

On appeal, Appellant does not dispute the angler endorsement on any of its permits. Appellant renews the claim that he submitted to RAM, namely that it should receive a fifth transferable permit because it took fifteen or more bottomfish trips where bottomfish fishing occurred with the [REDACTED] (VESSEL) in 2005.⁶ An applicant chooses 2004 or 2005 as the year in the qualifying period for NMFS to use in determining the number and type of permits that an applicant may receive.⁷ Appellant choose 2005.⁸ I therefore will examine Appellant's participation history in 2005, not 2004.

Appellant can file this appeal because it 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 it meets the requirements for five transferable permits instead of four transferable permits and two non-transferable permits.

I did not hold a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue it a fifth transferable charter halibut permit.⁹ I conclude that the record contains sufficient information upon which to decide the merits of this appeal.¹⁰ I therefore close the record and issue this decision.

For reasons which follow, I conclude that Appellant meets the participation requirements for four transferable charter halibut permits and two non-transferable permits and does not meet the participation requirements for a fifth transferable charter halibut permit.

ISSUE

Has Appellant shown that it meets the participation requirements for a fifth transferable permit?

FINDINGS OF FACT

1. In 2005, Appellant reported the following number of bottomfish logbook fishing trips by five vessels: 34 trips in Logbook [REDACTED];¹¹ 17 trips in Logbook [REDACTED];¹² 17 trips in Logbook [REDACTED];¹³ 15 trips in Logbook [REDACTED];¹⁴ 13 trips in Logbook [REDACTED];¹⁵ 7 trips in Logbook [REDACTED].¹⁶ Each logbook had trips by only one vessel.

⁶ Letter from Appellant to Office of Appeals (Mar. 28, 2011).

⁷ 50 C.F.R. § 300.67(f)(2).

⁸ Application for Charter Halibut Permit(s) at 2.

⁹ 50 C.F.R. § 679.43(g)(3)(i), (iv).

¹⁰ 50 C.F.R. § 679.43(g)(2).

¹¹ IAD at 7 – 8; Appellant's Copy of Logbook [REDACTED]. Appellant submitted to RAM copies of twelve logbooks on August 25, 2010. When I refer to Appellant's copy of a logbook, I am referring to one of these logbooks.

¹² IAD at 7 – 8; Appellant's Copy of Logbook [REDACTED]. With Appellant's Copy of Logbook [REDACTED], it was difficult to read a few entries. But there are at least seventeen trips recorded in Logbook [REDACTED].

¹³ IAD at 7 – 8; Appellant's Copy of logbook [REDACTED].

¹⁴ IAD at 7 - 8; Appellant's Copy of logbook [REDACTED].

¹⁵ Appellant's Copy of Logbook [REDACTED]. The IAD listed 12 trips. I address this difference in Finding of Fact 2.

¹⁶ IAD at 7 – 8; Appellant's Copy of Logbook [REDACTED].

2. Of these trips, the only trip that was not in the official record list of Appellant's trips for 2005,¹⁷ and that was not credited to Appellant in the IAD, is a trip on July 29, 2005, reported in Logbook [REDACTED] in statistical area 106200. This trip increased the number of Appellant's trips with that vessel from 12 to 13 trips.¹⁸
3. In 2005, Appellant had four vessels that each took fifteen or more bottomfish logbook fishing trips.¹⁹
4. In 2008, Appellant reported the following number of halibut logbook fishing trips by five vessels: 33 trips in Logbook [REDACTED]; 32 trips in Logbook [REDACTED]; 23 trips in Logbook [REDACTED]; 17 trips in Logbook [REDACTED]; 11 trips in Logbook [REDACTED]. Each logbook had trips by only one vessel.
5. In 2008, Appellant had four vessels that took fifteen or more halibut logbook fishing trips.²¹
6. Appellant filed a timely application for charter halibut permits on February 23, 2010.²²

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.²³ In January 2010, pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).²⁴ The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. The following is a description of the features of the CHLAP relevant to this appeal.

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

¹⁷ Official Record List of Trips by Appellant attached to email from NMFS Computer Specialist to Mary Alice McKeen (Oct. 25, 2011). I will refer to this list by that date.

¹⁸ Logbook [REDACTED] entry for July 29, 2005. The record contains no explanation for why RAM did not credit this trip. Appellant reported it in statistical area 106200. The file contains an email from the RAM Program Director approving RAM's crediting trips reported in Logbook [REDACTED], a different logbook, that occurred in statistical area 106200 and 107100. RAM Staff Email (Jan. 19 and Jan. 20, 2011).

¹⁹ Finding of Fact 1.

²⁰ IAD 7 – 8.

²¹ Finding of Fact 4.

²² Application (received Feb. 23, 2010).

²³ 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.

²⁴ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

for halibut in 2004 and 2005,²⁵ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁶

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).²⁷

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).²⁸

The charter halibut 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, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²⁹

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 the bottomfish fishing that occurred on the trip: statistical areas or stat areas, boat hours or the number of rods.

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

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 areas where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.³⁰

Thus, to be a halibut logbook fishing trip, the trip must not only have occurred but must have been reported to ADF&G with one of four pieces of information regarding the fishing that occurred on the trip: the number of halibut caught, the number of halibut released, the stat areas where bottomfish fishing occurred and the number of boat hours that the vessel engaged in bottomfish fishing.

²⁵ 50 C.F.R. § 300.67(f)(6).

²⁶ 50 C.F.R. § 300.67(f)(7).

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

²⁸ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

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

³⁰ 50 C.F.R. § 300.67(f)(3).

ANALYSIS

Has Appellant shown that it meets the participation requirements for a fifth transferable permit?

I initially examine how RAM determined that Appellant met the requirements for four transferable permits and two non-transferable permits. Then I examine Appellant's arguments as to why it should receive a fifth transferable permit instead of the two non-transferable permits.

A. RAM's determination: four transferable and two non-transferable permits.

Under the charter halibut regulation, RAM first determines if an applicant submitted a timely application.³¹ Appellant submitted a timely application. In that application, Appellant chose 2005 as the year NMFS should use to determine the number and type of permits that it would receive.³²

RAM takes the following steps to evaluate the application:

Step 1: applying 50 C.F.R. § 300.67(b), does the applicant meet the participation requirements for a non-transferable permit?

Step 2: applying 50 C.F.R. § 300.67(c), does the applicant meet the participation requirements for any additional permits?

Step 3: applying 50 C.F.R. § 300.67(d), does the applicant meet the participation requirements for any of its permits to be a transferable permit?

Step 4: applying 50 C.F.R. § 300.67(e), does the applicant meet the participation requirement for an angler endorsement greater than four on any of its permits?

RAM correctly applied these steps in evaluating Appellant's application.

Step 1: RAM determined that Appellant met the participation requirements for a non-transferable permit in 50 C.F.R. § 300.67(b): Appellant took at least five bottomfish logbook fishing trips in 2005 and at least five halibut logbook fishing trips in 2008.³³

Step 2: RAM determined that Appellant meet the participation requirement for five additional permits in 50 C.F.R. § 300.67(c), which states:

(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:

³¹ 50 C.F.R. § 300.67(b)(1)(i).

³² Application at 2.

³³ These requirements are specifically at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

(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. [italics added]

Applying federal regulation 50 C.F.R. § 300.67(c), the result is as follows:

The applicant-selected year: **2005**.³⁴

The total number of bottomfish logbook fishing trips in 2005: **102**.

The total number of bottomfish logbook fishing trips in 2005 divided by five, rounded down to nearest whole number: $102 \div 5 = 20.4$, rounded to **20**.

The number of vessels that made those trips: **6**.

Applicant receives **the lesser of 20 or 6**: Appellant receives **6 permits**.

Although this regulation may seem confusing, the underlying rationale is fairly straightforward. An applicant cannot receive a greater number of permits than the number of boats that the applicant used in its applicant-selected year.

Step 3: RAM determined that Appellant met the requirement in 50 C.F.R. § 300.67(d) for four permits to be transferable. In 2005, Appellant had four vessels that each took fifteen or more bottomfish logbook fishing trips. In 2008, Appellant had four vessels that each took fifteen or more halibut logbook fishing trips.

Step 4: Applying 50 C.F.R. § 300.67(e)(1) – (5), does the applicant meet the participation requirement for an angler endorsement greater than four on any of its permits? With respect to two of Appellant's transferable permits, yes. RAM determined that Appellant took at least one bottomfish logbook fishing trip in 2004 or 2005 with six anglers and therefore will have an angler endorsement of six on a transferable permit. RAM determined that Appellant took a bottomfish logbook fishing trip in 2004 or 2005 with five anglers with a different vessel and therefore will have an angler endorsement of five on a transferable permit. Appellant did not take more than four anglers on a bottomfish logbook fishing trip in 2004 or 2005 with any other vessel.

I note that, in evaluating Appellant's application, RAM meticulously reviewed the twelve logbooks that Appellant submitted. RAM concluded that the official record was incorrect in several instances, credited Appellant with three additional trips that were reported in Logbook [REDACTED] and nine additional trips that were reported in Logbook [REDACTED]. This resulted in RAM determining that Appellant should receive four transferable permits rather than the two transferable permits that were in the Summary of the Official Record that RAM had sent to Appellant.³⁵

³⁴ Application for Charter Halibut Permit(s) at 2.

³⁵ Summary of Official Charter Halibut Record (Aug. 2, 2010).

B. Appellant has not shown that it meets the participation requirement in the recent period (2008) for a fifth transferable permit.

Appellant argues that it made fifteen or more bottomfish logbook fishing trips with VESSEL in 2005. Even if I concluded that VESSEL made fifteen or more bottomfish logbook fishing trips in 2005, Appellant could not receive a fifth transferable permit unless it also met the participation requirement for a fifth transferable permit in the recent period (2008).

Appellant had five vessels that reported halibut logbook fishing trips in 2008. Appellant did not contest RAM's determination that only four of these five vessels made fifteen or more halibut logbook fishing trips in 2008. Therefore Appellant does not meet the participation requirement in the recent period for a fifth transferable permit.

I did carefully review the evidence in the record regarding Appellant's fifth vessel in 2008. The three sources of trip history in the record each showed that Appellant's fifth vessel made **eleven** trips in 2008: Appellant's copy of Logbook [REDACTED]; the number of trips listed in the Initial Administrative Determination;³⁶ the list of trips in the Official Record attributed to Appellant in 2005 with the fifth vessel.³⁷ In fact, Appellant's copy of Logbook [REDACTED] for 2008 agreed with the official record down to the dates of each trip by the fifth vessel in 2008: June 29, June 30, July 1, July 2, July 10, July 11, July 17, July 26, July 27, August 8, August 18.³⁸

C. Appellant has not shown that it meets the participation requirement in 2005 based on trips where it caught bottomfish but did not report, with respect to bottomfish fishing, the statistical area, number of boat hours or number of rods.

With respect to Appellant's argument that it had a fifth vessel in 2005 that made fifteen or more bottomfish logbook fishing trips, it is essential to remember the definition of a bottomfish logbook fishing trip in 50 C.F.R. § 300.67(f)(2): "a logbook fishing trip in the qualifying period [2004, 2005] 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."³⁹

All the evidence in the record agrees that Appellant made seven bottomfish logbook fishing trips with VESSEL in 2005: the number of trips listed in the Initial Administrative Determination,⁴⁰ Appellant's copy of Logbook [REDACTED]; and the list of trips in the Official Record attributed to Appellant with VESSEL in 2005.⁴¹ Appellant's copy of Logbook [REDACTED] and the Official Record List of Trips by Appellant both show bottomfish logbook fishing trips in 2005 on the following seven days: May 7, May 31, June 2, June 5, June

³⁶ IAD at 7 – 8.

³⁷ Official Record List of Trips by Appellant (Oct. 25, 2011).

³⁸ Official Record List of Trips by Appellant (Oct. 25, 2011); Appellant's Copy of Logbook [REDACTED] (received Aug. 25, 2010).

³⁹ 50 C.F.R. § 300.67(f)(2).

⁴⁰ IAD at 8. – "2005 Bottomfish Logbook Fishing Trips Per Logbook."

⁴¹ Official Record List of Trips by Appellant (Oct. 25, 2011).

19, July 5 and September 13. These are the seven trips in 2005 where Appellant reported one of the three pieces of information, with respect to the bottomfish fishing that occurred on the trip: the statistical area, the boat hours, the number of rods.

Appellant argues that it should get credit for at least eight more trips in 2005 where the charter vessel captain reported keeping or releasing specific numbers of bottomfish, that were not halibut, but did not enter the statistical area or stat area, the boat hours or the number of rods where that fishing occurred.⁴² In the IAD, RAM did not give Appellant credit for these trips because RAM determined these were not bottomfish logbook fishing trips as defined by 50 C.F.R. § 300.67(f)(2), namely Appellant did not report the stat area, boat hours or the number of rods.⁴³

Appellant is correct that on at least eight trips in 2005, it reported keeping or releasing bottomfish in Logbook [REDACTED]. In 2005, bottomfish *included* halibut but also included other species. In 2005, Appellant reported keeping or releasing non-halibut bottomfish on at least eight trips, specifically pelagic rockfish, nonpelagic rockfish or lingcod. Appellant states that it definitely was bottomfish fishing, as is evident from the fact that the captain reported catching or releasing specific numbers of bottomfish, and that the captain obviously made a mistake when he did not report the statistical areas, the boat hours or the number of rods where this bottomfish fishing occurred. If anglers did keep or release specific bottomfish, Appellant is correct that the captain could have reported, with respect to that fishing, the statistical area, the boat hours and the number of rods. Appellant is also correct that, if the captain had done that, Appellant would have gotten credit for those trips toward a charter halibut permit, even though Appellant had not been targeting halibut.

The representative of Appellant corporation states that he understands that an appellate officer would have authority to review the logbook data and recommend that he receive credit for the trips if he could show that he actually was fishing for bottomfish but simply had not filled in the statistical area, boat hours or number of rods.⁴⁴ It is true that sometimes a regulation will grant an appellate officer or administrative judge the authority to determine facts and make a recommendation to the final decision-maker⁴⁵ that the initial reviewing staff could not make.⁴⁶ This is not one those situations. An appellate officer does not have free-floating equitable authority. An appellate officer has the authority that the regulation grants the appellate officer just as the agency itself has the authority that the regulation grants to the agency.

⁴² Appellant's Copy of Logbook [REDACTED] (received Aug. 25, 2010).

⁴³ IAD at 8 – 9.

⁴⁴ Letter from Appellant to Office of Appeals (Mar. 28, 2011).

⁴⁵ The Regional Administrator (RA) for the Alaska Region is the final decision-maker. See 50 C.F.R. § 679.43(k) & (o) (appellate officer's decision becomes final agency action thirty days after issuance of the decision unless the RA reverses, remands or modifies the appellate officer's decision).

⁴⁶ For example, under the charter halibut regulation, only an appellate officer can determine whether an applicant may receive a permit based on the unavoidable circumstance regulation. 50 C.F.R. § 300.67(g) ("Unavoidable circumstances claims must be made pursuant to paragraph (h)(6) of this section . . ."); 50 C.F.R. § 300.67(h)(6) ("An applicant that receives an IAD may appeal to the Office of Administrative Appeals (OAA) pursuant to § 679.43 of this title.").

I conclude, under the charter halibut regulations, NMFS does not have authority – in either the initial administrative determination or through the appeal process – to examine why an applicant did not report a trip in the qualifying period with one of the three required pieces of information (stat area, boat hours, number of rods), evaluate the reason, determine whether the applicant actually was bottomfish fishing and grant some applicants receive credit for trips that were not reported with one of the required pieces of information and deny other applicants credit.

I base this conclusion on the clear and unambiguous language of the definition of bottomfish logbook fishing trip, the regulatory history of the definition and the Council Motion and Analysis.

First, the regulation specifically requires that NMFS award permits based on specified numbers of "bottomfish logbook fishing trips" that were "reported" in the qualifying period.⁴⁷ The regulation is clear and unambiguous. 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 regulation does not have any exceptions.

If NMFS had authority to make exceptions, it is highly likely that the regulation would specify that authority and give guidance for the grounds on which an appellate officer could excuse, subject to review by the Regional Administrator, a failure to report. The regulation has no such language. That is strong evidence that the regulation does not confer that authority on any level within NMFS.

Second, the regulatory history supports the conclusion that an appellant *must* have reported one of the three specified pieces of data for a trip to be counted towards a permit. 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

⁴⁷ 50 C.F.R. § 300.67(b)(1)(ii)(A).

period as a bottomfish logbook fishing trip for purposes of qualifying for one or more permit(s). . . .⁴⁸

In response to public comments on the proposed rule, NMFS affirmed the validity of use of using the 2004/2005 bottomfish data as a basis for issuing charter halibut permits.⁴⁹ 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 permit.⁵⁰

If I accepted Appellant’s argument, NMFS would, in essence, be changing the definition of “bottomfish logbook fishing trip” for an individual applicant through the appeal process when NMFS declined to make that change for all applicants in the rulemaking process. This supports the conclusion that NMFS does not have authority to make that change through the appeal process.

Third, when the North Pacific Fishery Management Council took final action on a moratorium on entry into charter halibut fishing, the Council Motion in Issue 9 specifically recommended the use of these three pieces of information in bottomfish logbooks data to determine participation: “Issue 9: Evidence of participation is ADF&G saltwater logbook entry with bottomfish statistical area, rods or boat hours.”⁵¹

This is very specific. The Council and NMFS analyzed comprehensively the Council’s preferred alternative in an Environmental Assessment/ Regulatory Impact Review.⁵² 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 in the qualifying period where the applicants did not report, with respect to bottomfish fishing on the trip, the statistical area, the number of rods or the number of boat hours.

I note that this appeal highlights a particular feature of this program, namely that a trip can be a bottomfish logbook fishing trip, and therefore count towards a charter halibut permit, even if the applicant was not fishing for halibut. The Council was aware of this and explained the basis for its recommendation:

Issue 9 was selected as part of the Council’s preferred alternative. Because the Council selected historic participation as the method used to allocate permits, it needed a data set that contains the participation history

⁴⁸ Proposed Rule, 74 Fed Reg. 18,178, 18,185 (Apr. 21, 2009).

⁴⁹ In the final rule, see NMFS’s responses to Comment 146 and Comment 148. Final Rule, 75 Fed. Reg. 554, 592, 593 (Jan. 5, 2010).

⁵⁰ Final Rule, 75 Fed. Reg. 554, 595 – 597 (Jan. 5, 2010)(changes in final rule). In the final rule, NMFS 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 (Change 17).

⁵¹ 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.

⁵² 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/earirffa_charter_vessel_moratorium110609.pdf.

of the vessels and businesses in the halibut charter industry. After considering all data sources available, the Council concluded the best source of participation data for the halibut charter industry is ADF&G Saltwater Logbooks. All Alaskan fishing guide businesses operating in saltwater are required to obtain, complete, and submit logbooks (although halibut specific data were not collected during all of the period of interest). ADF&G Saltwater logbooks required that entries covering bottomfish trips include the primary 6-digit statistical area fished, maximum number of rods fished, boat hours fished, number of fish kept, number of fish released, and the number of clients on the trip.

ADF&G Saltwater Logbooks, prior to 2006, were not designed to allow halibut data to be separated from other bottomfish data.⁵³ The information presented in this analysis (data from 2004 and 2005) will overestimate the participation in the halibut charter fishery to the extent that non-halibut bottomfish trips are reported in the logbooks. *However, because the predominant bottomfish species targeted in saltwater is halibut, it is assumed that bottomfish data provide a reasonable proxy for halibut activity.* The logbook data since 2006, [sic] separate halibut trips from bottomfish trips. So, data for the year prior to implementation (2007 or 2008) [recent period] reflect only halibut participation history, as reported in the logbooks.⁵⁴

I conclude that Appellant's trips in 2005 where he reported catching or releasing individual, non-halibut, bottomfish but not the statistical area where bottomfish fishing occurred, the boat hours or the number of rods are not bottomfish logbook fishing trips. I conclude that NMFS – either as a result of its initial review of an application or as a result of the appeal process – cannot count these trips toward a participation requirement for a charter halibut permit. I conclude that Appellant has not shown that it meets the participation requirement in the qualifying period for a fifth transferable permit.

CONCLUSIONS OF LAW

1. A trip is not a bottomfish logbook fishing trip unless the applicant reported to ADF&G one of the following pieces of information about the trip: statistical area where bottomfish fishing occurred, number of boat hours the vessel engaged in bottomfish fishing or the number of rods used from the vessel in bottomfish fishing.
2. Under the charter halibut regulation, NMFS does not have authority – in either the initial administrative determination or through the appeal process – to examine why an applicant did not report a trip in the qualifying period with one of the three

⁵³ In at least 2002 (and possibly 2001 and 2000), ADF&G collected halibut-specific data in logbooks. ADF&G stopped collected that information in 2003 and resumed collecting it in 2006. NMFS Alaska Region, Administrative Appeals website, has ADF&G Logbooks and Instructions from 2002 to 2010: http://www.fakr.noaa.gov/appeals/adfg_logbooks/2008.pdf.

⁵⁴ Analysis, *supra* note 52, at 61.

required pieces of information (statistical area, boat hours, number of rods), evaluate the reason, determine whether the applicant actually was bottomfish fishing, grant some applicants receive credit for trips that were not reported with one of the required pieces of information and deny credit to other applicants.

3. Appellant's trip on July 29, 2005, is a bottomfish logbook fishing trip because it reported the statistical area where bottomfish fishing occurred.
4. Appellant does not meet the participation requirement in 2005, its applicant-selected year, for a fifth transferable charter halibut permit.
5. Appellant does not meet the participation requirement in the recent period, 2008, for a fifth transferable charter halibut permit.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on February 22, 2012, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(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 February 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 issuance of a Decision on Reconsideration.



Mary Alice McKeen
Administrative Judge

Date issued: January 23, 2012