



and Appellant's two vessels took eighty logbook fishing trips in 2005 and with each vessel taking at least fifteen trips.<sup>6</sup>

But RAM determined that Appellant did not meet the participation requirement in the recent period for any transferable permit because, according to the official charter halibut record, neither vessel took fifteen or more halibut logbook fishing trips in 2008.<sup>7</sup> According to the official charter halibut record, Appellant's two vessels took a total of nineteen trips: thirteen trips by the [REDACTED] (VESSEL 1) and six trips by the [REDACTED] (VESSEL 2).

Appellant claims that the official record is incorrect and that it did report fifteen or more halibut logbook fishing trips in 2008 to the Alaska Department of Fish and Game (ADF&G) by each of its vessels.<sup>9</sup>

I determined that the record was insufficient for me to decide Appellant's claim and that an oral hearing was the best way to resolve whether Appellant meets the requirements for one or two transferable charter halibut permits.<sup>10</sup>

I held a hearing on October 11, 2011 in Juneau, Alaska. Appellant participated telephonically through the testimony of [REDACTED] (Captain), Owner 1 and Owner 2 and [REDACTED] father of Owner 1 and Owner 2 (Father). [REDACTED] an administrative person for Appellant Corporation, was on the line but did not testify. Counsel for Appellant attended the hearing in person.

I have carefully considered the entire record in this appeal and conclude that the record now contains sufficient information upon which to decide this appeal.<sup>11</sup> I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant has not shown that it meets the participation requirement in the recent period (2008) for one or two transferable permits. Appellant will therefore receive two non-transferable permits each with an angler endorsement of five for use in Area 3A.

## ISSUE

Did Appellant establish by a preponderance of evidence in the record that it meets the participation requirement in the recent period for one or two transferable permits?

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§ 300.67(f)(1)(definition of "applicant-selected year").

<sup>6</sup> Letter from Owner 1 to NMFS (Aug. 2, 2010)(changing applicant-selected year from 2005 to 2004); Official Record Summary (Jan. 27, 2010).

<sup>7</sup> 50 C.F.R. § 300.67(d)(1)(ii).

<sup>8</sup> Official Record List of Trips by Appellant attached to email from NMFS Computer Specialist to Mary Alice McKeen (Sep. 19, 2011), provided to Appellant. Email from Mary Alice McKeen to Attorney for Appellant (Sep. 19, 2011).

<sup>9</sup> Appeal of Initial Administrative Determination (Mar. 8, 2011).

<sup>10</sup> Order Scheduling Hearing (Sep. 18, 2011).

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

## FINDINGS OF FACT

1. Appellant was issued an Alaska Department of Fish and Game (ADF&G) Business Owner License in at least the following years: 2004, 2005, 2006 and 2008.<sup>12</sup>
2. Appellant operates a lodge and charter fishing business in [REDACTED], a small town on Kodiak Island. It is currently owned by Owner 1 and Owner 2, [REDACTED]. Their father bought the lodge in 1995 and turned it into a commercial operation offering charter services in 1997.<sup>13</sup>
3. In 2004, Appellant reported a combined total of eleven bottomfish logbook fishing trips with two vessels.<sup>14</sup>
4. In 2005, Appellant reported a combined total of eighty bottomfish logbook fishing trips with two vessels and reported at least fifteen trips with each vessel.<sup>15</sup>
5. In 2007, Appellant reported a combined total of 113 halibut logbook fishing trips with three vessels.<sup>16</sup>
6. In 2008, Appellant reported nineteen halibut logbook fishing trips to ADF&G: thirteen trips with VESSEL 1 and six trips with VESSEL 2.<sup>17</sup>
7. From August 18 to August 23, 2008, Captain took a party of two anglers out fishing on VESSEL 1. Captain filled out the appropriate logbook pages at the end of the trip. The trip encompassed five days where anglers caught, or tried to catch, halibut.<sup>18</sup>
8. On August 30 and August 31, 2008, Owner 2, who is also a licensed ADF&G guide, took four persons on a trip on VESSEL 1 where the anglers caught, or tried to catch halibut.<sup>19</sup>
9. Appellant did not report trips to ADF&G that are not contained in the official record.<sup>20</sup>
10. Appellant submitted a timely application for charter halibut permit(s) on April 1, 2010.<sup>21</sup>

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<sup>12</sup> Official Record List of Trips by Appellant (Sep. 19, 2011). It is highly likely Appellant was issued an ADF&G Business Owner licenses in the years before 2004, in 2006 and in the years after 2008. But these years are not material to resolving this appeal.

<sup>13</sup> Testimony of Father (Oct. 11, 2011).

<sup>14</sup> Official Record List of Trips by Appellant (Sep. 19, 2011).

<sup>15</sup> Official Record List of Trips by Appellant (Sep. 19, 2011).

<sup>16</sup> Official Record List of Trips by Appellant (Sep. 19, 2011).

<sup>17</sup> Official Record List of Trips by Appellant (Sep. 19, 2011).

<sup>18</sup> Testimony of Captain (Oct. 11, 2011); Declaration of Owner 2 (Aug. 2, 2010) and Attachment to Declaration: ADF&G Sport Fishing License issued to angler on trip (Aug. 18, 2008).

<sup>19</sup> Declaration of Owner 2 (Aug. 2, 2010) and Attachment to Declaration: Pictures from trip, ADF&G Sport Fishing Licenses issued to four anglers on trip (Aug. 30, 2008).

<sup>20</sup> I base this finding on the weight of evidence in the entire record.

## PRINCIPLES OF LAW

In January 2010, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program pursuant to section 773c of The Halibut Act.<sup>22</sup> These regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. NMFS must follow these regulations in evaluating applications for charter halibut permits. The following is a description of the chief features of the CHLAP regulations that are relevant to this appeal.

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.<sup>23</sup> 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).<sup>24</sup> 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 be a person to whom ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit. The trips must have been reported under the applicant's ADF&G Business Owner License for that year.<sup>25</sup>

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, and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>26</sup>

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.<sup>27</sup>

An applicant must prove "bottomfish logbook fishing trips" in the qualifying period (2004, 2005) and "halibut logbook fishing trips" in the recent period (2008).<sup>28</sup> A bottomfish logbook fishing trip is defined in the charter halibut regulation as:

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<sup>21</sup> Application for Charter Halibut Permit(s) (received Apr. 1, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

<sup>22</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

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

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

<sup>25</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>26</sup> 50 C.F.R. § 300.67(f)(6)-(7).

<sup>27</sup> 50 C.F.R. § 300.67(f)(4). The regulation adjusts for multi-day trips, which is not an issue here.

<sup>28</sup> The reason for the difference is that, in 2004 and 2005, ADF&G did not require participants in the charter halibut fishery to report halibut specifically but did require participants to report halibut effort as bottomfish effort. Therefore, for 2004 and 2005, NMFS evaluates an applicant's participation by bottomfish logbook fishing trips, which means that the applicant reported one of three pieces of information that showed bottomfish effort. Beginning in 2006, ADF&G required participants to report keeping or releasing halibut specifically. Thus, for 2008, NMFS evaluates an applicant's participation by

a logbook fishing trip in the qualifying period *that was reported to the State of Alaska* in a Saltwater Charter Logbook with any one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.<sup>29</sup>

A halibut logbook fishing trip is defined in the charter halibut regulation as:

a logbook fishing trip in the recent participation period *that was reported to the Alaska Department of Fish and Game* 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 kept, the number of halibut released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.<sup>30</sup>

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).<sup>31</sup>

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with one vessel in its applicant-selected year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).<sup>32</sup>

To receive a second transferable charter halibut permit, an applicant must meet the same requirements with a different vessel.<sup>33</sup>

## ANALYSIS

### **Did Appellant prove by a preponderance of evidence in the record that it meets the participation requirement in the recent period for one or two transferable charter halibut permits?**

RAM determined that Appellant took thirteen halibut logbook fishing trips with VESSEL 1 in 2008 and six halibut logbook fishing trips with VESSEL 2 in 2008. Appellant emphasizes that it definitely took many more trips where anglers caught, or tried to catch, halibut.

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halibut logbook fishing trips, which means that the applicant either reported keeping or releasing halibut or reported bottomfish effort. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

<sup>29</sup> 50 C.F.R. § 300.67(f)(2)(emphasis added).

<sup>30</sup> 50 C.F.R. § 300.67(f)(3)(emphasis added).

<sup>31</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

<sup>32</sup> 50 C.F.R. § 300.67(d)(1).

<sup>33</sup> 50 C.F.R. § 300.67(d)(2).

Appellant submitted documentary evidence with regard to two trips: a five-day trip from August 18 to August 23, 2008, with VESSEL 1 and the two-day trip on August 30 and August 31, 2008, with VESSEL 1. I found that Appellant took both trips and that anglers on the trip caught, or tried to catch, halibut.<sup>34</sup> If NMFS could count those trips toward a charter halibut permit, each day would actually count as a separate trip.<sup>35</sup> Thus, if Appellant could receive credit for either of those trips toward a charter halibut permit, Appellant would receive a transferable permit since RAM credited Appellant with thirteen trips by VESSEL 1.

For the reasons that follow, I conclude that NMFS cannot count either of those trips, or any trip that Appellant did not report, towards a charter halibut permit.

A. RAM correctly concluded that Appellant cannot receive credit for a trip in 2008 unless the trip meets the definition of a halibut logbook fishing trip.<sup>36</sup>

The participation requirement in the charter halibut regulation in the recent period is fifteen “halibut logbook fishing trips” from one vessel.<sup>37</sup> The regulation defines “halibut logbook fishing trip” as a trip reported to the State with one of the following four pieces of information: halibut caught, halibut released, the statistical area where bottomfish fishing occurred or the number of boat hours that the vessel engaged in bottomfish fishing. The regulation, on its face, makes no exceptions and does not authorize NMFS to make any exceptions to the requirement for fifteen “halibut logbook fishing trips” for a transferable permit and to the requirement that the trip had to be reported with one of four pieces of information.

There are many reasons why a trip might not be reported. Some people may be completely unaware of the reporting requirement. Some may not submit the reports out of inattention. Some persons may experience personal problems that distract them from their obligation to report. Some people rely on others, such as the vessel guide or perhaps an office manager, to submit the reports on their behalf.

If NMFS had authority to examine why an applicant did not report a trip, determine whether the applicant’s reason for not reporting was valid, determine whether the applicant did, in fact, take trips that the applicant did not report and, based on the evaluation, grant credit for some unreported trips, but not others, the regulation would likely specify that authority and provide guidance on what reasons would excuse lack of reporting and what reasons would not.

The regulation does none of that but specifically and unequivocally states that the trips must have been reported to the State of Alaska within the time limit for reporting, which is a time near when the trip occurred. The regulatory history supports the unambiguous language of the charter halibut regulation. In publishing the proposed and final rule,

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<sup>34</sup> Findings of Fact 7, 8.

<sup>35</sup> 50 C.F.R. §300.67(f)(4).

<sup>36</sup> IAD at 6 – 7.

<sup>37</sup> 50 C.F.R. § 300.67(d)(1)(ii).

NMFS stated that the rule meant that an applicant could not add trips to the official record years after those trips occurred.<sup>38</sup>

All applicants have been judged under the regulation, as adopted by the Secretary of Commerce, which requires that NMFS issue charter halibut permits based only on reported bottomfish logbook fishing trips or halibut logbook fishing trips.<sup>39</sup> It would be arbitrary to allow Appellant to report trips now when NMFS did not allow other applicants to do that.

In the alternative, Appellant argues that it actually did report trips to ADF&G that are not contained in the official record. I examine that claim now.

B. Appellant has not proven by a preponderance of evidence in the record that it reported charter halibut trips to ADF&G that are not contained in the official record.

Appellant argues that it reported additional trips by VESSEL 1 and VESSEL 2 in numbers sufficient to enable it to receive two transferable permits. That would be nine additional trips by VESSEL 1 and two additional trips by VESSEL 2.

NMFS created the official record from the ADF&G logbook trip database.<sup>40</sup> ADF&G records did not contain any additional trips by Appellant. A presumption of regularity attaches to acts performed by government officials. They are presumed to carry out their official duties correctly.<sup>41</sup> This means that ADF&G is presumed to have properly recorded logbook trip reports submitted by Appellant.

An applicant may overcome this presumption if the applicant shows, by a preponderance of evidence in the record, that it is more likely than not that it did report the required number of trips for the permit or permits that it seeks. I conclude that the applicant has not met that burden of proof with regard to its claim for additional trips in 2008.

The evidence tending to show that Appellant did report additional trips with VESSEL 1 is the testimony of Owner 2 that he generally put logbook trip reports in the ADF&G drop box in his small community or mailed them to ADF&G and the testimony of Father that from about 1997 to 2009, they had problems with receiving mail that might have been

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<sup>38</sup> Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009) (“If a trip was not reported within those time limits [for reporting a trip to ADF&G], NMFS would not consider it a logbook fishing trip for purposes of this proposed rule, and it would not serve as the basis for NMFS to issue a charter halibut permit.”); Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010) (“If a trip was not reported within those time limits, NMFS will not consider it a logbook fishing trip for purposes of a charter halibut permit application.”).

<sup>39</sup> That actually is redundant because a trip cannot be a bottomfish logbook fishing trip or a halibut logbook fishing trip unless the applicant did report it.

<sup>40</sup> Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

<sup>41</sup> “Administrative law has adopted a presumption of regularity for official decisions.” C. Koch, Jr., *Administrative Law and Practice* § 1.20 at [12] at 42 (3d. ed. 2010)(footnote omitted).

related to some local hostility toward their operation.<sup>42</sup> Owner 2 acted as the general manager of the lodge in 2008.

The evidence tending to show that Appellant reported additional trips with VESSEL 2 is the same general testimony by Owner 2 and Father, the credible testimony by Captain that it was his standard practice to fill out logbook reports after a trip and that he believed he followed that procedure after the August 18 – August 23, 2008 trip,<sup>43</sup> and the documentation that the trip occurred.<sup>44</sup>

This evidence is insufficient to establish that Appellant reported additional trips by VESSEL 1 or VESSEL 2. Although Captain gave credible testimony that he filled out the logbook trip report, Captain did not testify that he mailed the trip reports to ADF&G or put them in the ADF&G drop box. Captain testified that he would have given them to Owner 2. The testimony of Owner 2 was general and did not describe a standard procedure for reporting the trips, such as that he did it at a standard time, in a standard way (mailing versus drop box).

Further, in the Declaration of Owner 2, submitted to RAM, Owner 2 also did not state that he had submitted logbook pages to ADF&G that were not in the ADF&G database. Owner 2 stated that he did not know if that happened because he did not have the business's own copies of the logbook pages.<sup>45</sup> Owner 2 therefore has not consistently stated that he sent in logbook reports that are not in the ADF&G database.

With respect to Appellant's lack of its own copies of the logbook reports, as Owner 2 states, Appellant submitted no carbon copies of the additional logbook pages that it claims to have submitted in 2008. The ADF&G logbooks for 2008 have fifty pages and a business owner generally reports one trip per day by submitting the original sheet to ADF&G according to a weekly schedule.<sup>46</sup> The business owner creates a pink carbon copy and can keep that for its records. Appellant did not have any carbon copies of its trip reports for 2008. Owner 2 testified that those records were stored in a property used as a staff house and the records were mistakenly disposed of.<sup>47</sup>

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<sup>42</sup> Testimony of Owner 2 (Oct. 11, 2011).

<sup>43</sup> Testimony of Captain (Oct. 11, 2011).

<sup>44</sup> Finding of Fact 7.

<sup>45</sup> Declaration of Owner 2 (Aug. 2, 2010) at ¶ 3: "We had a lot more charter fishing trips than shown on the ADF&G printouts. But without being able to examine our logbooks, I can't figure out if these additional trips were not logged, or were logged but the logbook pages were not timely submitted to ADF&G, or were logged and timely submitted for some reason ADF&G did not input the information into its database." And at ¶ 7: "As suggested in paragraph 3, without being able to examine our logbooks, I cannot be sure how these trips were logged and what happened in submitting this information to ADF&G."

<sup>46</sup> 2008 Logbook Instructions at iii available on the NMFS Alaska Region website, Administrative Appeals: [http://www.fakr.noaa.gov/appeals/adfg\\_logbooks/2008.pdf](http://www.fakr.noaa.gov/appeals/adfg_logbooks/2008.pdf). The weekly schedule is on the inside cover of the logbook. An applicant can take more than one trip per day and would submit a separate page for each trip.

<sup>47</sup> Testimony of Owner 2 at (Oct. 11, 2011).

This hurts Appellant's claim in two ways. Apart from ADF&G having the original logbook pages, Appellant does not have the next best evidence that it submitted the logbook pages, namely the carbon copies of the logbook pages it claims to have submitted. And if Appellant was not that careful with its carbon copies of the logbook trip reports, it suggests that Appellant might not have been that careful about initially submitting the logbook trip reports.

Finally, the official record credits Appellant with 80 trips in 2005 and 113 trips in 2007. And, on appeal, Appellant submitted copies of its 2007 logbook reports. Appellant had a different manager in 2007, who both submitted the reports and saved the carbon copies.

With regard to uncertain mail service, [1] the Father's testimony was general, [2] Father testified they had problem with incoming mail, not outgoing mail and [3] Appellant was able to report 113 trips in 2007 with the same mail service it used in 2008 but with a different manager responsible for sending in the reports.

I acknowledge that Appellant's business is a family business, first started by a father and now owned by two sons. And I can appreciate their legitimate desire to have an asset that reflects their hard work and can perhaps be passed on to the next generation. But I am bound by the charter halibut regulation which only authorizes NMFS to issue charter halibut permits to persons that meet the participation requirement of fifteen reported halibut logbook fishing trips with one vessel in both the applicant-selected year in the qualifying period (2004, 2005) and the recent period (2008). Since Appellant does not meet the participation requirement for a transferable permit in the recent period, I affirm the IAD that is the subject of this appeal.

#### CONCLUSIONS OF LAW

1. Appellant meets the requirements to receive two non-transferable permits, each with an angler endorsement of five, for use in Area 3A.
2. Appellant cannot receive credit for a trip in 2008 towards a charter halibut trip unless the trip meets the definition of a halibut logbook fishing trip in 50 C.F.R. § 300.67(f)(3).
3. Appellant did not establish by a preponderance of evidence in the record that it meets the participation requirement in the recent period for one or two transferable permits.

## ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on February 29, 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 February 9, 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: January 30, 2012