

████████████████████⁴ Appellant requested a permit endorsed for six anglers. Appellant chose 2004 as the year for which his fishing history would be evaluated for the purposes of his permit application (also known as the “Applicant Selected Year”).⁵

On June 10, 2010, NMFS’ Restricted Access Management program (RAM), responsible for administering the CHLAP, sent Appellant and ██████ a “Notice of Opportunity to Submit Evidence” (Notice).⁶ In the Notice, RAM advised Appellant that it thought he would be eligible for a permit endorsed for four anglers, not six anglers as he had requested. Ordinarily, because Appellant had chosen 2004 as his “Applicant Selected Year,” the fishing history from that year would be used to evaluate Appellant’s application. However, RAM noted in the Notice that the 2004 logbook ██████ identified on Appellant’s application did not belong to Appellant; rather logbook ██████ was issued to ██████ owned by ██████ (collectively referred to as ██████).⁷ Because logbook ██████ was not Appellant’s, RAM did not use it in evaluating Appellant’s application, and instead used Appellant’s logbook, that is the one issued to him for 2005, logbook ██████.⁸

RAM reasoned that the Official Record showed Appellant’s logbook ██████ or 2005 showed no more than four anglers took charter halibut trips with Appellant on Vessel 1; that provided the rationale for making the preliminary assessment that Appellant’s permit would be endorsed for four anglers.⁹ Since the Notice was a preliminary evaluation of the application, RAM provided Appellant with an opportunity to show that he really was eligible for an endorsement of six anglers. As articulated by RAM: “Please explain why ██████ should be credited for the 2005 Saltwater Logbook Fishing Trips, [recorded in logbook ██████, from [Vessel 1].”¹⁰ Appellant did respond, but due to delays in retrieving his mail, not until October 8, 2010.¹¹

⁴ Original File Tab, Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A, 3rd Page.

⁵ Original File Tab, Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A, 2nd Page.

⁶ Original File Tab, Notice of Opportunity to Submit Evidence dated June 10, 2010. This notice was returned to RAM as “Sender Attempted Unknown.” RAM resent the Notice on June 29, 2010 to the same address; the Notice was not returned.

⁷ Original File Tab, Notice of Opportunity to Submit Evidence dated June 10, 2010, 1st Page.

⁸ Original File Tab, Notice of Opportunity to Submit Evidence dated June 10, 2010, 1st Page.

⁹ Original File Tab, Notice of Opportunity to Submit Evidence dated June 10, 2010.; Original File Tab, Print Summary created January 26, 2010.

¹⁰ Original File Tab, Notice of Opportunity to Submit Evidence dated June 10, 2010, 1st Page; Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated October 8, 2010, Page 3.

¹¹ Pleadings File Tab, ██████ letter dated October 8, 2010 with attachments.

On October 8, 2010, RAM issued its denial of Appellant's permit application in an Initial Administrative Determination (IAD).¹² RAM confirmed that Appellant was eligible for a permit with an endorsement of four anglers. RAM also stated that the permit would be transferable.¹³ RAM stated that Appellant's business was ██████ which did business as ██████.¹⁴ RAM noted that ██████ did not report any 2004 logbook fishing trips, and that the logbook Appellant claimed was for his business, logbook ██████, was issued to ██████ (That meant that Appellant could not use ██████ logbooks to get a permit.) RAM also stated that in response to the Notice, Appellant did not submit documentation to show why logbook ██████ for Vessel 1 should be credited to him.¹⁵ Thus, RAM relied on data from Appellant's logbook from 2005, logbook ██████ for Vessel 1. As stated by RAM: "The highest number of charter vessel anglers reported...for your business was four...in the year 2005." Accordingly, RAM's preliminary decision articulated in the Notice would stand. That meant Appellant would receive a transferable permit endorsed for four anglers, not a transferable permit endorsed for six anglers as he had hoped.¹⁶

On October 14, 2010, RAM received a filing from Appellant, dated October 8, 2010. RAM in turn forwarded that filing to OAA as an appeal of the IAD. On November 18, 2010, NAO acknowledged receipt of Appellant's appeal and provided Appellant until December 8, 2010 to supplement the record.¹⁷ On December 8, 2010 NAO received a letter with attachments from an attorney Appellant had engaged to represent him.¹⁸ In support of his appeal, Appellant argues that logbook ██████ should be credited to Appellant for the purposes of evaluating his application for a CHP endorsed for six anglers.

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).

¹² Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated October 8, 2010.

¹³ See 50 C.F.R. § 300.67(i).

¹⁴ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated October 8, 2010, Page 2.

¹⁵ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated October 8, 2010, Pages 2-3.

¹⁶ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated October 8, 2010, Page 4.

¹⁷ Appeals Correspondence Tab, NAO letter dated November 18, 2010.

¹⁸ Pleadings Tab, letter dated December 8, 2010 with attachments. The package was submitted both electronically and by the postal service.

ISSUES

The general dispute is whether Appellant is eligible for a permit endorsed for six anglers. To resolve the dispute, I must decide whether Appellant has shown by a preponderance of the evidence that he reported six charter vessel anglers on at least one logbook fishing trip in 2005.

If the answer to that question is “no,” then I must uphold the IAD.

FINDINGS OF FACT

1. █████ has been operating as a charter fishing business since 1999.¹⁹
2. █████ is Appellant’s business.²⁰ █████ does business as █████²¹
3. Appellant has used █████ Appellant’s father’s name as an individual, and Appellant’s individual name interchangeably since 1999.²²
4. ADF&G issued 2004 Saltwater Charter Logbook █████.²³
5. ADF&G did not issue a 2004 Saltwater Charter Logbook to Appellant.
6. In 2004, Appellant did not report to ADF&G any logbook fishing trips.²⁴
7. █████ was a corporation in 2004. █████ has not been dissolved.²⁵
8. █████ is not the successor in interest to █████²⁶
9. ADF&G issued 2005 Saltwater Charter Logbook █████ Logbook █████ was used by Appellant to record his bottomfish fishing trips, including the number of anglers on those trips.²⁷

¹⁹ Pleadings File Tab, letter dated October 8, 2010.

²⁰ Original File Tab, Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A.

²¹ Original File Tab, Print Summary created January 26, 2010.

²² Pleadings File Tab, letter dated October 8, 2010; attachment to Appellant’s October 8, 2010 letter listing eleven documents.

²³ Original File Tab, 2004 Saltwater Charter Vessel Logbook Sign-Out for Logbook █████

²⁴ Original File Tab, Summary of Official Charter Halibut Record dated January 28, 2010; Original File Tab, Print Summary created January 26, 2010.

²⁵ Pleadings Tab, Appellant’s letter dated October 8, 2010; █████ Application for an Open Account, attached to Appellant’s October 8, 2010 letter; attachment to Appellant’s October 8, 2010 letter listing eleven documents; Commercial Marine Insurance Policy Declarations Page effective 3/25/2010 to 3/25/2011 listing █████ as a loss payee for Vessel 2, attached to Appellant’s October 8, 2011 letter.

²⁶ Original File Tab, Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A, 1st Page; Finding of Fact 7.

10. For 2005, Appellant had a maximum of four anglers recorded on logbook fishing trips.²⁸

PRINCIPLES OF LAW

Generally, NMFS is only authorized to issue CHPs to the individual or entity to which ADF&G issued the ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP). 50 C.F.R. § 300.67(b)(1) and (3).

To qualify for a CHP, a fundamental requirement is that an applicant must have proof of qualifying “bottomfish logbook fishing trips.”²⁹ To establish one’s history of “bottomfish logbook fishing trips,” one must record qualifying trips in a state-issued logbook. ADF&G issues logbooks to those who hold a ADF&G Business Owner License. See 50 C.F.R. § 300.67(b)(1)(ii).

The number of anglers for which a transferable permit will be endorsed will be equal to the “greatest number of charter vessel anglers reported on any logbook trip in the qualifying period.” 50 C.F.R. § 300.67(e)(1).

As an exception to the general rule articulated above, NMFS could issue a CHP to a successor in interest to an entity that was issued a logbook that could be used to provide data on participation in the fishery. See C.F.R. § 300.67(b)(1). If the applicant applies as a successor in interest to the person or entity to which ADF&G issued the Business Owner Licenses that authorized qualifying logbook fishing trips, in order to qualify as a successor in interest, the applicant must document that the entity has been dissolved and that the applicant is the successor in interest to the dissolved entity. See 50 C.F.R. § 300.67(b)(1)(iii)(B).

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

²⁷ Original File Tab, Summary of Official Charter Halibut Record dated January 28, 2010; Original File Tab, Print Summary created January 26, 2010; Original File Tab, Notice of Opportunity to Submit Evidence.

²⁸ Original File Tab, Print Summary created January 26, 2010.

²⁹ A “bottomfish logbook fishing trip” is one timely reported to ADF&G in a Saltwater Charter Logbook and includes information about the statistical area where bottomfish fishing occurred, the boat hours the vessel was used for bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing. See 50 C.F.R. § 300.67(f)(2) and (4).

ANALYSIS

To determine whether the IAD was consistent with the CHLAP regulations, I must consider whether Appellant has shown by a preponderance of the evidence that he reported six charter vessel anglers on at least one logbook fishing trip in 2005. Fundamentally, then, the question is, what logbook was assigned to Appellant and in that logbook what was the largest number of charter anglers reported. Logbook ██████ was issued by ADF&G to Appellant to record his 2005 bottomfish fishing trips. That logbook indicated that the highest number of charter vessel anglers on any logbook fishing trip was four in 2005. The applicable regulation directs RAM to issue a permit endorsed for the largest number of reported anglers during the qualifying period or in this case for 2005. 50 C.F.R. § 300.67(e)(1). Since the highest number reported was four, RAM properly stated it would endorse Appellant's permit for four anglers.

In support of his appeal, Appellant argues that logbook ██████ for Vessel 1 should be credited to Appellant for the purposes of evaluating his application for a CHP endorsed for six anglers. Appellant explains that he started ██████ as a charter operation in 1999.³⁰ According to Appellant, at that point in time until 2003, the business was operated as ██████ doing business as ██████. ██████ doing business as ██████ provided sport fishing guides aboard Vessel 1. Appellant describes ██████ in 2003 as "a sole proprietorship doing business as ██████]...probably a partnership transitioning into a sole proprietorship."³¹ In 2004, according to Appellant, he took over ██████ doing business as ██████. In 2004, Appellant states he used Vessel 1 to take sport anglers on fishing trips. Proceeds for these trips were collected by Appellant through ██████ doing business as ██████. According to Appellant, ██████ "was a partnership between [Appellant] and [his father] that ceased to exist before the 2004 [fishing] season began when [Appellant] took over sole ownership and management of the sport fish charter business. At that point," Appellant contends, "the partnership which existed between [Appellant] and his father ceased to exist, and [Appellant] became the sole owner of the sport fishing charter business known as" ██████ doing business as ██████.³²

Generally, an applicant for a CHP must be the person to whom a logbook was issued. As an exception to that general rule, NMFS carved out a rule for successors in interest. As used in the CHLAP regulations, among the requirements to qualify as a successor in interest is that the applicant must prove the entity the applicant succeeded is dissolved. See 50 C.F.R. § 300.67(b)(1)(iii)(B).

³⁰ Pleadings Tab, letter dated October 8, 2010.

³¹ Pleadings Tab, letter dated December 8, 2010, Page 2.

³² Pleadings File Tab, letter dated December 8, 2010, Page 3.

CONCLUSIONS OF LAW

Appellant has not shown by a preponderance of the evidence that he reported six charter vessel anglers on at least one logbook fishing trip in 2005.

ORDER

The IAD of October 8, 2010, that is the subject of this appeal, is affirmed.

This decision is effective thirty days from the date issued and will become the final agency action for purposes of judicial review on June 16, 2011, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date issued: May 17, 2011