

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

In re Application of

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Appellant

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Appeal No. 10-0120

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 matter.¹

This appeal comes before NAO based on a timely appeal filed by ██████████ doing business as ██████████ (Appellant). On December 22, 2010, Appellant appealed the Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM). In the IAD dated October 28, 2010, RAM granted Appellant one transferable Charter Halibut Permit (CHP or permit) but denied Appellant's request for two transferable CHPs pursuant to the regulations governing the Charter Halibut Limited Access Program (CHLAP).

The application referred to in the IAD was filed by Appellant on February 2, 2010.² On the application, Appellant indicated that he operated two vessels ██████████ (Vessel I) and ██████████ (Vessel II). Appellant also indicated that in 2004, he took twenty-five logbook fishing trips, eight logbook fishing trips in 2005, and thirty-three logbook fishing trips in 2008 on Vessel I.³ For Vessel II, Appellant indicated on his application that he took thirty-seven logbook fishing trips in 2005 and forty-one logbook fishing trips in 2008.

Attached to Appellant's application was a letter dated February 9, 2010.⁴ In the letter, Appellant stated that he started his charter business in 2002 and was not able to

¹ 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, Type-written letter by Appellant dated February 9, 2010.

purchase his second boat until 2005.⁵ Appellant also explained that he had not recorded any trips in 2004 due to instructions by the State of Alaska Department of Fish and Game (ADF&G) to not worry about recording halibut in 2004 because there was no place for him to keep track in the logbook.⁶

After reviewing Appellant's file, RAM discovered that only Vessel I had taken over five logbook fishing trips in 2005 and that Vessel II had taken eight fishing trips but none of which met the definition of a bottomfish logbook fishing trip.⁷ Without at both vessels logging five logbook fishing trips each during the qualifying period, Appellant did not meet the minimum participation requirement for two transferable CHPs.⁸ On June 17, 2010, 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 non transferable CHP.⁹

On August 20, 2010, Appellant submitted copies of his 2005 ADF&G logbook for Vessels I and II as well as the 2008 ADF&G logbook for Vessel II, in response to the Notice.¹⁰

On October 28, 2010, RAM issued the IAD at issue in this appeal.¹¹ In the IAD, RAM denied Appellant's application for a non transferable CHP. RAM reasoned that the Official Record, which RAM uses to determine applicants eligibility, matched the records provided by Appellant and confirmed Appellant had not taken any halibut logbook fishing trips in 2005 with Vessel II.¹² RAM also indicated to Appellant that if he needed to change his selected year he could do so however, RAM did not receive any documentation from Appellant indicating that he would like to.

On December 22, 2010, Appellant timely appealed the IAD to OAA.¹³ With the appeal, Appellant renewed his claim that he did participate in the 2005 season but did not document the halibut caught because he was told not to do so and was not informed by ADF&G that he should notate halibut in his 2005 logbook.¹⁴ Appellant also attached letters from prior customers who during salmon trips caught halibut as well.¹⁵

⁵ Original File, Type-written letter by Appellant dated February 9, 2010.

⁶ Original File, Type-written letter by Appellant dated February 9, 2010.

⁷ Original File Tab, Print Summary created January 26, 2010; Original File Tab, Notice of Opportunity to Submit Evidence dated June 17, 2010.

⁸ Original File Tab, Notice of Opportunity to Submit Evidence dated June 17, 2010.

⁹ Original File Tab, Notice of Opportunity to Submit Evidence dated June 17, 2010.

¹⁰ Original File Tab, Appellant's 2005 logbook numbered 50578 and 50644 and 2008 Logbook 82156.

¹¹ Original File Tab, IAD.

¹² Original File Tab, IAD page 4.

¹³ Pleadings File Tab, Appellant's appeal letter received on December 22, 2010.

¹⁴ Pleadings File Tab, Appellant's appeal letter received on December 22, 2010.

¹⁵ Pleadings File Tab, Signed statements from prior customers ██████████ ██████████ and ██████████ .

On March 3, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until April 4, 2011 to supplement the record.¹⁶ NAO did not receive any additional information from Appellant.

Upon review of Appellant's appeal and case record, I have determined that the record contains sufficient information on which to reach a final judgment. There is no disputed material issue of fact, and no need for a hearing for testimony on disputed factual issues. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.¹⁷

ISSUES

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

Did Appellant establish by a preponderance of the evidence that he met the minimum participation requirement for the qualifying period by properly reporting to ADF&G five or more bottomfish logbook fishing trips in 2005 for Vessel II?

If the answer to the question is "no," I must uphold the IAD and conclude that Appellant is not eligible for two transferable CHPs.

FINDINGS OF FACT

1. In 2004, 2005, and 2008, Appellant's charter fishing business was issued a Business Owner License by ADF&G and the corresponding logbook.¹⁸
2. In 2004, Appellant reported no logbook fishing trips to ADF&G.¹⁹
3. In 2005, Appellant reported to ADF&G twenty-nine bottomfish logbook fishing trips from one vessel.²⁰
4. In 2008, Appellant reported sixty-six halibut logbook fishing trips to ADF&G.²¹

¹⁶ Appeals Correspondence Tab, NAO letter dated March 3, 2011.

¹⁷ 50 C.F.R. § 679.43 (g) and (k).

¹⁸ Original File Tab, Appellant's 2005 logbook numbered 50578 and 50644 and 2008 Logbook 82156.

¹⁹ Original File Tab, Print Summary dated January 26, 2010.

²⁰ Original File Tab, Print Summary dated January 26, 2010.

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

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.²²

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.²³

To be eligible for a permit, an applicant must 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 recent participation period in 2008.²⁴

A "logbook fishing trip" means a bottomfish logbook fishing trip or a halibut logbook

A "bottomfish logbook fishing trip" is a logbook fishing trip that was reported in the qualifying period with one of the following pieces of information: the statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²⁵

A "halibut logbook fishing trip" means a logbook fishing trip in the 2008 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.²⁶

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS used the Official Record to implement the CHLAP, including evaluating applications for CHPs.²⁷

ANALYSIS

The issue before me is whether Appellant has shown by a preponderance of the evidence that he properly reported to ADF&G a minimum of five bottomfish logbook fishing trips for Vessel II in 2005. A "bottomfish logbook fishing trip" is a logbook fishing

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

²³ 50 C.F.R. § 300.67(b)(1)(ii)

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

²⁵ 50 C.F.R. § 300.67(f)(2).

²⁶ 50 C.F.R. § 300.67(f)(3).

²⁷ 50 C.F.R. § 300.67(f)(5).

trip that was reported in the qualifying period with one of the following pieces of information: the statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²⁸

NMFS correctly applied these steps in evaluating Appellant's application.

Step 1: RAM determined that Appellant met the participation requirements for a non-transferable permit in 50 C.F.R. § 300.67(b), namely, for Vessel I, Appellant took at least five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and at least five halibut logbook fishing trips in the recent participation period (2008).²⁹

Step 2: RAM determined that Appellant did not meet the participation requirement for a second permit in 50 C.F.R. § 300.67(c), which states:

(c) *Number of permits.* An applicant that meets the participation requirements in paragraph (b) of this section [to receive at least one non-transferable charter halibut permit] will be issued the number of charter halibut permits *equal to the lesser of the number of permits* determined by paragraphs (c)(1) or (c)(2) of this section as follows:

(1) The *total number of bottomfish logbook fishing trips* made pursuant to the applicant's ADF&G Business License in *the applicant-selected year* divided by five, and rounded down to a whole number; or

(2) The *number of vessels* that made the bottomfish logbook fishing trips in the applicant-selected year. [italics added]

The applicant-selected year means the year in the qualifying period, either 2004 or 2005, that the applicant selects for NMFS to use in determining the number of applicant's permits.³⁰

Applying federal regulation 50 C.F.R. § 300.67(c) to this applicant, the result is as follows:

*The applicant-selected year: 2005.*³¹

The total number of bottomfish logbook fishing trips in 2005: 29.

The total number of bottomfish logbook fishing trips in 2005 divided by five, rounded down to nearest whole number. $29 \div 5 = 5.8$, rounded to 5.

The number of vessels that made those trips: 1.

²⁸ 50 C.F.R. § 300.67(f)(2).

²⁹ These requirements are specifically at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

³⁰ 50 C.F.R. § 300.67(f)(1).

³¹ Application for Charter Halibut Permit(s) at 2 (dated Mar. 22, 2010, received Mar. 23, 2010)

Applicant receives **the lesser** of 5 or 1. Appellant receives **1 permit**.

The underlying rationale is fairly straightforward. If an applicant only used one vessel in the applicant-selected year (2004 or 2005), the applicant receives one permit. Appellant only reported one vessel's trips in 2005. Therefore, Appellant can only receive one permit, no matter how many trips it took with that vessel in 2005.

Appellant selected 2005. To receive two permits, an applicant would have had to have used two boats in the applicant-selected year and taken five (or more) trips with each vessel in 2005.³²

In his appeal, Appellant concedes he did not report any bottomfish logbook fishing trips to ADF&G for Vessel II in 2005, which the Official Record confirms. Appellant asserts that he did not do so due to ADF&G giving unclear instructions on how to properly document bottomfish logbook fishing trips. However, Appellant did not explain in his appeal how he was able to properly document twenty-nine bottomfish logbook trips for Vessel I using the same 2005 logbook as he did with Vessel II. Therefore, since the minimum participation requirement is five or more "bottomfish logbook fishing trips" in 2005, and Appellant reported none for Vessel II, RAM did not err in the IAD when it notified Appellant his application for a CHP was denied.

In reaching my decision about this case, I have carefully reviewed the entire file, including Appellant's appeal documentation. However, I am bound to follow the CHLAP regulations, and as such, am not authorized to provide Appellant relief under those regulations and the facts of this case.

CONCLUSIONS OF LAW

Pursuant to CHLAP regulations, Appellant has not shown he properly reported the minimum of five halibut logbook fishing trips in 2005 to ADF&G for Vessel II.

As a result, the IAD is consistent with CHLAP regulations and Appellant is not eligible for two transferable permits under CHLAP rules.

ORDER

The IAD dated October 28, 2010 is upheld. This decision takes effect thirty days from the date issued, December 29, 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 reverses, modifies, or remands this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

³² The same result would occur if Appellant chose 2005 because Appellant also used only one vessel in 2005.

³³ 50 C.F.R. § 679.43(k) and (o).

Appellant 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 December 9, 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.

[REDACTED]

Steve Goodman
Administrative Judge

Date Issued: November 29, 2011