

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

In re Application of

[REDACTED]

Appellants

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Appeal No. 10-0070

DECISION

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On October 7, 2010, [REDACTED] (Father) and [REDACTED] (Son), doing business as [REDACTED] (Appellant, or collectively referred to as Appellants) timely filed an appeal with the Office of Administrative Appeals, challenging a National Marine Fisheries Service (NMFS) Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated September 17, 2010.¹ Appellants sought two transferable Charter Halibut Permits (CHPs) under the Charter Halibut Limited Access Program (CHLAP).²

In its determination, RAM notified Appellants that it had determined that Appellants did not qualify for two transferable CHPs for IPHC regulatory Area 2C. RAM explained that, pursuant to governing program regulations found at 50 C.F.R. § 300.67(c), Appellants qualified for only one CHP since Appellants operated only one vessel in 2004. 2004, the "Applicant Selected Year," was the year Appellants chose for NMFS to use in

¹ Pleadings Tab, Appellants' appeal submission received October 7, 2010, Original File Tab, IAD dated September 17, 2010, Appellants' letter dated March 19, 2010.

² The CHLAP regulations became effective in 2010 and will be codified at 50 C.F.R. § 300.67. At present, the regulations can be obtained by accessing the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition, of the CFR. Citations to the CHLAP are to the e-CFR, unless otherwise noted.

determining Appellants' number of transferable/nontransferable permits. 50 C.F.R. § 300.67(f)(1). Appellants had also only operated one vessel in 2005 and 2008. In addition, RAM determined that the single CHP for which Appellants qualified was non-transferable since Appellants did not have the requisite number of logbook fishing trips, fifteen trips, in the qualifying period of participation and in the recent period of participation to qualify for a transferable permit.³

In the appeal, Father argues that the issuance of a non-transferable permit, rather than a transferable permit, is unfair to the business operation he shares with Son and will not allow him to transfer the permit to Son, who will eventually take over the business. Father states he and Son "have a long established good reputation in the industry and a good family business" that will be rendered worthless as the result of RAM's decision.⁴

Father states that the primary focus of the business he shares with Son is not fishing. Rather, for the last twenty years the focus of their business has been to provide "eco cruises," of which fishing is a part. Consequently, the inability to fish would have an adverse effect on Appellants' business. Father contends that the "logbook program" was designed for day vessels that fish 4-6 hours each day, not for operations like his that do a very diverse week-long trip of which fishing is a part.⁵ Further, Appellants claim that each logbook entry constitutes a week-long trip, not a single day trip, and that the Alaska Department of Fish & Game (ADF&G) advised them to report their trips in this manner. Additionally, Appellants claim that Father and Son should each be qualified to receive a CHP since each holds a Guide license.⁶

I have reviewed Appellants' appeal and the case record and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing. See 50 C.F.R. § 679.43(g)(2) and (k).

ISSUES

The issues presented in this appeal are twofold. The first issue I must resolve is whether Appellants are qualified to receive two CHPs, rather than the one CHP as determined by RAM. To resolve this issue, I must evaluate whether Appellants have established by a preponderance of the evidence that they met the requirements of 50 C.F.R. § 300.67(c) to qualify for more than one CHP. The second issue I must resolve

³ Case File, Original File Tab, IAD dated September 17, 2010, Father and Son's CHP applications dated March 21, 2010.

⁴ Case File, Pleadings Tab, Appellants' appeal submission received October 7, 2010.

⁵ Case File, Pleadings Tab, Appellants' appeal submission received October 7, 2010.

⁶ Case File, Pleadings Tab, Appellants' appeal submission received October 7, 2010.

is whether the type of permit Appellants are qualified to receive is transferable, rather than non-transferable as determined by RAM. To resolve this issue, I must evaluate whether Appellants have established by a preponderance of the evidence that they met the minimum requirements of 50 C.F.R. § 300.67(d) to qualify for permit transferability. In other words, whether Appellants reported a minimum of fifteen logbook fishing trips during one year of the qualifying period (2004 or 2005) and during the recent participation period (2008).

FINDINGS OF FACT

1. Father and Son have worked together in their family business since 1981.⁷
2. For the last twenty years, Appellants have offered week-long “eco cruises” to their clients, of which fishing is a part but not a primary focus.⁸
3. Appellants have an Alaska business license, identifying Father and Son as owners of the business partnership, with a December 31, 2010 date of expiration.⁹
4. For 2004, the Official Record summary reveals that, operating one vessel, Appellants reported ten logbook fishing trips and nine clients. For 2005, the Official Record summary reveals that, operating one vessel, Appellants reported ten logbook fishing trips and nine clients. For 2008, the Official Record summary reveals that, operating one vessel, Appellants reported thirteen logbook fishing trips. The Official Record summary relates to IPHC Regulatory Area 2C.¹⁰
5. On March 21, 2010, Father and Son each completed and signed a CHP application for “IPHC Regulatory Areas 2C and 3A” with Area 2C chosen as the area for which the permit sought should be endorsed. RAM received those applications on March 25, 2010. In both applications, 2004 was chosen as the “applicant selected year.” In both applications, Father and Son claimed they should receive two transferable permits. In both applications, Appellant was identified as the business owned in 2004, 2005, and 2008. In both applications,

⁷ Case File, Original File Tab, Appellants’ letter dated March 19, 2010, Pleadings Tab, Appellants’ appeal submission received October 7, 2010.

⁸ Case File, Original File Tab, Appellants’ letter dated March 19, 2010, Pleadings Tab, Appellants’ appeal submission received October 7, 2010.

⁹ Case File, Original File Tab, Alaska License Detail.

¹⁰ Case File, Original File Tab, Official Record Summary, IAD dated September 17, 2010.

For a transferable permit, minimum participation criteria for a transferable permit are as follows: an applicant must have reported fifteen bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period, namely 2004 or 2005, and must have reported fifteen halibut logbook fishing trips or more from the same vessel during the recent participation period, namely 2008. 50 C.F.R. § 300.67(d)(1)(i) and (ii) and 50 C.F.R. § 300.67(f)(6) and (7). The number of transferable CHPs issued to an applicant will be equal to the lesser of the number of vessels that met the minimum transferable permit qualifications described above. 50 C.F.R. § 300.67(d)(2).

An applicant that meets the participation requirements in 50 C.F.R. § 300.67(b) will be issued the number of charter halibut permits equal to the lesser of the number of: (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. 50 C.F.R. § 300.67(c).

A "logbook fishing trip" means 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. 50 C.F.R. § 300.67(f)(4).

A "bottomfish logbook fishing trip" means a logbook fishing trip in the qualifying period that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing. 50 C.F.R. § 300.67(f)(2).

A "halibut logbook fishing trip" means a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing. 50 C.F.R. § 300.67(f)(3).

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits. 50 C.F.R. § 300.67(f)(5).

ANALYSIS

The first issue presented in this appeal is whether Appellants are qualified to receive two CHPs, rather than the one CHP as determined by RAM. To resolve this issue, I must evaluate whether Appellants have established by a preponderance of the evidence that they met the requirements of 50 C.F.R. § 300.67(c) to qualify for more than one CHP. The CHLAP regulations provide that a qualified applicant (meaning, among other things, an individual, or non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses) will be issued the number of charter halibut permits equal to the lesser of the number of: (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. See 50 C.F.R. § 300.67(b)(1)(ii); 50 C.F.R. § 300.67(c).

The facts of this case show that Appellants maintained an Alaska business license that identifies Father and Son as owners of the business partnership. Further, Appellants operate a single vessel, Vessel, which made the bottomfish logbook fishing trips in 2004, the applicant selected year. Thus, in accordance with the regulatory language of 50 C.F.R. § 300.67(c), the fact that Appellants operate a single vessel is the key factor that determines issuance of a single CHP. The regulatory language states that the lesser of two factors determines the number CHPs. In Appellants' case, that lesser factor is operation of a single vessel. Consequently, RAM correctly determined that Appellants qualified for one CHP, not two.

I considered Appellants' arguments on appeal, specifically as it relates to this issue, that Father and Son should each be qualified to receive a CHP since each holds a Guide license. However, the CHLAP regulations specifically state that qualification to receive a CHP requires, among other things, that the applicant be one that the ADF&G issued the ADF&G Business Owner Licenses. For the purposes of 50 C.F.R. § 300.67, the term "ADF&G Business Owner(s) License(s)" includes a "business registration," "sport fish business owner license," "sport fish business license," and "ADF&G business license." 50 C.F.R. § 300.67(b)(3). Hence, holding a Guide license, does not meet the regulatory requirements to qualify to receive a CHP. As a result, I find no error in RAM's decision.

The second issue I must resolve is whether the type of CHP permit Appellants are qualified to receive is transferable, or non-transferable as determined by RAM. To resolve this issue, I must evaluate whether Appellants satisfied the minimum requirements of 50 C.F.R. § 300.67(d) to qualify for permit transferability. In effect, this

means whether Appellants reported a minimum of fifteen bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005) and fifteen halibut logbook fishing trips during the recent participation period (2008) to qualify to receive a transferable CHP.

The CHLAP regulations define a “bottomfish logbook fishing trip” as 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. 50 C.F.R. § 300.67(f)(2). A “halibut logbook fishing trip” is defined as a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing. 50 C.F.R. § 300.67(f)(3).

Further, the CHLAP regulations identify that the Official Record, which is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, is that which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits. 50 C.F.R. § 300.67(f)(5).

The facts of this case show that, based on the Official Record summary, Appellants reported: ten bottomfish logbook fishing trips and nine clients for 2004 (consistent with Appellants’ 2004 Saltwater Charter Vessel Logbook Data); ten bottomfish logbook fishing trips and nine clients for 2005; and thirteen halibut logbook fishing trips for 2008. While Appellants reported a sufficient number of logbook fishing trips to meet the minimum requirements for a non-transferable permit (five trips during each period), Appellants have not established that they took the minimum number of fifteen logbook fishing trips during each period, as is necessary to satisfy the regulatory requirements to receive a transferable permit. Therefore, RAM’s decision that Appellants qualify to receive one non-transferable CHP is in accord with program regulations and is not in error.

I considered Appellants’ arguments on appeal, namely that the “logbook program” was designed for day vessels that fish 4-6 hours each day, not for operations like Appellants that offer a diverse week-long trip of which fishing is a part. Additionally, Appellants contend that each logbook entry constitutes a week-long trip, not a day trip, and that

ADF&G advised them to report their trips in this manner. I am not persuaded by Appellants' arguments.

At the outset, I note that the preamble to the Final Rule by NMFS published on January 5, 2010, implementing the CHLAP, addressed an issue of adhering to ADF&G reporting requirements. Specifically, NMFS stated

If a business owner did not comply with specified reporting requirements, then the fishing trip will not be counted as either a bottomfish logbook fishing trip during the qualifying period or a halibut logbook fishing trip during the recent participation period for purposes of this rule. Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.

See 75 Fed. Reg. 592 (January 5, 2010) (response to comment 146).

The instructions for completing the logbooks, to which RAM referred in its IAD, are specific and clearly written. For 2004, the instructions state that logbooks are to be completed daily and, for multiple day trips, the logbook is to be completed at the day's end for each day of the trip. For 2008, the instructions state that, for multiple day trips, logbooks are to be completed at day's end for each day of the trip and that a separate logbook data sheet is to be used for each day of the trip. Further, the instructions state that trip information should not be completed for days when guided fishing activity did not occur.¹⁵

Thus, Appellants were on notice that multi-day trips were to be reported at day's end for each day of the trip, irrespective of the alleged statements of an ADF&G employee. Appellants' decision not to follow the plainly written logbook reporting requirements of ADF&G do not establish error in RAM's decision. Moreover, I note that, contrary to Appellants' arguments--that each logbook entry constitutes a week-long trip, not a day trip-- Appellants' 2004 Saltwater Charter Vessel Logbook Data reveal multiple occasions when fishing trips were reported for consecutive days within the same week. For example, during Appellants' "Trip 2, Week June 1st - June 8th" during which Appellants assert there was fishing for six days, Appellants reported fishing trips in its logbook on June 4 and June 5. In another example, during Appellants' "Trip 5, Week June 27th - July 4th" during which Appellants assert there was fishing for six days,

¹⁵ Case File, Original File Tab, IAD dated September 17, 2010 ; http://www.fakr.noaa.gov/appeals/adfg_logbooks/2004.pdf and http://www.fakr.noaa.gov/appeals/adfg_logbooks/2008.pdf.

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Appellants reported fishing trips in its logbook on June 29, June 30, July 1 and July 2. In yet another example, during Appellants' "Trip 6, Week July 6th - July 13th" during which Appellants assert there was fishing for six days, Appellants reported fishing trips in its logbook on July 8 and July 9.¹⁶ Accordingly, I find no merit in Appellants' arguments.

CONCLUSIONS OF LAW

RAM correctly determined that Appellants are qualified to receive one CHP, in accordance with the provisions of 50 C.F.R. § 300.67(b)(1)(ii) and 50 C.F.R. § 300.67(c).

RAM correctly determined that the one CHP Appellants are qualified to receive is non-transferable, in accordance with the provisions of 50 C.F.R. § 300.67(d) and 50 C.F.R. § 300.67(f)(5).

ORDER

The IAD dated September 17, 2010 is upheld. This decision is effective thirty (30) days from the date issued and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made or the Regional Administrator elects to review this decision.¹⁷

[REDACTED]

Christine D. Coughlin
Administrative Judge

Date Issued: April 5, 2011

¹⁶ Case File, Original File Tab, Appellants' letter dated March 19, 2010, Pleadings Tab, Appellants' 2004 Saltwater Charter Vessel Logbook Data

¹⁷ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).