report, with respect to bottomfish fishing, the statistical area, the number of rods or the boat hours, I would be changing the regulation for this applicant through the appeal process. The regulatory history supports my conclusion that I do not have the authority to make a change for an individual applicant through the appeal process where NMFS expressly did not make change for applicants generally in the rulemaking process.

C. ADF&G Logbook Instructions.

ADF&G’s instructions explaining how to complete the Saltwater Charter Vessel Logbooks for the years 2002 through 2011 are displayed on the NMFS Alaska Region website.⁵³ With respect to recording 2005 bottomfish trips, those instructions provided as follows:⁵⁴

⁵⁰ Final Rule, 75 Fed. Reg. 554, 592 (Jan. 5, 2010).

⁵¹ Final Rule, 75 Fed. Reg. 554, 593 (Jan. 5, 2010).

⁵² Final Rule, 75 Fed. Reg. 554, 595 – 597 (Jan. 5, 2010)(changes in final rule). In Change 17, NMFS noted that it did change the definition of “halibut logbook fishing trip” because the proposed rule had mistakenly omitted the first information element, namely “the statistical area(s) where bottomfish fishing occurred.” Final Rule, 75 Fed. Reg. at 596.

⁵³ ADF&G Saltwater Logbooks for the years 2002 through 2011 are displayed on the NMFS, Alaska Region, website at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

⁵⁴ 2005 ADF&G Saltwater Charter Vessel Logbook Instructions at iv (emphasis in original).

BOTTOMFISH	
Primary Stat Area (Incl. Halibut)	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 (incl. halibut) and targeting salmon and halibut simultaneously. . . .
No. Boat Hours Fished	The number of boat hours that at least one line was targeting bottomfish (incl. halibut) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew . . . Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected . Halibut kept and released data is collected through established survey programs.
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted?	An operator must decide if gear and fishing methods were effectively targeting salmon, bottomfish, or both species groups.
Example 1: One Target Salmon	<p>After completing the first five columns, record 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.</p> <p>NOTE: If bottomfish are caught when targeting salmon only, record the number of bottomfish in the appropriate columns in the bottomfish section, but leave columns for maximum number of rods and boat hours fished in the bottomfish section blank-DO NOT record information in these columns.</p>
Example 2: One Target Bottomfish (including halibut)	<p>After completing the first five columns, record the maximum number of rods and number of boat hours in the appropriate columns in the bottomfish section, even if no bottomfish were caught or kept.</p> <p>NOTE: If salmon are caught when targeting bottomfish only, record the number of salmon in the appropriate kept/released columns in the salmon section, but leave columns for maximum number of rods and boat hours fished in the salmon section blank-DO NOT record information in these columns.</p>
Example 3: Two Targets	After completing the first five columns, record the maximum number of rods and boat hours spent

<p>Salmon <u>and</u> Bottomfish (including halibut) Simultaneously (i.e., mooching)</p>	<p>fishing simultaneously for salmon and bottomfish in the appropriate columns in BOTH the salmon and bottomfish sections.</p> <p>For example, if mooching for 4 hours with up to 4 rods, record 4 hours and 4 rods in the salmon effort columns, and 4 hours and 4 rods in the bottomfish effort columns.</p>
<p>Example 4: A combination of any of the above</p>	<p>After completing the first five columns, record the maximum number of rods and boat hours spent targeting salmon AND targeting both salmon and bottomfish (including halibut) simultaneously in the appropriate columns in the salmon section, and the maximum number of rod and boat hours spent bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.</p>
<p>SPECIAL NOTES AND INSTRUCTIONS</p>	
<p>“Halibut”</p>	<p>The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to record your effort. Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (stat areas, no. rods, and boat hrs).</p>

The instructions under “Bottomfish” tell the operators to include halibut effort when recording statistical area, rods and boat hours. Example 3 and Example 4 specifically address the situation of a charter operator targeting salmon and bottomfish, including halibut, and instruct the operator to record that effort under salmon *and* bottomfish.

Appellant states that he did not report bottomfish information on trips in 2005 where anglers were trying to catch salmon and halibut because they were using troll gear and not “the ‘stop and drop’ style of fishing that I normally think of as a bottomfish trip.”⁵⁵ While I do not doubt that Appellant interpreted the instructions that way in good faith, the instructions to report halibut fishing under bottomfish fishing do not depend on the type of gear used to try to catch halibut but rather whether the anglers were, in fact, targeting, or trying to catch, halibut.⁵⁶ Appellant also states that “[e]ntering this information [from salmon fishing] under the bottomfish column would have, in effect, double-booked the effort data, which does not make sense.”⁵⁷ Under the Instructions, if

⁵⁵ Appellant’s Statement re Evidence Submitted in Support of Application for Charter Halibut Permit at 1 (July 10, 2010).

⁵⁶ I note that if anglers caught halibut incidentally to salmon fishing, the vessel operator was not asked to report that fishing as bottomfish fishing (stat area, number of rods, boat hours). It is only if anglers caught halibut when they were targeting halibut that ADFG asked vessel operators to report that effort under bottomfish fishing.

⁵⁷ Appeal of Initial Administrative Determination at 2 (Mar. 8, 2011).

anglers were targeting salmon and halibut, vessel operators were, in effect, instructed to double-book the effort.

D. Council Motion and Analysis.

When the North Pacific Fishery Management Council took final action on a moratorium on entry into charter halibut fishing, it specifically recommended the use of bottomfish logbook data to determine participation: “Issue 9: Evidence of participation is ADF&G saltwater logbook entry with bottomfish statistical area, rods or boat hours.”⁵⁸ The regulation defining bottomfish logbook fishing trip adopted the criterion in the Council Motion.⁵⁹

The Council and NMFS analyzed comprehensively the Council’s preferred alternative in an Environmental Assessment/ Regulatory Impact Review.⁶⁰ The Analysis showed a significant number of businesses reported a sufficient number of trips that meet the criterion for a “bottomfish logbook fishing trip” in the qualifying period to receive transferable and non-transferable permits.⁶¹ It would be a significant departure from what the Council recommended, and from what the Council and NMFS analyzed, if applicants through the appeal process could receive charter halibut permits based on trips where the applicants reported salmon data but no bottomfish data.

I conclude that Appellant’s trips in 2005 where he reported salmon fishing information (salmon caught, salmon released, stat areas, boat hours, number of rods) but not any information about bottomfish fishing (stat areas, boat hours, number of rods) are not bottomfish logbook fishing trips. I therefore conclude that Appellant does not meet the minimum participation requirement in 2005 for a transferable charter halibut permit based on the fishing activities of either VESSEL 1 or VESSEL 2.

I note that Appellant’s logbooks are uniformly, meticulously, filled out.⁶² I also acknowledge that, based on Appellant’s logbooks from 2000, 2006 and 2008, he appears to have carefully reported halibut kept and halibut released when ADF&G requested that information. I also acknowledge that anglers on Appellant’s trips appear

⁵⁸ North Pacific Fishery Management Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007)(footnote omitted), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

⁵⁹ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

⁶⁰ Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A, National Marine Fisheries Service (lead agency) (Nov. 6, 2009), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/analyses/halibut/earirfrfa_charter_vessel_moratorium110609.pdf I will refer to this as “Analysis.” Table 37 at page 138 analyzes the maximum number of permits.

⁶¹ In the Analysis, Table 37 at page 138 estimates the maximum number of businesses and permits under the Council’s preferred alternative: 380 businesses could receive 689 permits in Area 2C and 471 business would receive 611 permits in Area 3A. Table 11 at page 54 estimates that 29% of those permits would be non-transferable in Area 2C and 21% would be non-transferable in Area 3A. As the notes to Table 11 and Table 37 state, these estimates do not take into account whether a business would meet the participation requirement in the year prior to implementation.

⁶² 2000 Logbook [REDACTED] 2004 Logbook [REDACTED] 2005 Logbook [REDACTED] 2006 Logbook [REDACTED] 2008 Logbook [REDACTED] Appellant appears to have filled out every line and every box that he believed he needed to fill out. If the box was for a number of fish, Appellant filled it out with either a number or a zero.

to target salmon and halibut simultaneously. To take the year 2000, on the eighty-five trips where Appellant reported salmon data, he reported halibut data – stat area, boat hours and number of rods – on every single trip.⁶³ I have no reason to doubt that Appellant would have continued to report halibut fishing – by stat area, boat hours and the number of rods – in 2004 and 2005, if he understood that ADF&G wanted that information, even though it no longer wanted halibut kept and halibut released.

It is simply that, as explained above, under the regulation as adopted by the Secretary of Commerce, I do not have authority to evaluate why an applicant did not report bottomfish fishing in 2004 or 2005 and, based on that evaluation, order that NMFS give an applicant credit for a trip as a bottomfish logbook fishing trip where an applicant did not report one of three pieces of data: the statistical area of bottomfish fishing, the number of rods or the number of boat hours.

Since I have concluded that Appellant does not meet the minimum participation requirement with VESSEL 1 or VESSEL 2 in the qualifying period for a transferable permit, I do not resolve whether Appellant reported a fifteenth trip with VESSEL 2 in the recent period (2008). Appellant stated that he submitted page 3 of Logbook [REDACTED], which would be a fifteenth reported trip.⁶⁴ ADF&G stated that it did not receive that page.⁶⁵ Since Appellant would not receive a transferable permit even if he did report a fifteenth trip by VESSEL 2 in 2008, I do not resolve that issue.

2. Did Appellant show that he should receive a permit endorsed for six anglers?

According to the official record, the highest number of clients that Appellant took on any bottomfish logbook fishing trip in 2004 or 2005 was four.⁶⁶ RAM therefore concluded that both of Appellant’s permits should have an angler endorsement of four.

Appellant contends that one of his permits should have an angler endorsement of six based on trips taken by VESSEL 2.⁶⁷ Appellant makes two arguments.

Appellant contends that he reported six clients on a number of salmon trips with VESSEL 2 and that those salmon trips should be considered bottomfish logbook fishing trips because anglers on those trips were, in fact, targeting salmon and halibut. However, I have concluded that Appellant’s trips where he reported salmon fishing, but not bottomfish fishing, are not bottomfish logbook fishing trips.

In the alternative, Appellant contends that the language of the angler endorsement regulation supports calculating an angler endorsement based on salmon fishing trips.⁶⁸ Specifically, Appellant highlights the regulation’s directive that an angler endorsement will be based on the “greatest number of charter vessel anglers reported on *any* logbook

⁶³ 2000 Logbook 1050 submitted with Submission of Additional Evidence (Aug. 1, 2011).

⁶⁴ Supplemental Statement of Appellant (May 18, 2011).

⁶⁵ IAD at 6.

⁶⁶ Finding of Fact 6.

⁶⁷ Appeal of Initial Administrative Determination at 3 (Mar. 8, 2011).

⁶⁸ Appeal of Initial Administrative Determination (Mar. 8, 2011).

trip in the qualifying period.”⁶⁹ Appellant contends that his salmon fishing trips with VESSEL 2 were reported in a logbook and therefore must be looked at to determine if the applicant reported more than four anglers on “any” logbook fishing trip.

I conclude that “any logbook trip in the qualifying period” means any “logbook fishing trip” in the qualifying period. I conclude the absence of the word “fishing” has no significance. The regulation defines “logbook fishing trip” as “a bottomfish logbook fishing trip or a halibut logbook fishing trip.”⁷⁰ The regulation then defines “bottomfish logbook fishing trip” as a trip that occurred in the qualifying period (2004, 2005) and was reported with one of three pieces of bottomfish fishing data: statistical area, number of rods, boat hours.⁷¹

Further, Appellant points to nothing in the regulatory history to suggest that an angler endorsement on a charter halibut permit should be determined with reference to the highest number of anglers on a salmon trip, a trip that itself cannot count toward receiving a charter halibut permit.⁷² It is far more likely and reasonable that NMFS must determine an angler endorsement on a charter halibut permit based on a trip that could itself count toward a charter halibut permit. I conclude that NMFS may not use the greatest number of anglers on a salmon trip to determine the angler endorsement on an applicant’s charter halibut permit.

Appellant has not shown that he took more than four anglers on any bottomfish logbook fishing trip in 2004 or 2005. Therefore the appropriate angler endorsement on both of his permits is four.

CONCLUSIONS OF LAW

1. Appellant’s trips in 2004 and 2005 where he reported salmon fishing (salmon kept, salmon released, statistical area, number of rods, boat hours) but not any bottomfish information (statistical area, number of rods, boat hours) are not bottomfish logbook fishing trips as defined by 50 C.F.R. § 300.67(f)(2).
2. Appellant’s confusion as to the logbook reporting requirements in 2004 and 2005 is not a basis for counting certain trips, reported by Appellant as salmon fishing trips, as bottomfish logbook fishing trips.
3. An appellate officer or administrative judge does not have the authority to evaluate why an applicant did not report bottomfish information on a trip and, based on that evaluation, order that NMFS treat the trip as a bottomfish logbook fishing trip and credit the trip toward a charter halibut permit.
4. Appellant has not shown that he took fifteen or more bottomfish logbook fishing trips with a single vessel in his applicant-selected year in the qualifying period (2005).

⁶⁹ 50 C.F.R. § 300.67(e)(1) (emphasis added).

⁷⁰ 50 C.F.R. 300.67(f)(4).

⁷¹ 50 C.F.R. § 300.67(f)(2).

⁷² Appeal of Initial Administrative Determination (Mar. 8, 2011).

5. An applicant's salmon fishing trips may not serve as a basis for determining the angler endorsement on a charter halibut permit.
6. Appellant has not shown that he should receive an angler endorsement greater than four on either of his permits.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on February 17, 2012, unless by that date the Regional Administrator orders review of the Decision.

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 January 30, 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 issuance of a Decision on Reconsideration.


A small handwritten mark, possibly a checkmark or the letter 'V', is located below the redacted signature.

Mary Alice McKeen
Administrative Judge

Date issued: January 18, 2012