

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

In re Application of



Appellant

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Appeal No. 10-0066

DECISION

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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 September 20, 2010, [REDACTED] (Appellant) 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 July 21, 2010.<sup>1</sup> In that determination, RAM notified Appellant that it denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup> Appellant claimed eligibility for a CHP permit based on an unavoidable circumstance that occurred during the qualifying period, 2004 or 2005. RAM determined that the Official Record showed Appellant met the minimum participation requirements in 2008, the recent participation year, but that Appellant did not meet the requirement of reporting a minimum of five bottomfish logbook fishing trips in 2004 or 2005, the qualifying period. RAM further

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<sup>1</sup> Pleadings Tab, Appellant's appeal submission received September 20, 2010, Original File Tab, IAD dated July 21, 2010.

<sup>2</sup> 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.

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advised that a determination regarding Appellant's unavoidable circumstance claim during 2004 or 2005 had to be reached by the Office of Administrative Appeals.<sup>3</sup>

In his appeal, Appellant requests issuance of a transferable CHP based on an unavoidable circumstance that prevented him from operating a charter halibut fishing business in 2005. Appellant asserts that his 65-foot charter fishing vessel, the [REDACTED] (Vessel), has chartered an average of 70 trips per season since 2006 and would have chartered at least as many trips in 2005 had the Vessel not encountered engine and gear failure. Appellant explains that he intended to operate Vessel in 2005 but Vessel's engines and gears failed and required replacement. Although Appellant promptly ordered new engines and gears and expected installation to be complete by July 2005, leaving time to fish during the heart of the halibut season, unprecedented worldwide demand of the required gears delayed delivery of the engines and gears until October 2005. As a consequence, Vessel remained docked for the 2005 charter fishing season. Appellant states that he does not believe there are disputed factual issues; nevertheless, Appellant requests a hearing "to ensure that the [Office of Administrative Appeals] has a clear understanding of [his] position."<sup>4</sup>

I have reviewed Appellant's 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

At issue in this appeal is whether Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. §§ 300.67(b)(1)(ii)(A) and (B) and 300.67(d)(1). If Appellant does not meet these minimum participation requirements then I must determine whether the unavoidable circumstance provisions of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g), qualify Appellant to receive a CHP in lieu of such participation.

## FINDINGS OF FACT

1. Appellant took Vessel out of the charter fishing business for the 2004 season to use in a wildlife and glacier cruise business with the intent to return to charter fishing in 2005. Appellant had intended to make the 2005 fishing season the first season in

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<sup>3</sup> Original File Tab, IAD dated July 21, 2010, Appellant's CHP application received by RAM on March 11, 2010, Official Record summary.

<sup>4</sup> Pleadings Tab, Appellant's appeal submission received September 20, 2010.

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which he operated Vessel as part of the member-based fishing club he had envisioned, which he hoped would cater to large groups of clients and attract corporate members.<sup>5</sup>

2. In April 2005, Vessel experienced engine failure, requiring the replacement of its engines and gears.<sup>6</sup> Vessel is a 65-foot charter fishing vessel, capable of accommodating up to 30 fishermen.<sup>7</sup>
3. In May 2005, Appellant purchased two new Caterpillar C18 Marine Propulsion Engines with ZF gears for Vessel, totaling \$264,050.00.<sup>8</sup> Appellant made a down payment of \$125,000 to "make sure nothing delayed delivery."<sup>9</sup>
4. Based on routine delivery of four to six weeks, Appellant expected the engines and gears to be delivered and installed by July 2005, which would have enabled Appellant to complete the 2005 halibut fishing season.<sup>10</sup>
5. Due to unprecedented worldwide demand, delivery of the required ZF gears was delayed until October 2005.<sup>11</sup> Given the funds Appellant already committed to the down payment on the engines and the lack of any suitable alternatives in Alaska, Appellant had no other repair options and Vessel had to remain docked for the 2005 charter fishing season.<sup>12</sup>
6. Following its repair, Appellant used Vessel in his charter fishing business for the 2006 season and thereafter.<sup>13</sup>
7. For the 2006 season, Appellant logged approximately 52 charter fishing trips on Vessel, and the number of clients totaled approximately 669 over the course of the season, ranging from two to twenty-four clients per trip. For the 2007 season, Appellant logged approximately 76 charter fishing trips on Vessel. For the 2008 season, the Official Record summary reveals, and Appellant's logbook confirms, that

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<sup>5</sup> Original File Tab, Appellant's statement accompanying his CHP application, Pleadings Tab, Appellant's Declaration dated September 17, 2010.

<sup>6</sup> Original File Tab, Appellant's statement accompanying his CHP application, Pleadings Tab, Appellant's Declaration dated September 17, 2010.

<sup>7</sup> Pleadings Tab, Appellant's appeal submission received September 20, 2010, Appellant's Declaration dated September 17, 2010.

<sup>8</sup> Original File Tab, Appellant's submissions received by RAM on March 11, 2010.

<sup>9</sup> Pleadings Tab, Appellant's appeal submission received September 20, 2010, Appellant's Declaration dated September 17, 2010.

<sup>10</sup> Original File Tab, Appellant's statement accompanying his CHP application, Pleadings Tab, Appellant's Declaration dated September 17, 2010.

<sup>11</sup> Original File Tab, Appellant's statement accompanying his CHP application, June 22, 2010 statement from ██████████ (also found in Pleadings Tab), Pleadings Tab, Appellant's appeal submission received September 20, 2010, Appellant's Declaration dated September 17, 2010.

<sup>12</sup> Pleadings Tab, Appellant's appeal submission received September 20, 2010, Appellant's Declaration dated September 17, 2010.

<sup>13</sup> Original File Tab, Appellant's statement accompanying his CHP application, Pleadings Tab, Appellant's appeal submission received September 20, 2010, Appellant's Declaration dated September 17, 2010.

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Appellant logged 67 charter fishing trips on Vessel in Area 3A. For the 2009 season, Appellant logged approximately 55 charter fishing trips on Vessel.<sup>14</sup>

8. On March 4, 2010, Appellant completed and signed a CHP application for "IPHC Regulatory Areas 2C and 3A." RAM received Appellant's application on March 11, 2010. In his application, Appellant claimed that an unavoidable circumstance occurred during the qualifying period, namely in 2005, that prevented him from operating a charter halibut business.<sup>15</sup>
9. In a letter dated May 3, 2010, RAM provided Appellant with notice of the opportunity to submit evidence for RAM's consideration. On June 4, 2010, Appellant responded and submitted additional documentation to support his claim.<sup>16</sup>
10. In a letter dated July 21, 2010, RAM issued its IAD, denying Appellant's application for a CHP. RAM determined Appellant met the minimum requirements for the recent participation period in 2008, but that Appellant did not meet the minimum requirements for the qualifying period because he did not reporting a minimum of five bottomfish logbook fishing trips in 2004 or 2005.<sup>17</sup>
11. On September 20, 2010, Appellant timely filed his appeal of the IAD to NAO.<sup>18</sup>

#### PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements. 50 C.F.R. § 300.67(b)(1)(ii). Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008. 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

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,

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<sup>14</sup> Original File Tab, IAD dated July 21, 2010, Official Record summary, Pleadings Tab, Appellant's appeal submission received September 20, 2010, including Saltwater Charter Logbook Data for 2006, 2007, 2008, and 2009.

<sup>15</sup> Original File Tab, Appellant's CHP application received by RAM on March 11, 2010.

<sup>16</sup> Original File Tab, RAM's letter dated May 3, 2010 and Appellant's response.

<sup>17</sup> Original File Tab, IAD dated July 21, 2010.

<sup>18</sup> Pleadings Tab, Appellant's appeal submission received September 20, 2010.

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and must have reported fifteen halibut logbook fishing trips or more from the same vessel during the recent participation period, namely. 50 C.F.R. § 300.67(d)(i) and (ii). 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 for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves the following: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period. 50 C.F.R. § 300.67(g)(2)(i)-(iv). If the applicant proves the foregoing elements of an unavoidable circumstance claim then the applicant will receive either one non-transferable permit with an angler endorsement of four, or the number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period. 50 C.F.R. § 300.67(g)(v)(A)-(B).

A charter halibut permit will be endorsed for the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period, with certain exceptions. The first exception is that the angler endorsement number will be four if the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period is less than four. The second exception states the angler endorsement number will be four when no charter vessel anglers were reported on any of the applicant's logbook fishing trips in the applicant-selected year. The third exception states the angler endorsement number will be six on a charter halibut permit issued pursuant to military service under 50 C.F.R. § 300.67(g)(3). 50 C.F.R. § 300.67(e).

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 I must resolve in this appeal is whether Appellant meets the minimum participation requirements to qualify for a CHP. Under the CHLAP regulations, minimum participation requirements to qualify for a CHP require that an applicant reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, namely 2008. For a transferable permit, the minimum number of reported logbook fishing trips for each period becomes fifteen and must be from the same vessel. See 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(2).

My review of the record in this case reveals there is no dispute that Appellant did not meet the minimum participation requirements for the qualifying period. Appellant did not report bottomfish logbook fishing trips in either 2004 or 2005. Appellant took Vessel out of the charter fishing business for the 2004 season to use in a wildlife and glacier cruise business and intended to return Vessel to charter fishing in 2005 but was unable to do so. There is also no dispute that Appellant met the minimum participation requirements for the 2008 recent participation period. The Official Record summary, to which RAM refers in its IAD, confirms that Appellant met the recent participation requirement by having reported 67 logbook fishing trips in 2008. In the IAD, RAM states that Appellant met this requirement, but denied Appellant's CHP application because he did not meet both periods of participation and because RAM does not adjudicate claims of unavoidable circumstance. The evidence presented, therefore, establishes that Appellant did not meet the minimum participation requirements to qualify for a CHP.

Since Appellant does not meet the minimum participation requirements to qualify for a CHP, namely those relating to the qualifying period of 2004 or 2005, I must turn to the second issue presented in this case and determine whether the unavoidable circumstance provisions of the CHLAP regulations qualify Appellant to receive a CHP in lieu of such participation.

The CHLAP regulations provide, specific to the issue at hand, that an applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(2)(i)-(iv). I will now address each element.

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Fifty C.F.R. § 300.67(g)(2)(i) requires that the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period. The evidence presented shows that Appellant intended to operate a charter halibut fishing business in 2005, one of the qualifying years of participation. Vessel had been used for charter fishing for many years.<sup>19</sup> For the 2004 season, Appellant made the decision to take Vessel out of operation for charter fishing to use it in a wildlife and glacier cruise business. Appellant had planned to return Vessel to charter fishing in 2005, in furtherance of his vision for developing a fishing club. Appellant intended to make the 2005 fishing season the first season in which he operated Vessel as part of a member-based fishing club that he hoped would cater to large groups of clients and attract corporate members.

However, Appellant's plans were derailed when Vessel required repair in April 2005. Although Appellant promptly ordered replacement engines and gears for Vessel, he encountered unusual delay in obtaining the equipment. Appellant invested a substantial sum of money (\$264,050.00) in ordering the replacement engines and gears and made a significant down payment of \$125,000 to ensure prompt delivery of the items so that he could participate in the heart of the 2005 charter halibut fishing season. In spite of such efforts, the replacement equipment arrived too late to allow Appellant to participate in the 2005 season. The preponderance of the evidence presented in this case convinces me that Appellant had a specific intent to operate a charter halibut fishing business in 2005, one of the qualifying period years.

Fifty C.F.R. § 300.67(g)(2)(ii)(A)-(C) requires that the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business. Fifty C.F.R. § 300.67(g)(2)(iii) requires that the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred. The evidence presented establishes that Appellant's intent to operate a charter halibut fishing business in 2005 was thwarted by the failure of Vessel's engines and gears in April 2005, necessitating the replacement of those parts that was unusually delayed through no fault of Appellant. The failure of Vessel's engines and gears and delays in obtaining the replacement parts was unavoidable, unique to Appellant, and unforeseen and reasonably unforeseeable by Appellant. There is no indication in the record that Appellant could have avoided or prevented Vessel's engine and gear failure. Vessel's equipment failure was unique to Appellant because Vessel was the only vessel used in Appellant's fishing operation. Appellant promptly ordered replacement engines and gears for Vessel in the month following the equipment breakdown and had no reason to suspect that delivery of the engines and

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<sup>19</sup> Original File Tab, Appellant's statement accompanying his CHP application.

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gears would be outside the range of routine delivery, or four to six weeks. Due to unprecedented worldwide demand for the required gears, which Appellant could not have foreseen or anticipated, delivery and installation of the engines and gears could not be completed until October 2005.

The record establishes that the circumstance that prevented Appellant from operating a charter halibut fishing business in 2005--the engine and gear failure followed by the delay in obtaining replacement engines and gears due to unprecedented demand--actually occurred. The preponderance of the evidence presented in this case convinces me that Appellant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business, and was a circumstance that actually occurred.

Fifty C.F.R. § 300.67(g)(2)(iv) requires that the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period. The evidence presented shows that Appellant made a reasonable effort to overcome the challenges he faced when Vessel's engines and gears failed in April 2005. Appellant reacted to the situation by promptly ordering replacement engines and gears, totaling \$264,050.00, in May 2005, the month following the equipment failure. Appellant made a down payment of \$125,000 to do his part of ensuring timely delivery of the replacement engines and gears. However, due to unprecedented worldwide demand for the gears, delivery of the engines and gears was delayed for months. It was not until October 2005 that the engines and gears were delivered and installed. Given the funds Appellant already committed to the down payment on the engines and the lack of any suitable alternatives in Alaska, Appellant had no other repair options and Vessel had to remain docked for the 2005 charter fishing season. The preponderance of the evidence presented in this case convinces me that Appellant took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in 2005.

Under the CHLAP regulations, if the applicant proves the elements of an unavoidable circumstance claim found in 50 C.F.R. § 300.67(g)(2)(i)-(iv) then the applicant will receive either one non-transferable permit with an angler endorsement of four, or the number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the

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qualifying period and the applicant did not participate during the other year of the qualifying period. 50 C.F.R. § 300.67(g)(v)(A)-(B).

In the instant case, Appellant has demonstrated that he qualifies for a transferable CHP. The evidence presented shows that, for the 2008 recent participation period, Appellant had 67 reported halibut logbook fishing trips from Vessel in Area 3A, exceeding the minimum requirement of fifteen reported trips. The evidence presented also shows that for 2006, 2007, and 2009, Appellant took approximately 52, 76, and 55 logbook fishing trips, respectively, with Vessel. Appellant asserts that he would have likely taken the average number of charters in 2005 with Vessel as he did in 2006 through 2009 (approximately 63 trips) had the unavoidable circumstance that thwarted his intent to operate a charter halibut business in 2005 not occurred. Further, it is clear from the record that Appellant did not participate in the charter halibut fishing business in 2004, the other year of the qualifying period. Given this evidence, Appellant has established he would have likely taken more than fifteen logbook fishing trips in 2005 with Vessel but for the unavoidable circumstance he experienced. Accordingly, I conclude Appellant qualifies for a transferable CHP for Area 3A.

As to the angler endorsement number associated with the transferable permit Appellant is qualified to receive, I note that Appellant did not present argument as to the angler endorsement number he believed appropriate given his fishing history.<sup>20</sup> The CHLAP regulations provide that a charter halibut permit will be endorsed for the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period. While there are certain exceptions to this provision, they are not applicable to the facts of this case. See 50 C.F.R. § 300.67(e) and 75 Fed. Reg. 56904 (September 17, 2010).

Additionally, a Final Rule published in the Federal Register by NMFS on September 17, 2010, which revised the method of assigning angler endorsements to charter halibut permits issued to applicants that receive more than one permit in an area, provides some general guidance on the issue. See 75 Fed. Reg. 56903-56910 (September 17, 2010). In this Final Rule, NMFS noted its prior and continued use of the "total clients" field in the logbook data received from ADF&G to determine the angler endorsement on a charter halibut permit. See 75 Fed. Reg. 56907 (September 17, 2010) (response to comment 2). NMFS also noted that an angler endorsement number is determined by the applicant's past participation in the charter halibut fishery as reported in ADF&G logbooks. See 75 Fed. Reg. 56907 (September 17, 2010) (response to comment 4). Lastly, NMFS noted that the angler endorsement on a charter halibut permit would not supersede US Coast Guard licensing or other safety rules or regulations. See 75 Fed. Reg. 56907 (September 17, 2010) (response to comment 3).

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<sup>20</sup> Pleadings Tab, Appellant's appeal submission received September 20, 2010.

In evaluating this issue, I considered the 2006 through 2009 Saltwater Charter Logbook Data Appellant presented. I focused on the details of the 2006 logbook data since that would appear to most closely approximate the fishing trips Appellant would have likely taken in 2005, the qualifying year upon which the angler endorsement is to be based. The 2006 Saltwater Charter Logbook Data reveals, as previously stated, that Appellant took approximately 52 fishing trips with Vessel. It also shows, among other things, that the number of Appellant's total clients ranged from a minimum of two clients per trip to a maximum of twenty-four clients per trip. Thus, the highest number of charter vessel anglers Appellant reported in 2006 was twenty-four. I also considered the size of Vessel—a 65-foot fishing vessel that can accommodate up to thirty fishermen. Given this evidence, I find it reasonable to conclude that an angler endorsement of twenty-four for the CHP Appellant is qualified to receive for Area 3A is appropriate and consistent with the CHLAP regulations.

#### CONCLUSIONS OF LAW

Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004 or 2005. However, in lieu of such participation, Appellant has proven the elements of 50 C.F.R. § 300.67(g)(2) and established his qualifications for a transferable CHP for Area 3A with an angler endorsement number of twenty-four.

#### ORDER

The IAD dated July 21, 2010 is vacated. RAM is directed to issue Appellant a transferable CHP for Area 3A with an angler endorsement number of twenty-four. 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.<sup>21</sup>

[REDACTED]  
Christine D. Coughlin  
Administrative Judge

Date Issued: February 10, 2011

<sup>21</sup> <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).