

should receive one transferable and one non-transferable permit.⁷ In addition, RAM informed Appellant that according to the Official Record, Appellant was eligible for an endorsement of five anglers instead of the six requested.⁸ RAM provided Appellant thirty days to submit additional information to establish his eligibility for a second transferable CHP and a sixth angler endorsement for both permits.⁹ On August 30, 2010, Appellant submitted records of the trips taken by both Vessel I and II in 2005 and 2008.¹⁰ Appellant's records for 2005, indicate the greatest number of anglers was 5.

Subsequently, on October 19, 2011, RAM issued a revised computation of angler endorsements (Notice II).¹¹ In Notice II, RAM informed Appellant he would still receive an endorsement of five anglers.¹² RAM provided Appellant until November 16, 2010, to challenge the endorsement.¹³

On November 4, 2010, Appellant submitted copies of the Alaska Department of Fish and Game (ADF&G) data for 2005 and 2008. The data for 2005 indicated the greatest number of anglers on any trip was five. The data for 2008 indicated on August 18, 2008, Appellant took a trip with six anglers. Appellant also attached a letter explaining he was only contesting the angler endorsement for his transferable permit and wished to withdraw his request for two transferable permits as stated on his application.¹⁴

On December 27, 2010, RAM issued the IAD at issue in this appeal.¹⁵ In the IAD, RAM denied Appellant's request for an endorsement of six anglers. RAM reasoned the Official Record showed the greatest number of anglers on Appellant's trips in the relevant years was five. RAM explained angler endorsements are based on the greatest number of anglers reported on any logbook fishing trip during the qualifying period, 2004 or 2005. Appellant had not submitted documentation which established he took and properly reported six anglers during the qualifying period.

On January 26, 2011, Appellant timely appealed the IAD to NAO.¹⁶ In the appeal, Appellant renews his claim that the angler endorsement for his transferable permit should be six instead of five.¹⁷ Appellant states he operates a lodge in a remote location that does not have scheduled mail service and access to roads. Appellant states he did mail several logbooks pages in 2005 to the Alaska Department of Fish and Game (ADF&G). Appellant contends the logbook pages showed trips with six anglers;

⁷ Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated July 29, 2010.

⁸ Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated July 29, 2010.

⁹ Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated July 29, 2010.

¹⁰ Original File Tab, Appellant's logbook data for 2005 and 2008.

¹¹ Original File Tab, RAM's 2nd Notice of Opportunity to Submit Evidence dated October 19, 2010.

¹² Original File Tab, RAM's 2nd Notice of Opportunity to Submit Evidence dated October 19, 2010

¹³ Original File Tab, RAM's 2nd Notice of Opportunity to Submit Evidence dated October 19, 2010

¹⁴ Original File Tab, Appellant's logbook data for 2005 and 2008.

¹⁵ Original File Tab, IAD.

¹⁶ Pleadings File Tab, Appellant's appeal letter received on January 26, 2011.

¹⁷ Pleadings File Tab, Appellant's appeal letter received on January 26, 2011.

however, due to irregular mail service and weather all of Appellant's logbook trips were not reflected in ADF&G's records.¹⁸

On April 21, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until May 23, 2011 to supplement the record.¹⁹ To support his argument, Appellant submitted signed witness statements from customers who state they fished on trips with six anglers during the 2005 season.²⁰

On October 18, 2011, NAO sent Appellant a hearing notice. The hearing notice scheduled an oral hearing for November 16, 2011.²¹ However, due to Appellant's inability to contact the primary pilot who picks up and delivers his mail, the hearing was later rescheduled for November 22, 2011.²² On November 22, 2011, an oral hearing commenced and on the same day completed.

At the hearing, Appellant testified that due to the location of his lodge, his mail had to be picked up and delivered by private plane.²³ Appellant testified his mail could be picked up and delivered between once a week and once a month depending on weather conditions and schedules of private planes.²⁴ In addition, the pilots who normally picked up Appellant's mail did not immediately mail his packages after picking them up.²⁵ A majority of the pilots had multiple stops to make before returning home and would first finish their route before mailing anything.²⁶ This could take even longer depending on weather conditions.²⁷ During the hearing, Appellant presented the pilot who delivered and picked up his mail the most, [REDACTED] (Pilot), as a witness. Pilot confirmed Appellant's recitation of the relevant facts. Pilot testified he made numerous other stops before returning home and had his wife take the mail to the local post office.²⁹ Pilot indicated he would normally fly to Appellant's lodge to drop off and pick up customers.³⁰ It would be during this time that he would pick up and deliver Appellant's mail.³¹ Pilot further testified weather played a major part in when he could get to Appellant's lodge.³²

When questioned about the logbook pages for 2004 and 2005, Appellant indicated that approximately twenty-five pages in 2004 and thirty-five pages in 2005, were mailed to

¹⁸ Pleadings File Tab, Appellant's appeal letter received on January 26, 2011.

¹⁹ Appeals Correspondence Tab, NAO letter dated March 3, 2011.

²⁰ Pleadings File Tab, signed statements from customers [REDACTED]

[REDACTED]

²² Appeals Correspondence Tab, Notice to Schedule Hearing dated October 18, 2011.

²² Appeals Correspondence Tab, Notice to Schedule Hearing dated November 14, 2011.

²³ Appellant's Hearing Testimony on November 22, 2011.

²⁴ Appellant's Hearing Testimony on November 22, 2011.

²⁵ Appellant's Hearing Testimony on November 22, 2011.

²⁶ Appellant's Hearing Testimony on November 22, 2011.

²⁷ Appellant's Hearing Testimony on November 22, 2011.

²⁸ Appellant's Hearing Testimony on November 22, 2011.

²⁹ Appellant's Hearing Testimony on November 22, 2011.

³⁰ Appellant's Hearing Testimony on November 22, 2011.

³¹ Appellant's Hearing Testimony on November 22, 2011.

³² Appellant's Hearing Testimony on November 22, 2011.

ADF&G but were not recorded on the official record.³³ Appellant assumed the pages were lost in transit.³⁴ Appellant could not produce the original logbook for either year.³⁵ At the conclusion of the hearing, I closed the record. I have determined the information in the record is sufficient to render a decision.³⁶

ISSUES

At issue in this appeal is whether Appellant is eligible for an angler endorsement of six on his transferable permit. To resolve this issue, I must evaluate the following:

Did Appellant prove by a preponderance of the evidence that the largest number of anglers taken on at least one charter logbook fishing trips in 2004 or 2005 was six, and therefore his transferable permit should be endorsed for six anglers?

If the answer to the question is “no,” I must uphold the IAD and conclude Appellant is not eligible for an angler endorsement of six on his transferable permit.

FINDINGS OF FACT

1. In 2004, 2005, and 2008, Appellant’s charter fishing business was issued a Business Owner License by ADF&G.³⁷
2. In 2005, Appellant was licensed to carry up to six anglers on his vessels.³⁸
3. In 2005, the greatest number of anglers on Appellant’s bottomfish logbook trips was five.³⁹

PRINCIPLES OF LAW

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.⁴⁰

³³ Appellant’s Hearing Testimony on November 22, 2011

³⁴ Appellant’s Hearing Testimony on November 22, 2011

³⁵ Appellant’s Hearing Testimony on November 22, 2011

³⁶ See 50 C.F.R. § 679.43(g) (2).

³⁷ Original File Tab, Application page 3.

³⁸ Appellant’s Hearing Testimony on November 22, 2011.

³⁹ Original File Tab, Print Summary dated January 26, 2010; Appellant’s logbook pages submitted under cover letters dated August 25, 2010 and November 1, 2010 (received by NMFS on November 4, 2010).

⁴⁰ 50 C.F.R. § 300.67(b)(1)(ii)

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.⁴¹ A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.⁴²

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to the State of Alaska 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.⁴³

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.⁴⁴

The angler endorsement number for the first transferable permit for an area issued to applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area.⁴⁵

The angler endorsement number for the first non-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 for a vessel not already used to determine an angler endorsement in that area.⁴⁶

ANALYSIS

The issue before me is whether Appellant has shown by a preponderance of the evidence that the largest number of anglers he took on at least one charter fishing trip in 2005 was six.⁴⁷

Appellant operates a charter fishing business and lodge in a remote location. The lodge is not accessible by road and does not receive regular or traditional mail service. Appellant testified during the hearing, that private pilots are relied on to pickup and drop off customers, deliver mail, and sometimes supplies upon arrival. Most pilots lend their services to more than one lodge which, coupled with dangerous weather, can cause

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

⁴² 50 C.F.R. § 300.67(f)(4).

⁴³ 50 C.F.R. § 300.67(f)(3).

⁴⁴ 50 C.F.R. § 300.67(f)(5).

⁴⁵ 50 C.F.R. § 300.67(e)(1).

⁴⁶ 50 C.F.R. § 300.67(e)(3).

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

delay between the pickup and mailing of packages. Appellant testified that sometimes his mail could sit for days and sometimes weeks waiting to be picked up. Appellant's testimony was corroborated by Pilot, Appellant's primary pilot, who testified all customers have the understanding that packages are not mailed until after the completion of his route.

During the hearing, Appellant testified he gave Pilot several logbook pages to be mailed to ADF&G which contained approximately thirty-five logbook fishing trips but for reasons unknown, the trips were not reflected ADF&G's record. According to Appellant, of those thirty-five trips, at least one noted six anglers. Appellant further explained ADF&G may not have received the pages due to pilot error. Appellant testified that on some occasions, mail was misplaced or simply never mailed by private pilots. However, Pilot testified he never misplaced any of Appellant's mail and mailed everything that was given to him as promptly as he could.

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,⁴⁸ 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.

⁴⁸ Appellant's Hearing Testimony on November 22, 2011.

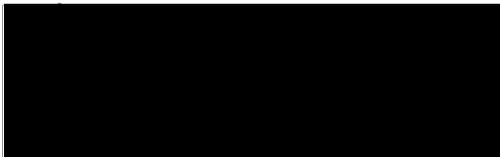
CONCLUSIONS OF LAW

Pursuant to CHLAP regulations, Appellant has not shown by a preponderance of evidence the largest number of anglers he took on a bottomfish fishing trip in 2004 or 2005 was six; therefore, his transferable permit shall remain endorsed for five.

ORDER

The IAD dated December 27, 2010 is upheld. This decision takes effect thirty days from the date issued, March 12, 2012, 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 reverse, remand, or modify this decision pursuant to 50 C.F.R. § 679.43(k), (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 Standard Time on February 20, 2012, 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 of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.



Eileen G. Jones
Chief Administrative Judge

Date Issued: February 10, 2012