

**NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
ALASKA REGIONAL OFFICE**

In re Application of)
)
 [REDACTED]) Appeal No. 11-0021
)
) ORDER REVERSING DECISION
Appellant)

**REGIONAL ADMINISTRATOR'S ORDER REVERSING THE DECISION
ISSUED BY THE NATIONAL APPEALS OFFICE ON FEBRUARY 10, 2012**

I have reviewed the National Appeals Office (NAO) Decision dated February 12, 2012, *In Re Application of* [REDACTED] Appeal No. 11-0021 (Decision), and the NAO's subsequent Order Denying Motion for Reconsideration, dated April 6, 2012. On May 1, 2012, I issued an order staying the effective date of the Decision until June 7, 2012. Upon further review of the record in this appeal, including the hearing conducted by NAO, the information appellant submitted in support of his motion for reconsideration after the hearing officer formally closed the record, and copies of the original logbook pages subsequently obtained from ADF&G, I have determined that the NAO's Decision should be reversed.¹ I conclude that appellant has proven by a preponderance of the evidence that he should receive a transferable charter halibut permit with an angler endorsement of six. Accordingly, I order RAM to re-issue appellant's transferable charter halibut permit with an angler endorsement of six.

This appeal presents the following issue: does appellant qualify for a transferable charter halibut permit with a charter angler endorsement of six? The NAO's Decision only partially addressed the arguments that appellant raised in this appeal. The NAO's Decision correctly concluded that appellant did not establish his eligibility for a transferable charter halibut permit with a charter angler endorsement of six based on the argument that additional bottomfish logbook fishing trips should be added to the official record for his vessel [REDACTED]. Appellant argued the official record was incomplete because it purportedly did not include the information from various bottomfish logbook fishing trips that were not timely reported to the State of Alaska's Department of Fish and

¹ In support of his motion for reconsideration, appellant submitted additional evidence regarding the number of anglers that were present on bottomfish logbook fishing trips during the qualifying period. The hearing officer concluded that this evidence is not properly included in the record of this appeal. Without opining whether that conclusion is legally sound under the appeal regulations, in the interest of reaching the correct outcome in this difficult case, I have exercised my discretion to consider such evidence in reviewing the merits of this appeal. Additionally, I have obtained copies of the original saltwater charter vessel logbook pages received by ADF&G for appellant's vessel [REDACTED] for 2004 and 2005, and I have supplemented the record with those documents.

Game (ADF&G). This argument is not supported by the record.² The NAO Decision did not, however, address appellant's alternative argument that the official record already includes bottomfish logbook fishing trips on which appellant effectively reported carrying six charter vessel anglers.

Appellant argued that the official record includes logbook entries for trips where appellant effectively reported six charter anglers on bottomfish logbook fishing trips. In support of his application for a transferable permit with an angler endorsement of six, appellant submitted to NMFS Restricted Access Management (RAM) a printout summary of the saltwater logbook entries for his vessel [REDACTED] for 2005, which he asserted "show[s] that several trips were made with 6 anglers on board."³ In the enclosed printouts, appellant highlighted four rows in a table, which represent four bottomfish logbook fishing trips where the summary indicates that 6 rods were used to fish for bottomfish during the trip.⁴ This argument is reiterated in appellant's statement in

² Appellant argued that, due to the remote location of his lodge and the attendant delays in sending mail, some of the logbook entries that he recorded and gave to private pilots to submit to ADF&G may have been lost in transit or may have been received by ADF&G too late to be included in the official record under NMFS regulations. See 50 C.F.R. §§ 300.67(f)(2), (f)(4) (defining bottomfish logbook fishing trip and logbook fishing trip to include trips that were reported to the State of Alaska within the time limit for reporting the trip that was in effect at the time that the trip occurred). Based on my review of the record, appellant's argument is at least partially correct. The date stamps on the logbook entries from ADF&G indicate that there were often delays between the time a trip occurred and the time that the corresponding logbook entry was received at ADF&G. Many of the logbook entries were not received by ADF&G until well beyond the time limit for reporting the trip that was in effect at the time the trips occurred and would not, under strict application of NMFS regulations, qualify as bottomfish logbook fishing trips.

Nonetheless, all of the bottomfish fishing trips reported in these logbook entries are reflected in the Official Record, irrespective of the time that elapsed between the time the trip was taken and recorded and the time that the logbook entry was received by ADF&G. I obtained copies of the original logbook pages in possession of ADF&G. A review of these pages and RAM's summary of the official record of bottomfish logbook fishing trips for the vessel [REDACTED] confirms that all of the trips appellant reported on logbook pages for the vessel [REDACTED] are included in the official record. For 2004, ADF&G provided logbook pages consecutively numbered from page 6 to page 23. Page 6 reports a bottomfish logbook fishing trip on May 24, 2004 and includes an "X" in the box labeled "FIRST trip of the season." Page 23 reports bottomfish logbook fishing trips on September 20, 2004 and September 21, 2004, and includes an "X" in the box labeled "LAST trip of the season." For 2005, ADF&G provided logbook pages consecutively numbered from 1 to 5. Page 1 reports bottomfish logbook fishing trips between June 6, 2005 and June 29, 2005, and is marked with an "x" in the box labeled "FIRST trip of the season." Page 5 reports bottomfish logbook fishing trips between September 9 and September 13, 2005, and is marked with an "x" in the box labeled "LAST fishing trip of the season." The fact that these pages are consecutively numbered, and all reflected in the official record confirms the hearing officer's conclusion that the official record includes every trip appellant reported to ADF&G in the qualifying period, whether or not the trips were reported within the reporting deadline in effect at the time of the trip. As a result, this argument, which was the focus of the hearing and of NAO's Decision, is unfounded. Appellant may have misunderstood that the absence of data for number of anglers did not occur because ADF&G failed to receive his logbooks; rather, it occurred due to the manner in which he entered the data on the forms.

³ Appellant's letter to RAM dated August 25, 2010 (Original File Tab).

⁴ Original File Tab.

support of the appeal, which states, “Several trips were reported that showed angler totals of 6 at one given time and the subsequent testimony will show that a qualification for 6 anglers is justified.”⁵ Admittedly, appellant presented this argument in a somewhat opaque fashion. Nonetheless, in light of the informal nature of the proceedings and their purpose to correct NMFS’s errors, I find it appropriate to liberally construe these pleadings by an appellant who was not represented by counsel in this administrative appeal.

Under NMFS regulations an angler endorsement is based on the number of charter vessel anglers *reported on* a bottomfish logbook fishing trip during the qualifying period. NMFS regulations provide, “[t]he angler endorsement number for the first transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area.”⁶ NMFS regulations define a “charter vessel angler” as “a person, paying or non-paying, who uses the [sport fishing guide] services of a charter vessel guide.”⁷

The central issue in this appeal is whether appellant “reported” six charter vessel anglers on a bottomfish logbook fishing trip during the qualifying period (2004 and 2005). Appellant submitted to ADF&G numerous logbook entries for bottomfish logbook fishing trips during the qualifying period which do not include any information in the column of the logbook page entitled “Number of Clients and Crew Fishing,” but do include information in the column of the logbook page entitled “Max. No. Rods Fished.” These logbook pages report that six rods were fished during several bottomfish logbook fishing trips during the qualifying period. Thus, the issue is whether these logbook entries effectively “reported” that six charter vessel anglers were present on these bottomfish logbook fishing trips, in light of the totality of evidence in the record. Though this is a very close issue, for the reasons set forth below, I conclude that the totality of the evidence in this case supports a conclusion that appellant effectively “reported” six charter vessel anglers on bottomfish logbook fishing trips during the qualifying period. Accordingly, I conclude that appellant’s transferable permit for the vessel [REDACTED] should have a charter angler endorsement of six.

I find that a preponderance of the evidence supports a conclusion that appellant effectively reported six charter vessel anglers on bottomfish logbook fishing trips with the vessel [REDACTED] in the qualifying period in Area 3A. This finding is based on the totality of the evidence in the record, which includes the following: logbook entries reported that 6 rods were fished on multiple bottomfish logbook fishing trips in 2004 and

⁵ Appellant’s letter to RAM and Office of Administrative Appeals, dated Jan. 20, 2011 (Pleadings Tab).

⁶ 50 C.F.R. § 300.67(e)(1). NMFS regulations also provide that “[t]he angler endorsement number will be four (4) if the greatest number of charter vessel anglers reported on any logbook fishing trip for an area in the qualifying period is less than four (4), or no charter vessel anglers were reported on any of the applicant’s logbook fishing trips in the applicant-selected year.” 50 C.F.R. § 300.67(e)(5). This provision is not applicable here, however, because it is undisputed that appellant reported five charter vessel anglers on multiple bottomfish logbook fishing trips during the qualifying period and NMFS has already issued appellant a transferable charter halibut permit with an angler endorsement of five.

⁷ 50 C.F.R. § 300.61; *see* 76 Fed. Reg. 19,708 (April 6, 2011) (interpretive rule which indicates that the term “services” should be construed as equivalent to the term “sport fishing guide services.”).

2005, and for one trip, the logbook entry specifically reported that 6 rods were fished by clients; multiple clients submitted statements, indicating that appellant took them on charter halibut fishing trips with a total of 6 client anglers in 2004 and/or 2005; there is no countervailing evidence in the record that there were fewer than 6 client anglers on such trips; and appellant's vessel was and is licensed by the U.S. Coast Guard to carry 6 anglers, and is operated with equipment and safety gear for six people.

Appellant submitted a total of 6 logbook pages that reported 33 bottomfish logbook fishing trips on [REDACTED] in 2005. The Official Record contains logbook entries for four separate bottomfish logbook fishing trips in 2005 which report that 6 rods were fished during the trips.⁸ These entries are for two back-to-back trips, on July 18 and July 19 and August 25 and August 26, 2005. The "client" column was left blank for each of these logbook entries.

Appellant reported a total of 27 bottomfish logbook fishing trips during the months of July, August and September of 2005. For all trips during the months of July, August and September of 2005, Appellant followed a consistent practice when reporting bottomfish logbook fishing trips. Appellant identified the statistical area where bottomfish fishing occurred, the number of boat hours fished, and the maximum number of rods fished during the trip. Appellant did not, however, enter any information in the column of the logbook labeled "Number of Clients and Crew Fishing." During the months of July, August and September, Appellant left that column blank.⁹ Each of appellant's logbook entries, however, does identify the "[Maximum Number of] Rods Fished" for bottomfish during all bottomfish logbook fishing trips that appellant reported in 2005.

Appellant reported a total of 6 bottomfish logbook fishing trips on [REDACTED] in June 2005, all on a single logbook page. For each trip on this page, appellant filled in information in the column for the "Number of Clients and Crew Fishing," as well as the column for "[Maximum Number of] Rods Fished." For each of these trips, the reported maximum number of rods fished was equal to the reported number of clients fishing. Appellant reported no fishing by crew and the number of reported rods fished never

⁸ In the 2005 logbook pages, the column labeled "Max. No. Rods Fished" does not differentiate between rods fished by clients and rods fished by crew. In the 2004 logbook pages, by contrast, the column labeled "Max. No. Rods Fished" included separate rows to enter the number of rods fished by clients and the number of rods fished by crew during the trip.

⁹ In response to the proposed rule to establish the current regulations for angler endorsement determinations, NMFS received a comment indicating that NMFS should not determine angler endorsements based on bottomfish fishing conducted and reported by crew members. NMFS responded that it would use information presented in the "total clients" field of the logbook entries to determine angler endorsements. The main point of this response was to clarify that NMFS will not use the sum of the numbers provided in both the "total clients" field and the "crew" field to determine angler endorsements, but will limit the angler endorsement to the number of clients reported. In the normal course, where there is information presented in the "total clients" field, NMFS has used and will continue to use this information to determine angler endorsements. However, this comment and response does not preclude NMFS from considering other information to inform a determination of the number of client anglers reported on a trip when the "total clients" field in a logbook entry is left blank. 75 Fed. Reg. at 56907 (Sept. 17, 2010) (Final Rule).

exceeded the number of clients reported. This suggests a consistent business practice of fishing no more than one rod per client on a charter halibut trip in 2005. There is scant evidence in the record to suggest that appellant might have deviated from this practice in July or August of 2005.

Appellant submitted a total of 18 logbook pages that reported bottomfish logbook fishing trips on ██████████ in 2004, which reported a total of 60 bottomfish logbook fishing trips.¹⁰ Appellant's logbook entries for ██████████ for 2004 do not contain any information in the column labeled "Number of Clients and Crew Fishing" but always contain information in the column labeled "Max. No. Rods Fished," and always separately identify the number of rods fished by clients and the number of rods fished by crew. These logbook entries include a single trip during which a total of six rods were fished by clients, according to the information recorded in the logbook page that appellant submitted to ADF&G.

Appellant's case is supported by additional evidence in the form of statements submitted by several former clients, each of whom stated that he or she took charter fishing trips with appellant and fished for halibut. Five former clients stated that they took charter fishing trips with appellant for halibut in 2004 and/or 2005 during which the vessel carried 6 anglers. According to the description provided in these statements, the anglers on these trips would qualify as charter vessel anglers as that term is defined in NMFS regulations. Appellant submitted a statement that specifically asserts that four of these former clients took charter fishing trips with a party of 6 anglers, identifies each of the individuals on those trips, and the specific dates on which those trips occurred in 2004 and 2005. Appellant's statement indicates that two of these clients were present on a single charter halibut fishing trip in 2004 and two other clients were present on a single charter halibut fishing trip in 2005. The official record reflects that appellant took and reported bottomfish logbook fishing trips on the dates specified. Thus, each of these client statements is corroborated by one or more additional pieces of evidence in the record.

Finally, appellant testified that the vessel ██████████ is licensed to carry 6 anglers and was licensed to carry 6 anglers during the qualifying period. A statement submitted by one of appellant's former clients indicates that she took at least three charter halibut fishing trips with appellant with 6 anglers on the vessel ██████████, including during the qualifying period, and that there was fishing equipment and safety gear for each of the anglers present on the vessel.

Given the evidence in the record, I find that appellant did take at least one charter halibut fishing trip with 6 client anglers in 2004 or 2005 and that in effect, appellant did report 6 anglers on at least one bottomfish logbook fishing trip during the qualifying period. The

¹⁰ Appellant reported that crew fished for bottomfish using one rod on a total of three out of these 59 bottomfish logbook fishing trips. On June 14, on a trip during which clients fished only four rods, appellant reported that crew fished one rod. In addition, on September 19 and 20, the third-to-last and second-to-last trips of the season, appellant reported that crew fished one rod. During these two trips, the reported maximum number of client rods fished were three and four.

preponderance of the evidence does not support a contrary conclusion, unless one were to give conclusive weight to the fact that the vast majority of appellant's logbook entries did not contain any information in the column for recording the "number of clients" present on bottomfish logbook fishing trips during the qualifying period. While it may be reasonable to give conclusive weight to the blank spaces in the logbook entries under different factual circumstances, under the specific facts presented in this appeal, I decline to do so. In numerous logbook entries, appellant recorded and reported that 6 rods were used during a trip for bottomfish fishing. As supported by testimony of appellant, numerous clients of appellant, and appellant's consistent practice of fishing no more than one rod per client in early 2005, I conclude that the reported number of rods fished represents and accurately reflects the total number of charter vessel anglers on these bottomfish logbook fishing trips.

Given the totality of the evidence in the record, I find that appellant established by a preponderance of the evidence that he reported six charter vessel anglers on bottomfish logbook fishing trips taken by [REDACTED] during the qualifying period and included in the official record. Therefore, RAM should issue a transferable charter halibut permit with an angler endorsement of six.

IT IS SO ORDERED.

[REDACTED]

James W. Balsiger, Ph.D.
Regional Administrator
NOAA Fisheries, Alaska Region

5.30.12
Date