

Discussion Paper on Implementation of Permit Leasing Prohibition in March 2007 Council Motion on Charter Halibut Moratorium in Areas 2C and 3A

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Summary

In March 2010 the Council requested a discussion paper on a range of proposed alternatives to limit leasing of charter halibut limited entry permits (CHPs). In a discussion after the charter halibut Limited Entry Program (LEP) was implemented, Council members commented that the program did not appear to be implemented according to

“Issue 6. Leasing of permits would not be allowed.”⁶

⁶Halibut charter permit holders may only use their permit onboard a vessel that is identified on an ADF&G saltwater logbook assigned to the person holding the permit. If the permit holder wishes to use the permit on a different vessel, they must obtain an ADF&G logbook for the new vessel before the permit may be used on that vessel. The permit number must be recorded on the logbook for each trip.

Council intent. The relevant portion of the Council’s March 2007 preferred alternative motion is provided (see box). A *limit* on leasing was implemented in the final rule, as identified in the Council’s preferred alternative motion (footnote 6). NMFS however did not implement a *prohibition* on leasing because the staff notified the Council (through the analysis and staff presentation) that the Council had not identified the tools to implement such a broad prohibition on leasing CHPs.

The staffs of the Council (and contractors), NMFS, and ADF&G note that, as described in the Council’s analysis, the nature of charter businesses makes it extremely difficult to determine the types of leasing agreements that would be prohibited and those that would be allowed. The staffs have identified the following possible business arrangements:

1. Single resident or nonresident permit holder, one permit, operator (permit holder is the only licensed guide)
2. Single resident or nonresident permit holder, multiple permits, operator + hired guides
3. Single resident or nonresident permit holder, one permit, non-operator (permit holder not a licensed guide)
4. Single resident or nonresident permit holder, multiple permits, non-operator (all vessels run by hired guides)
5. Single resident or nonresident permit holder, one or multiple permits, non-operator not present on site (business and vessel run by employees)
6. Multiple owner (partnership, corporation) holding single or multiple permits; any combination of operators and non-operators; none, some, or all may be on site.
7. Others?

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Given the structure of business arrangements within the charter halibut industry, enforcing a prohibition on leasing would be extremely difficult, at best, and impossible in many situations. NMFS implemented the provisions that the Council adopted to *deter* leasing (see footnote), knowing the Council did not develop the necessary management measures to *prohibit* leasing (see main text) per its stated objective.

Staff review of proposed alternatives

In May 2010 the staffs reviewed the Council's March 2010 motion for proposed alternatives to limit leasing and were unable to identify any that would not "substantially change the character and current primary business practice of the halibut charter fleet," which is the language that the Council adopted in the problem statement in its March 2010 motion. Instead, the Council's proposed management solution may, in fact, compound the identified problem of restructuring the charter fleet; data are not available to determine whether substantial numbers would be affected. The staffs identified additional issues and requests for clarifications as noted in the Attachment, in the event the Council wished to proceed with this range of alternatives.

Charter Small Entity Compliance Guide

NMFS is preparing a Charter Small Entity Compliance Guide that will address frequently asked Questions (FAQs), such as transferring permits. The guide will identify that an operator of a vessel in Area 2C or Area 3A with one or more charter vessel anglers on board that are catching and retaining halibut is required have on board the vessel a State of Alaska Department of Fish and Game (ADF&G) Saltwater Charter Logbook issued in the name of the charter halibut permit holder, along with numerous other elements of the program.

Potential Action

In place of the Council's current range of proposed alternatives, the staff has identified a potential action that the Council may wish to consider to further meet its intent to *limit* leasing (see discussion below); however, *it is not known if the benefits of the potential action would outweigh the costs of implementation.* It may be of limited effectiveness and the Council may wish to confer with enforcement staff before requesting a regulatory amendment be initiated.

Staff Tasking

The Council should consider that any new regulatory amendment should be prioritized for development AFTER the final rule for the catch sharing plan (CSP) is published in the *Federal Register*. Any new tasking WILL jeopardize the 2012 target date for implementation of the CSP, as has already occurred under the Council's higher prioritization of the regulatory amendment to revise issuance of angler endorsements on CHPs (75 FR 56903, September 17, 2010). Note that due to the nature of a potential amendment to address leasing of CHPs, it is likely that NMFS staff would prepare all aspects of analysis and rulemaking.

Status Quo

Relevant regulation: 50 CFR 300.66(v)(1), which will be effective February 1, 2011, is in the form of a prohibition (as follows).

§ 300.66 Prohibitions. In addition to the general prohibitions specified in 50 CFR 300.4, it is unlawful for any person to do any of the following:

- (v) Be an operator of a vessel in Area 2C or Area 3A with one or more charter vessel anglers on board that are catching and retaining halibut without having on board the vessel a State of Alaska Department of Fish and Game Saltwater Charter Logbook that specifies the following:

- (1) The person named on the charter halibut permit or permits being used on board the vessel;
- (2) The charter halibut permit or permits number(s) being used on board the vessel; and
- (3) The name and State issued boat registration (AK number) or U.S. Coast Guard documentation number of the vessel.

Section 300.66(v)(1) prohibits an operator who wishes to use a charter halibut permit held by another person from (1) being issued a logbook by ADF&G in their own name and (2) recording the permit holder's name and permit number in the logbook issued to the permit user. The prohibition at §300.66(v)(1) is expected to provide a disincentive to using a charter halibut permit issued to another person because the permit user would be required to record his or her charter activity in a logbook issued to the permit holder rather than a logbook issued to the permit user. Some charter operators may perceive this as undesirable because the permit holder would receive any potential future harvest privilege if logbook records are used to determine eligibility for the privilege.

Additionally, to be issued a logbook, ADF&G requires a business name and ADF&G Business License number. In order to obtain a business license, the operator has to provide (1) a current State of Alaska Occupational Business License Number available from the Dept. of Commerce and Economic Development, Division of Occupational Licensing, and (2) a liability or marine protection insurance policy providing coverage of at least \$100,000 for each incident, and \$300,000 for incidents in a year covering all periods of time when the owner or owner's employees are providing sport fishing services to clients. These requirements may deter permit holders from making arrangements for another operator to use their charter halibut permit if they do not wish to actively participate in charter operations.

March 2010 Motion

The Council may have had State-issued limited entry permits in mind when it adopted its range of alternatives to prohibit leasing. Commercial Fishing Entry Commission (CFEC) permits are issued to individuals who meet specified qualifications, which typically meant that they could prove harvest of a fish species with a particular gear type as holders of gear licenses or interim-use permits. State of Alaska statutes require that the permit holder be on board and operating the gear. Permits are issued for a particular gear type and a particular fishery (<http://w3.legis.state.ak.us/pubs/pubs.php>). Unlike the charter halibut fishery, it seems there would be little incentive to owning multiple vessels that all fish the same gear type, since the CFEC permit holder can't be on board multiple vessels simultaneously. This is NOT the case with the variety of charter halibut business models.

Note that AS 16.43.150(g) prohibits leasing of CFEC permits. The requirement that the permit holder be on board and involved in operation of the gear would appear to be an effective deterrent to leasing. CFEC staff noted that the term "leasing" is sometimes used but fishermen are usually incorrectly referring to emergency medical transfers.

The charter permit application clearly shows that permits are issued to "the person who held the ADF&G Business Owner License." Note that a person can be an individual, corporation, partnership, or other type of legal entity. When logbooks were checked out, they were associated with a particular business by registering the name of the business and the business license number. The person to whom charter halibut permits are issued was not required to be a licensed guide, and was not required to have been present on the vessel or vessels that were associated with that business in the logbook. So the fundamental difference is that CFEC permits are issued to individuals that participate directly in the fishery and can prove that participation, presumably with signed fish tickets. If the charter halibut program were structured similarly, perhaps permits would have been issued to sport fishing guides that

operated the vessels. The number of hired skippers is unknown. The Stakeholder Committee and Council felt that the people who owned the business should get the permits.

If it is Council intent that a permit holder should either be present on the vessel using the permit or present where the vessel using the permit either leaves or returns (lodges or remote pickup and back to lodge), there are permit holders that own multiple permits that do not operate from a lodge. For example some permit holders may be out on another vessel when their hired skipper returns to port.

Background

The most common charter business model is an owner/operator. Another typical charter business model is for a charter business to hire a captain to take clients fishing. Some businesses hire a captain for the businesses' vessel while other businesses hire a captain and a vessel. Contracts with captains are business arrangements that can extend within a year, or over a number of years, and may be terminated at any time. These business arrangements make it difficult to determine with certainty whether permits would be leased to a captain or if the captain is working as an employee of the owner.

To proceed further to limit leasing of charter halibut permits, the Council first must define the activity for both leasing of vessels *and* leasing of permits. The definition of a boat lease in commercial IFQ regulations was developed by the Office of Administrative Appeals (OAA) over time and through case law. It is not definitive, however; it is based on "a preponderance of evidence" (see pages 5-6 of this OAA Decision: <http://www.fakr.noaa.gov/appeals/98-0001.pdf>).

The Council discussed that hiring a skipper means that someone else is running your boat, but a business owns the vessel and the LEP; however this interpretation does not include businesses that hire a skipper and a boat. The Council identified that leasing a permit means transferring the permit, with monetary compensation to an entirely different business owner with their own vessel(s). But transferring a permit with compensation also could occur to a different business owner without its own vessel(s) or to a skipper with or without his own boat. Many different combinations occur in the fleet. Another scenario that the Council could consider to be leasing would involve an operator that allows a family member, close friend, etc. to fish under an unused permit at no charge.

Council Concerns

- Current rule does not *prevent* leasing
- Lack of incentive to transfer a permit
- Constraints on new entrants (no incentive to (permanently) transfer permits)
- More desirable to have turnover rather than long term leasing
- If harvest privilege is associated with permit, then it could have additional value in the future

Staff Comments:

- Unique permit identifier(s) for 2011 may be recorded in the logbook.
- Inherent nature of limited entry is less exit/entry
- A lease is paying for the privilege of using a permit
- Council adopted a program where the permit is not tied to a vessel (or skipper)
- State requires skipper to have a copy of the owner's business permit
- Achieving new social goals will incur a high cost on charter fleet

- More economical for new entrants to lease, rather than buy (transfer), permits
- Concerns about new entry contrast with number of current participants who do not qualify
- Potential for hundreds of new community permit holders provides entry level opportunities

What NMFS Might be Able to Do

(to limit leasing, but not prevent it and whose effectiveness has not been determined)

- Amend the regulations to require that the name of the permit holder match the business owner as listed on the ADF&G business license. The ADF&G business license number and name of business, vessel name, and AK number is recorded when the logbook is checked out. Enforcement staff can match the permit owner name on the logbook with business license. They may transfer that logbook to another vessel if the first breaks down.

What NMFS Can Do

(but with potentially burdensome impediments)

- Require business owners to name a specific vessel and consider it a transfer to change the vessel affiliation, and then require the name of the owner of a vessel (but this is contrary to original intent of the program and could be an administrative and public burden- i.e., changing vessels due to breakdowns, document ownership in vessels – see history of commercial halibut IFQ hired skipper amendments)
- Owner on board requirement (but is contrary to original intent of the program)
- Grandfather current participants and require all future permit holders (transferees) to be owner on board (i.e., remove current grandfather provision that allows e.g., lodges to transfer)
- Add Use it or Lose it element to the program to transfer unused permits to (new) entrants

What NMFS Cannot Do

- Define a permit that is being leased or prohibit permit leasing without further definition of a lease by the Council (e.g., would the Council consider a business that owns 5 boats and hires 5 (or more) skippers for the boats to be leasing permits?)
- Define a vessel that is being leased
- Distinguish between legitimate and illegitimate business arrangements
- Require (corporate) business owners to be on board (e.g., commercial IFQ A shares)
- Verify contract during a boarding
- Continue current fleet behavior and prohibit leasing – requiring that all skippers be an employee of the business but this could be circumvented (similar to commercial hired skipper “paper” transactions - could employ on a daily basis or not pay with cash)

Written Record for the Status Quo

PROPOSED RULE

The proposed rule does not include a prohibition against leasing charter Limited Entry Permits (LEPs) although the Council recommended such a prohibition because such a prohibition would not lead to a permit holder being on board the vessel or having any direct connection with the charter operation. Under the proposed rule, a permit holder would not have to own a vessel or operate a vessel. A permit holder could legitimately allow a vessel operator to use the permit holder's permit as authority for the vessel operator to take anglers out charter halibut fishing, even though the permit holder does not own or operate the vessel and has nothing directly to do with the charter vessel fishing operation. The vessel operator may pay the permit holder for the right to use the permit or the permit holder may pay the vessel operator to take out anglers organized by the permit holder. *The charter industry has a variety of business models and the way some of these business models function is substantially similar to a lease between the permit holder and the vessel operator.* Therefore, prohibiting leasing may result in a restructuring of many charter businesses.

Further, it would be difficult to enforce a prohibition on leasing. NMFS would have to collect additional information attendant to a transfer. Simply prohibiting a transfer called "a lease" would result in the prohibition being enforced only against legally unsophisticated persons who did not draft their document to avoid such a term. For NMFS to examine the substance of any transaction would be difficult, time-consuming and undermine the principle that the permits are relatively freely transferable.

In light of this difficulty, the Council recommended three specific measures to *discourage* leasing:

1. Prohibit the charter halibut permit from being used on board a vessel unless that vessel is identified in an ADF&G Saltwater Charter Logbook;
2. Require that a charter vessel operator have on board the vessel an ADF&G Saltwater Charter Logbook issued in the name of the charter halibut permit holder; and
3. Require the authorizing charter halibut permit number to be recorded in the ADF&G Saltwater Charter Logbook for each trip.

This action proposes all of these Council recommendations as part of the requirement to have the Saltwater Charter Logbook on board. The requirement to identify the vessel in the logbook is intended to be consistent with an existing State of Alaska requirement that a charter vessel operator have on board the vessel an ADF&G Saltwater Charter Logbook. This logbook must be specific to the vessel on which it is used.

FINAL RULE

The final rule does not have an explicit prohibition against leasing, although the Council recommended one, for the reasons discussed in the proposed rule (74 FR 18178, April 21, 2009) at page 18191 and summarized above. The charter industry has a variety of business models, and the way some of these business models function is substantially similar to a lease between the permit holder and the vessel operator. For example, the owner of a charter business or of a business such as a wilderness lodge, that also provides charter services, employs hired skippers and guides to operate one or more vessels. The charter business may or may not own the vessels.

The rules governing the identification of qualified businesses and the number of permits they would receive did not require vessel ownership by the qualified business. Operations by these businesses may be difficult to distinguish from leasing. There is no bright line between how these types of businesses operate and what would be considered leasing arrangements. For this reason, enforcement of a prohibition on leasing would be difficult, time consuming, and costly. NMFS determined that the benefits derived from a leasing prohibition did not justify the costs of enforcement and the disruption to existing business operations. This position was described in the Council analysis, yet the Council identified a prohibition on leasing in its preferred alternative.

§ 300.66 Prohibitions.

* * * * *

(v) Be an operator of a vessel in Area 2C or Area 3A with one or more charter vessel anglers on board that are catching and retaining halibut without having on board the vessel a State of Alaska Department of Fish and Game Saltwater Charter Logbook that specifies the following:

- (1) The person named on the charter halibut permit or permits being used on board the vessel;
- (2) The charter halibut permit or permits number(s) being used on board the vessel; and
- (3) The name and State issued boat registration (AK number) or U.S. Coast Guard documentation number of the vessel

Council EA/RIR/IRFA (excerpts)

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“Issue 6 [see Motion above] **was selected as part of the Council’s preferred alternative.** Leasing of permits (and IFQs) is generally discouraged in fisheries under Council authority. Prohibitions on leasing stem from a desire to keep persons from holding permits for the sole purpose of generating income from the active participants. The Groundfish LLP program discourages leases by only allowing the permit to be transferred once per year. The NMFS transfer application also asks if there is an agreement to return the license to the seller or to transfer it to any other person, or if there is any condition requiring the resale or conveyance of the license.

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The IFQ program for halibut and sablefish has an owner-on-board requirement for most vessel classes, to encourage only persons intending to actively fish to buy into the fleet. Persons subject to owner-on-board must carry government issued photo identification while onboard the vessel.

Tracking whether halibut charter moratorium permits are being leased may be difficult without a provision such as owner-on-board. However, that type of requirement is not practical, because of the structure of the halibut charter fishery. In some cases, a charter business may hire a captain(s) to take clients fishing. Contracts with captains are business arrangements that can be extended within a year, or over a number of years, and may be terminated at any time with proper notice. The hired captain may or may not own the vessel used to take clients fishing. If the captain owns the vessel and the permit holder hires him to take their clients fishing, distinguishing this operation from a lease arrangement may not be possible.

These business arrangements may make it difficult to determine with certainty whether permits are being leased to a captain for a year, or if the captain is working as an employee of the owner. Given the structure of business arrangements within the halibut charter industry, enforcing a prohibition on permit leases may be problematic.

Given the above complexity with enforcing a prohibition on leasing, the Council added a footnote to this provision, clarifying the implementation approach intended under the moratorium. In brief, halibut charter permit holders may only use their permit onboard a vessel that is identified on an ADF&G saltwater logbook assigned to the person holding the permit. If the permit holder wishes to use the permit on a different vessel, they must obtain an ADF&G logbook for the new vessel before the permit may be used on that vessel. The permit number must also be recorded on the logbook for each trip. While these provisions are not expected to completely prevent leasing, they are intended to discourage some private leasing arrangements. A discussion of this approach is provided in Section 2.6.4.3 of the implementation section.”

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“2.6.3 Leasing

The Council’s preferred alternative includes a provision under Issue 6 to prohibit leasing in the moratorium program. Leasing is a nebulous term that describes a multitude of arrangements between two or more persons, but generally infers a temporary transfer of a right to possess or use specific property or a property-like privilege (e.g., fishing permit). Leasing arrangements are often designed to generate rent on the property or property-like privilege while allowing the lessee to use the property without the outlay of capital required if the property privilege was transferred. These lease arrangements are often short-term in nature. One type of leasing arrangement that is common in the commercial halibut fishery is the leasing of halibut individual fishing quota (IFQ). Leasing, in terms of the IFQ Program, occurs when there is a transfer of annual IFQ from the quota share holder to another party. In this situation, the quota share holder retains the quota share and the annual right of receiving IFQ resulting from that quota share, but

transfers the annual right to harvest the IFQ to another person. In this way, the person(s) involved in the transfer (conducted through NMFS) would be expected to have an arrangement that allows for mutual gain.

An important difference between the IFQ program and the moratorium program is that there is not a short-term harvest privilege (i.e., IFQ) associated with the moratorium permit that could be transferred through NMFS. In the case of the proposed charter moratorium, any change of the person(s) holding the moratorium permit would involve a transfer conducted by NMFS. For example, a permit holder who wants to “lease” a permit could conduct short-term transfers through NMFS, or completely circumvent NMFS by making private business arrangements without changing the permit holder’s name. Thus, in the latter example, NMFS and NOAA OLE would not have any documentation that a private business exchange took place. Moreover, there may be a greater incentive for permit holders to use private transactions because transaction costs associated with the application process can be avoided.

Private business arrangements are extremely difficult for NOAA OLE to enforce, because documentation about the arrangement is often not available, and a large amount of enforcement resources would be required to interpret documents, investigate, and prosecute leasing situations. This problem has been encountered by NMFS, with current leasing provisions in the groundfish LLP and IFQ. Regulations governing current programs, such as the groundfish LLP, prohibit leasing and allow NMFS to review transfer agreements to check if leasing has occurred. Despite having access to the transfer agreements, it is very difficult for NMFS to determine if the ostensive transfer is, in fact, a lease. Moreover, defining the term “lease” is problematic, because business contracts can be carefully worded to obfuscate a lease, so that NMFS will not deny an application.

The nature of charter businesses also makes it extremely difficult to determine the types of leasing agreements that would be prohibited and those that would be allowed. Many charter businesses hire a captain to take clients fishing, as this represents a typical charter business model. Contracts with captains are business arrangements that can extend within a year, or over a number of years, and may be terminated at any time. These business arrangements make it difficult to determine with certainty whether permits are being leased to a captain or if the captain is working as an employee of the owner. Given the structure of business arrangements within the halibut charter industry, enforcing a prohibition on leasing would be extremely difficult, at best, and impossible in many situations. Section 2.3.3 provides more information about enforcement issues associated with a prohibition on leasing.

2.6.3.1 Purpose of prohibiting leasing

Fisheries generally have leasing prohibitions for permits, because of concerns by fishermen about the “absentee landlord” syndrome (Wilen and Brown 2000). In fisheries, this syndrome broadly refers to situations where a permit holder does not personally fish the permit, or have any direct involvement with the fishery. Business arrangements involving owners who are not operating the charter vessel are common for the halibut charter industry. Many charter business owners hire captains or deckhands to operate the charter vessel, whether the vessel is owned by the business or captain. For example, a charter business owner in Atlanta may own a lodge in Southeast Alaska that relies on staff to manage the lodge, market trips, and provide guide services. Thus, while maintaining and managing capital in the sport fishery, this type of charter business owner is not on-site, fishing or working in fishery operations. The moratorium program (Alternative 2) would not eliminate or reduce this type of absentee ownership. Alternative 2 was intended to allow charter businesses to operate the way they do currently, which includes owning a business and hiring skipper and crew to operate the vessel, and/or operate several vessels under a single business.

The extent of the absentee ownership issue in the charter fishery is difficult to predict prior to program implementation. Looking at similar situations and economic theory for guidance, most mature markets that involve productive assets ultimately allow leasing and short-term contracting. In fact, it is difficult to find many property-like privilege systems in the world that prohibit short-term leasing and only allow

“permanent” transfers in order to eliminate absentee landlords. The widespread tolerance of leasing suggest two possibilities: (1) the benefits associated with short term production flexibility are seen by most participants as outweighing the social costs associated with absenteeism; and/or, (2) the basic incentives in many systems work against absenteeism (Wilens and Brown 2000). The latter seems particularly likely when the productive use of the asset requires specialized skills. For example, in the charter fishery, the skills and knowledge associated with catching halibut may discourage absenteeism. However, absenteeism in the charter fishery may be encouraged by specialized skills such as superior marketing, packaging, and bundling skills that better serve the market niche associated with a primary business. Given that many business owners currently operating in the charter fishery do not personally guide clients or are offsite managing the charter fishing business, incentives that currently exist for absenteeism would likely continue under Alternative 2.

2.6.3.2 Options to discourage leasing

Given the problems associated with enforcing the prohibition on leasing, other types of regulatory controls that do not directly prohibit leasing were considered by the Council. The types of controls that may be considered have the potential to influence behavior by increasing the transaction and opportunity costs associated with business arrangements.

The IFQ Program has several controls in place that increase transaction costs between IFQ users by limiting the use of a vessel. These types of controls include a requirement for a certain level of vessel ownership before IFQ may be fished from that vessel, and a proposed regulation that prevents short-term transfers of vessel ownership (i.e., vessel ownership for at least 12 months). The vessel ownership regulation requires a corporation, partnership, or entity who did not receive an initial issuance of QS to demonstrate 20-percent ownership of a vessel before the IFQ may be fished (50 CFR 679.42). This capital investment imposes an opportunity cost for individuals wanting to use QS/IFQ and thus reduces the incentive for some individuals to enter contractual agreements. To further reduce the number of short-term leasing transactions, a 12-month vessel ownership requirement was recently published as a proposed rule in the *Federal Register*. A vessel ownership requirement is an effective method for limiting some types of short-term transactions; however, a vessel use restriction that requires a unique vessel be registered through RAM is not an option for the charter moratorium program described in Alternative 2. This type of vessel use restriction would require registration of the vessel with NMFS which would substantially reduce the charter fleet’s ability to quickly change vessels in case of breakdowns. In December 2006, the Council considered adding a vessel registration requirement, but decided not to do so, primarily due to the additional burden created.

The Council’s preferred alternative under Issue 6 includes an explicit provision intended to help both enforce the use cap and discourage certain lease arrangements. This provision allows halibut charter permit holders to only use their permit onboard a vessel that is identified on an ADF&G saltwater logbook assigned to the person holding the permit. If the permit holder wants to use the permit on a different vessel, he or she must obtain an ADF&G logbook for the new vessel before the permit may be used on that vessel. The logbook could provide linkage between the business holding the moratorium permit and the vessel from which guided fishing occurs, although there is no requirement that the charter business owner also own the vessel from which guided fishing occurs. Implementation of this provision would require modifying the ADF&G logbook to allow the recording of moratorium permit numbers for each trip.

The State has indicated its ability and willingness to make the required change to the logbook. This change would allow moratorium permits to be linked to a business operating a charter vessel on a specific trip (assuming the business holding the permit also operated the charter vessel). Note that a permit holder could only use their permit onboard a vessel that is identified on an ADF&G logbook assigned to the person holding the permit. The advantage to this enforcement method is that additional reporting requirements imposed on the charter fleet are minimal and enforcement authorities could determine if a

business exceeded its use cap. This measure would not increase NOAA OLE's ability to determine if private leasing arrangements occurred between the permit holder and the person using the permit to guide charter clients. However, the logbook information would allow enforcement to "flag" businesses that exceeded the use cap or were used on a vessel not corresponding to the business holding the moratorium permit.

Current ADF&G regulations require that every charter vessel from which guided trips are being conducted must have a logbook onboard and be an ADF&G licensed sport fish business. The logbook effectively links a vessel with the ADF&G business operating a charter vessel and is typically unique to each vessel. A business can obtain a logbook for any vessel it may use to conduct guided trips during any point in the season. Thus, at the beginning of a fishing season, a business could obtain a logbook for each vessel it intends to use. For example, a business that generally uses a single vessel, but has a second spare vessel used only occasionally, could obtain a logbook for the spare vessel at the start of the season. In this example, the logbook for the spare vessel would also be registered to the ADF&G business that was holding the moratorium permit. In some situations, a single vessel is used by two businesses. In these situations, each business would need to have a unique logbook linked to the vessel to allow identification of the business holding a moratorium permit. The 2006 logbook provides this linkage for each trip fished.

In summary, the "no leasing" provision is very difficult to enforce on the charter fishery, and its purpose in the context of the traditional industry structure that characterizes halibut charters in Alaska. The Council's preferred alternative continues to include a prohibition on leasing, and includes provisions that are intended to discourage leasing."

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"Leasing of permits (annual) would not be allowed.161

Leasing of permits is generally discouraged in fisheries under Council authority. Prohibitions on leasing stem from a desire to keep persons from holding permits for the sole purpose of generating income from the active participants. Because of the nature of charter fishing businesses (e.g., an operator may run multiple boats, perhaps out of different ports, targeting different species) the traditional reasons for the Council's objections to "leasing", per se, may not readily apply. For example, the "owner-on-board" rationale for restricting leasing in traditional commercial fisheries is inconsistent with the charter business model of many operations active in Alaska.

Furthermore, tracking whether halibut charter limited access permits are being leased may be exceedingly difficult and costly. In many cases, a charter business must hire a captain(s) to take anglers fishing. Contracts with captains are private business arrangements that can be extended within a year, or over a number of years, and may be terminated at any time. The hired captain may or may not own the vessel used to take anglers fishing. If the captain owns the vessel, and the permit holder hires him to take anglers fishing, distinguishing this operation from a lease arrangement may not be possible.

These business arrangements may make it difficult to determine with certainty whether permits are being leased to a captain for a year or if the captain is working as an employee of the owner. Given the structure of business arrangements within the halibut charter industry, enforcing a prohibition on permit leases may be difficult, without additional intrusive and potentially burdensome requirements.

The proposed rule does not have a prohibition against leasing, although the Council recommended one. The proposed rule does not contain a comprehensive prohibition on leasing, because such a prohibition would not lead to a permit holder being on board the vessel or having any direct physical interaction with the clients, while they are actively participating in any given charter cruise. Under the proposed rule, a permit holder would not have to own a vessel or operate a vessel. A permit holder could legitimately allow a vessel operator to use the permit holder's permit as authority for the vessel operator to take anglers out charter halibut fishing, even though the permit holder does not own or operate the vessel and has nothing directly to do with the charter vessel fishing operation. The vessel operator may pay the

permit holder for the right to use the permit or the permit holder may pay the vessel operator to take out anglers organized by the permit holder. As noted, the charter industry has a variety of business models and the way some of these business models function is substantially similar to a lease between the permit holder and the vessel operator.

Further, as noted, it would be difficult to enforce a prohibition on leasing. NMFS would have to collect additional information attendant to a transfer. Simply prohibiting a transfer called “a lease” would result in the prohibition being enforced only against legally unsophisticated persons who did not draft their document to avoid such a term. For NMFS to examine the substance of any transaction would be difficult, time-consuming, and could undermine the principle that the permits are relatively freely transferable.

In light of this difficulty, the Council recommended three specific measures to discourage leasing:

- Prohibit the charter halibut permit from being used on board a vessel, unless that vessel is identified in an ADF&G Saltwater Charter Logbook;
- Require that a charter vessel operator have on board the vessel an ADF&G Saltwater Charter Logbook issued in the name of the charter halibut permit holder; and
- Require the authorizing charter halibut permit number to be recorded in the ADF&G Saltwater Charter Logbook for each trip.

This action proposes all of these Council recommendations as part of the requirement to have the Saltwater Charter Logbook on board. The requirement to identify the vessel in the logbook is intended to be consistent with an existing State of Alaska requirement that a charter vessel operator have on board the vessel an ADF&G Saltwater Charter Logbook. This logbook must be specific to the vessel on which it is used.”

“2.6.4.3 Leasing

As stated previously, enforcement of a prohibition on leasing is very difficult for NOAA OLE and GC to investigate and prosecute. There are two primary issues that complicate enforcement: (1) often it is not possible for enforcement to obtain private business contracts that are not submitted to NMFS; and (2) even when business contracts are submitted to NMFS, it is not always possible for NMFS and enforcement to determine that the business arrangement described in the contract is a lease. The first issue cannot be avoided under Alternative 2, because of the myriad small business arrangements that may be arranged by a permit holder. NOAA OLE does not have the capability to enforce private business arrangements outside of agency processes, such as requiring transfers and associated contractual documentation through NMFS. Even if NMFS receives contractual documentation during a transfer, the term “lease” is very difficult to define and contracts can be constructed in such a way that they obfuscate lease arrangements by avoiding key terms that may trigger suspicion by enforcement authorities. Thus, attempting to enforce a prohibition on leasing requires substantial staff resources to investigate and prosecute cases. Additionally, many situations would likely not contain the level of documentation necessary to prosecute a case. Given the inherent historic structure of the charter sector and the enforcement complexities referenced above, a prohibition on leasing permits in the Alaska halibut charter industry may not be justified on efficiency and/or cost-benefit grounds.”