

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0021

ORDER DENYING MOTION for  
RECONSIDERATION

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On February 10, 2012, NAO issued a Decision for the captioned appeal. In the Decision, NAO upheld the Initial Administrative Determination (IAD) under appeal. On February 22, 2012, Appellant filed a Motion for Reconsideration (Motion). Due to the circumstances articulated in Appellant's Motion, I deem it filed timely.

NAO also granted Appellant until March 12, 2012 to supplement his Motion. Appellant mailed additional materials to NAO on March 12, 2012 which are included in the record under the File Tab marked "Pleadings." Appellant submitted the following copies of documents on March 12, 2012 to support his Motion: three sheets of booking calendars; invoices from trips taken in 2004 and 2005, and; photographs with attached explanatory notes.

Appellant wants his charter angler permit (CHP) endorsed for six anglers. In the IAD, NMFS informed Appellant his permit would be endorsed for five anglers and NAO upheld that determination in its Decision.

On reconsideration, Appellant argues at the time of the hearing on November 22, 2012, he was in Colorado, but his guest book for 2004 and 2005 was in Alaska. However, after retrieving his guest book from Alaska, he notes that in both 2004 and 2005 he took trips with six anglers. He also argues he reported trips with six anglers, but those trips were "received late and apparently not counted due to our remote location with subsequent irregular mail service."

In his correspondence mailed March 12, 2012, Appellant explains that he took five six-or-more angler trips on: September 20, 2004, August 10, 2005, one between August 13 and 20, 2005, August 31, 2005, and one between September 4 and 10, 2005.

For the reasons that follow, I deny the Motion.

A motion for reconsideration is not a new layer of appeal or an opportunity to present arguments or evidence that were available prior to the date the record closed. A motion for reconsideration must state material issues of law or fact an appellant believes were

misunderstood or overlooked in the decision. In support of a motion for reconsideration, an appellant must include argument, or points and authorities in support thereof.<sup>1</sup> While I have added all of Appellant's reconsideration documentation to the record, I will be relying solely on the Motion and Appellant's letter mailed March 12, 2012 in denying Appellant's Motion. Evidence that was available prior to the hearing needed to be presented before the record closed. The documents attached to the Motion and attached to Appellant's letter mailed on March 12, 2012, are evidence that was available prior to the hearing. At the hearing I explained that once the record closed, NAO generally does not accept additional documentation. As stated, a reconsideration is not another appeal whereby in the face of an unfavorable decision one presents evidence to counter the decision.

Further, in the appeal before me, Appellant had ample opportunity to present the evidence he has produced subsequent to the issuance of the Decision. While he states the evidence was not available because he was not in Alaska at the time of the hearing, he could have retrieved the evidence in the summer preceding the hearing (2011) at which time his appeal was pending. Indeed, on April 21, 2011, NAO advised Appellant: "If you wish to submit additional materials about the facts and the law in your appeal, please do so by May 23, 2011."<sup>2</sup> Prior to the hearing, Appellant was asked to submit copies of his relevant logbook pages to NAO and any additional evidence he wished.<sup>3</sup> Also, when NMFS asked Appellant for further information to support his application on July 29, 2010,<sup>4</sup> Appellant could have retrieved the documents he now wishes NAO to consider. Lastly, Appellant did not object to closing the record at the end of the hearing after being advised that no further documentation would be accepted after the record closed. Given the ample opportunities and notice to Appellant, in denying Appellant's Motion, I will not consider new documentation presented for the first time with Appellant's Motion and supplemental letter.

I turn to Appellant's claims made on reconsideration. Appellant wants his permit endorsed for six anglers. To be eligible for a six-angler endorsement, an appellant must prove by a preponderance of the evidence he took and properly reported to Alaska Department of Fish and Game (ADF&G) at least one six-angler logbook trip in both qualification periods, 2004 or 2005, and 2008.<sup>5</sup> It is undisputed that Appellant properly reported a six-angler logbook trip in 2008.<sup>6</sup>

If an appellant presents evidence from which the fact finder can conclude that by a preponderance of the evidence the six-angler trips were in fact timely reported to ADF&G, then the appellant can prevail. However, based on the record before me when deciding Appellant's appeal, I concluded Appellant has not met his burden of proof.

As stated in the Decision:

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<sup>1</sup> <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>

<sup>2</sup> Appeals Correspondence, NAO letter dated April 21, 2011.

<sup>3</sup> Appeals Correspondence Tab, Notice of Hearing, October 18, 2011.

<sup>4</sup> Original File Tab, NMFS's letter dated July 23, 2010.

<sup>5</sup> 50 C.F.R. § 300.67(e)(1).

<sup>6</sup> Decision dated February 10, 2012, page 2.

Prior to the hearing, I requested Appellant produce the logbook pages that were not reflected in ADF&G's record. NAO did not receive the requested records. During the hearing, when questioned about the pages, Appellant testified he could not produce the pages because he had destroyed the pages years ago. Appellant explained he kept logbook pages for no more than three to four years and then destroyed them due to space limitations. Since he did not have the records any longer, Appellant testified he was unable to recall the exact dates the trips with six anglers occurred but believed the trips must have occurred between late May and September 2005.

Although Appellant provided signed statements from past customers who purport to have taken logbook fishing trips in 2005 with Appellant that carried six anglers,<sup>7</sup> Appellant was unable to recall the exact dates the trips were taken and was also unable to produce any additional evidence that held as much weight as the logbook pages he destroyed. Also, Pilot, who carried most of Appellant's mail, testified that he never lost Appellant's mail. Further, the Official Record shows the greatest number of anglers on Appellant's charter fishing trips in 2005 was five. Appellant provided his 2008 log which showed trips that carried a range of three to five anglers and only one trip with six. One trip with six anglers in 2008 does not provide sufficient support that Appellant took a logbook trip in 2005 or 2004 with six anglers. Given the totality of evidence, I conclude the greatest number of anglers Appellant reported to ADF&G was five for logbook trips in 2004 and 2005. To be clear, in the face of contrary evidence, including that of a state agency responsible for keeping fishing records, and in the absence of original copies (pink carbons) of his relevant logbook pages, I am not persuaded Appellant has met his burden of proof. Therefore, for the reasons mentioned above, I find Appellant has not established by preponderance of the evidence that he is eligible to receive an angler endorsement of six.<sup>8</sup>

Appellant's arguments made in his Motion do not show the Decision includes a material error of law or fact. Appellant does not argue an error of law occurred, but rather a factual one. Appellant argues the evidence shows he took at least one six-angler trip in 2004 or 2005. However, as stated above, the evidence I am considering is the same evidence I had before me when making the Decision. While Appellant may disagree with the conclusions I have drawn from the evidence, that does not show I erred.

Further, for the sake of argument, I also note that the newly-produced evidence would not change the analysis reflected in the Decision. Even if I considered the photographs, for example, they do not help persuade me Appellant operated a six-angler logbook trip in 2004 or 2005. Only one photograph may be identified by date, that being from July 2005. The fact that the photograph shows seven individuals by a cabin does not show that Appellant not only took the same people on a logbook fishing trip in 2005 but that

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<sup>7</sup> Appellant's Hearing Testimony on November 22, 2011.

<sup>8</sup> Decision dated February 10, 2012, page 6.

the trip was properly reported to ADF&G. Similarly, I am not persuaded by four yellow receipts dated February 14, 2005, February 15, 2005, August 12, 2005, and September 11, 2005. The receipts do not show the trips actually occurred or again that the trips constituted logbook fishing trips with six anglers that were properly reported to ADF&G.

Lastly, even if I considered them, I would not be persuaded by Appellant's calendars. I am not convinced they were created close in time to the events described on them. Further, even on their face, they do not show logbook trips with six anglers occurred. Generally, the notations have what appears to be a last name. Sometimes they have an indication of what is most likely a time and sometimes they have a number in parenthesis.

The September 2005 calendar does not have a clear notation that a six-angler logbook trip occurred and even if it did, that would not be evidence that Appellant properly reported that information to ADF&G. A similar pattern repeats itself in the other two calendars submitted, one for August 2005 and the other for September 2004. On the August 2005 calendar on the 8<sup>th</sup>, there is a notation which includes "6 from Anch. (9 total)." I do not know if "9 total" refers to the number of anglers, but again even if one were to assume it does, that entry does not prove a logbook trip with at least six anglers actually occurred or that it was properly reported to ADF&G.

Whether considered in isolation or as a group or with the evidence of record at the time it was closed, the newly presented evidence does not meet Appellant's burden. Other evidence, particularly that of the state, shows the largest number of anglers Appellant took on a logbook trip in 2004 or 2005 was five. Again in the face of that reliable evidence and the absence of Appellant's carbon (pink) sheets from his logbook showing he took six anglers, I am not persuaded Appellant has met his burden of proving he both took at least one six-angler logbook trip in 2004 or 2005 and properly reported said trip(s) to ADF&G.

#### ORDER

The IAD dated December 27, 2010 is affirmed.

The original Decision takes effect May 7, 2012 unless the Administrator reverses, modifies, or remands that Decision pursuant to 50 C.F.R. § 679.43 (k), (o).



Eileen G. Jones  
Chief Administrative Judge

Date Issued: April 6, 2012