

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0106

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 (OAA), Alaska Region, and is charged with processing appeals that were filed with OAA. The undersigned is the administrative judge assigned to review and decide this appeal.¹

This matter comes before NAO based on a timely appeal filed by [REDACTED] doing business as [REDACTED] (Appellant). On January 13, 2011, NAO received Appellant's appeal of the Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM) dated September 30, 2010. In the IAD, RAM granted Appellant six transferable Charter Halibut Permits (CHPs or permits), but denied Appellant's application for a seventh transferable permit, under the Charter Halibut Limited Access Program (CHLAP).

The application referred to in the IAD was filed by Appellant on March 17, 2010.² On the application, Appellant indicated he operated seven vessels that took over fifteen logbook fishing trips in 2004, 2005, and 2008.³ Appellant also indicated on his application that one logbook was missing but the information was being requested. Appellant also attached a letter to the application indicating he disagreed with the Alaska Department of Fish and Game's (ADF&G's) records and believed that he was eligible for a seventh transferable permit.

After reviewing Appellant's file, RAM discovered one of Appellant's vessels had not taken the requisite fifteen bottomfish logbook fishing trips in 2005.⁴ On June 3, 2010,

¹ See 50 C.F.R. § 679.43.

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

³ Original File Tab, Application page 3.

⁴ Original File Tab, Trip Summary

RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice). In the Notice, RAM informed Appellant he had thirty days to provide additional information that could establish his eligibility for a seventh transferable CHP. On June 28, 2010, Appellant submitted the records of his trips taken in 2005 in response to the Notice.⁵

On September 30, 2010, RAM released the IAD at issue in this Appeal.⁶ In the IAD, RAM denied Appellant's application for a seventh transferable CHP. RAM reasoned that the Official Record, which RAM uses to determine applicants eligibility, did not match the records submitted by Appellant.⁷ RAM explained that only six of the seven vessels operated by Appellant reported fifteen or more bottomfish logbook fishing trips to the State of Alaska Department of Fish and Game (ADF&G).⁸

On November 30, 2010, Appellant timely appealed the IAD to NAO.⁹ With the appeal, Appellant renews his claim that all seven of his vessels reported fifteen or more bottomfish logbook fishing trips in 2005.¹⁰ Appellant argues the logbook pages for the seventh vessel, ██████████ (Vessel) were submitted in a timely fashion along with the records for the other six vessels operated by Appellant. Appellant asserts Vessel took more than eighty bottomfish logbook fishing trips in 2005 which were all properly reported to ADF&G. Appellant also submitted signed witness statements.

On February 16, 2011, NAO acknowledged receipt of the Appellant's appeal and provided Appellant until March 18, 2011 to supplement the record.¹¹ NAO did not receive any additional information from Appellant.

On August 12, 2011, NAO sent Appellant a hearing notice by regular and electronic mail. The hearing notice acknowledged receipt of the Appellant's appeal and also scheduled an oral hearing to take place on September 21, 2011 at 10 a.m. Alaska Time, 2 p.m. Eastern Time.¹² On September 21, 2011, an oral hearing commenced.¹³ At the hearing Appellant testified he always submitted the logbook sheets for each of the seven vessels at the same time.¹⁴ Appellant testified it was the responsibility of ██████████ (Land Manager) to deliver the logbook pages of all of the vessels each week directly to the ADF&G drop box in Sitka. Both Appellant and Land Manager testified that aside from several weeks during the summer when Land Manager was on vacation, he personally took the pages to the drop box for Vessel. At the conclusion of the hearing, I closed the record.

⁵ Original File Tab, Appellant's type-written response to RAM's Notice.

⁶ Original File Tab, IAD.

⁷ Original File Tab, IAD page 2.

⁸ Original File Tab, IAD page 4.

⁹ Pleadings File Tab, Appellant's appeal letter received on November 30, 2010.

¹⁰ Pleadings File Tab, Appellant's appeal letter received on November 30, 2010.

¹¹ Appeals Correspondence Tab, NAO letter dated April 16, 2011.

¹² Appeals Correspondence Tab, Notice to Schedule Hearing dated August 12, 2011.

¹³ Appeals Correspondence Tab, Notice to Schedule Hearing dated August 12, 2011.

¹⁴ Appellant's Hearing Testimony.

On October 6, 2011, NAO contacted Appellant's attorney and requested that additional documentation be submitted. NAO requested that Appellant submit the original logbooks for Vessel, as well as, its client database for the 2005 fishing season to be postmarked by October 14, 2011. Appellant submitted the requested documentation. I have determined that the information in the record is sufficient to render a decision and I have closed the record.¹⁵

ISSUES

At issue in this appeal is whether Appellant is qualified to receive a seventh transferable CHP. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence that he properly reported fifteen or more halibut logbook fishing trips during the qualifying period of 2005 to ADF&G?

If the answer to the question is "yes," I must vacate the IAD and conclude that Appellant is eligible for a transferable CHP.

FINDINGS OF FACT

1. In 2000, to ensure that his logbook fishing trips are properly recorded, Appellant implemented a reporting procedure which all captains were required to follow.¹⁶
2. In 2004, 2005, and 2008, Appellant's charter fishing business was issued a Business Owner License by ADF&G.¹⁷
3. Appellant operates seven charter vessels within his business.¹⁸
4. In 2004, Appellant reported to ADF&G over fifteen bottomfish logbook fishing trips taken by Vessel.¹⁹
5. In 2005, Appellant continued to follow his procedure in reporting his trips.²⁰
6. In 2005, Appellant reported to ADF&G over fifteen bottomfish logbook fishing trips taken by Vessel.²¹

¹⁵ See 50 C.F.R. § 679.43(g) (2).

¹⁶ Appellants' Hearing Testimony.

¹⁷ Original File Tab, Application page 3.

¹⁸ Appellants' Hearing Testimony.

¹⁹ Original File, Print Summary, created on January 26, 2010.

²⁰ Appellant's Hearing Testimony.

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

7. In 2008, Appellant reported to ADF&G over fifteen bottomfish logbook fishing trips taken by Vessel.²²

PRINCIPLES OF LAW

In general, NMFS is only authorized to issue a CHP to an individual or entity that has been issued an ADF&G Business Owner License. These licenses can include business registration, sport fishing business owner license, sport fish business license, or ADF&G business license. With this license one is then authorized to take qualifying logbook fishing trips.²³

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 an ADF&G Business Owner License.²⁴

To be eligible for a permit, an applicant must also have reported a minimum of five bottomfish logbook fishing trips during one year of the qualifying period, either 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the 2008 recent participation period.²⁵

To receive a transferable charter halibut permit, an applicant must have properly reported at least fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).²⁶ The number of transferable charter halibut permits issued to an applicant will be equal to the number of vessels that met these qualifications.²⁷

A "logbook fishing trip" means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.²⁸

A "halibut logbook fishing trip" means a logbook fishing trip in the recent participation period that was reported to ADF&G 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.²⁹

²² Original File, Print Summary, created on January 26, 2010.

²³ See 50 C.F.R. § 300.67(b)(1)(ii) and (3).

²⁴ 50 C.F.R. § 300.67(b)(1)(ii)

²⁵ 50 C.F.R. § 300.67 (b)(1)(i) and (ii)(A) and (B); 50 C.F.R. § 300.67 (f)(6) and (7).

²⁶ 50 C.F.R. § 300.67(d)(1)(i)-(ii).

²⁷ 50 C.F.R. § 300.67(d)(2).

²⁸ 50 C.F.R. § 300.67(f)(4).

²⁹ 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.³⁰ NMFS may revise the Official Record if Appellant proves that it is not accurate.³¹

ANALYSIS

Did Appellant establish by a preponderance of the evidence that he properly reported fifteen or more halibut logbook fishing trips for Vessel during the qualifying period of 2005 to ADF&G?

Appellant operates a charter fishing business that owns a total of seven vessels. Due to the magnitude of trips each vessel takes during the fishing season, since 2000, each captain is required to follow a system to ensure that all of the trips for each of the vessels are reported in a timely fashion. During the hearing, Appellant testified. I find Appellant's testimony credible. Appellant stated that company procedure required each captain to fill out their daily logbook entries prior to guests disembarking their vessel. These pages were required to be turned into Land Manager that same day. Land Manager was then required to double check the pages and then drive the logbook pages to the Sitka ADF&G office drop box, on a weekly basis. According to Land Manager's testimony, which I also find credible, all logbook pages are placed in the same envelope when delivered. Land Manager explained at the hearing his regular practice of making sure all logbook pages were submitted to him by the captains and how he made sure all logbook pages got to ADF&G. Appellant's records from Appellant's other six vessels were recorded by ADF&G. However, seven pages from Vessel were not recorded by ADF&G for reasons unknown.

Appellant in this case testified under oath that each trip for each vessel was reported in the same manner at the same time. At the conclusion of the hearing, Appellant supplied the original 2005 logbook for Vessel. Appellant's logbook for 2005 shows at least sixty bottomfish logbook trips were actually taken. Further, post-hearing, Appellant produced its own sixteen-page spreadsheet of clients, names, addresses, phone numbers and number in their party who took charter fishing trips on Vessel in 2005. Also, the number of qualifying trips Appellant took overall, 392 in 2004, and 543 in 2008, supports Appellant's contention that Vessel took at least fifteen qualifying trips in 2005. The logbook, Appellant's spreadsheet, hearing testimony, and trips properly recorded in 2004 and 2008 establishes that the trips did in fact occur and were timely reported to ADF&G. I find Appellant properly reported to ADF&G more than fifteen bottomfish logbook fishing trips in 2005 and the Official Record is in error. In reaching my conclusion, I am aware that ADF&G denies receiving Vessel's logbook sheets.³² However, in the face of Appellant's overwhelming and convincing evidence to the

³⁰ 50 C.F.R. § 300.67(f)(5).

³¹ 50 C.F.R. § 300.67(h)(3).

³² Original File Tab, Email between RAM and ADF&G dated May 28, 2011. ADF&G stated it only received two of Vessel's logbook sheets.

contrary, Appellant has shown by a preponderance of the evidence that in 2005 Vessel took at least fifteen bottomfish logbook fishing trips and that those trips were properly reported to ADF&G. Accordingly, Appellant is eligible to receive a seventh transferable permit.

CONCLUSIONS OF LAW

Pursuant to CHLAP regulations, Appellant has shown he properly reported to ADF&G at least fifteen logbook trips in 2005 and took at least fifteen logbook trips in 2008 and therefore is eligible for a transferable permit.

ORDER

The IAD dated September 30, 2010 is vacated. RAM is directed to issue Appellants a transferable CHP for Area 2C with an angler endorsement of five. This decision takes effect thirty days from the date issued, December 19, 2011,³³ and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to remand, reverse, or modify this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

Appellants or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time on November 28, 2011, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.



Eileen G. Jones
Chief Administrative Judge

Date Issued: November 18, 2011

³³ 50 C.F.R. § 679.43(k) and (o).