

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0024

DECISION on REMAND  
(Corrected)

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STATEMENT OF THE CASE

On October 19, 2011, NAO issued a Decision for this appeal. In the Decision, NAO upheld the Initial Administrative Determination (IAD) because NAO found the evidence showed that Appellant did not meet the elements of an unavoidable circumstances claim.

On December 12, 2011, the Regional Administrator (RA) for the National Marine Fisheries Service (NMFS), Alaska Regional Office issued the Final Decision granting Appellant a Charter Halibut Limited Access Program permit (CHP). The RA reasoned Appellant had proven an unavoidable circumstance claim stemming from events in 2008. In his Final Decision, the RA also remanded the appeal to NAO. The RA ordered NAO to “determine the number of transferable and/or non-transferable permits and the angler endorsement on those permit(s) that result from the application of the criteria in 50 C.F.R. § 300.67(b) – (e). See 50 C.F.R. § 300.67(g)(1)(v).”<sup>1</sup>

On January 20, 2012, NAO issued an Order to Show Cause and Opportunity to Respond (Order) to Appellant. In the Order, NAO provided notice to Appellant about data in the Official Record and provided a two-week period in which Appellant could present evidence to challenge the Official Record or otherwise supplement the record. On February 3, 2012, Appellant submitted to NAO a two-page statement to supplement his appeal.<sup>2</sup>

Number of permits. In Appellant’s submission to NAO of February 3, 2012, he states he is eligible for two permits. I agree.

Fifty C.F.R. § (g)(1)(v) provides that once an Appellant meets the unavoidable circumstances provision, the number of permits, whether the permits are designated transferable or nontransferable, and the angler endorsement is governed by 50 C.F.R. §

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<sup>1</sup> Decision Tab, RA’s Final Decision, page 3.

<sup>2</sup> Evidence Tab.

300.67 (b)-(f). Paragraph (c) provides guidance on deciding the number of permit(s). An eligible applicant will receive the lesser of the results of two computations:

- (1) The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G [Alaska Department of Fish and Game] 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.

Applying those criteria to Appellant's record shows he is eligible for two permits. Appellant's applicant selected year is 2005.<sup>3</sup> In 2005, the record shows Appellant reported twenty-four bottomfish logbook trips. Twenty-four divided by five and rounded down yields four. Applying the second formula, the number of vessels Appellant used for chartering in his applicant selected year of 2005, was two, [REDACTED] (Vessel I) and [REDACTED] (Vessel II).<sup>45</sup> As two is less than four, Appellant is eligible for two CHPs.

Transferability. In Appellant's submission to NAO of February 3, 2012, he states he is eligible for one transferable and one nontransferable permit. I agree.

Under the regulations governing the Charter Halibut Limited Access Program (CHLAP), the "Applicant Selected Year" is the year one looks to in deciding whether permits will be transferable or nontransferable.<sup>6</sup> As indicated, Appellant chose 2005 as his "Applicant Selected Year."<sup>7</sup> In 2005, Appellant completed twenty-four bottomfish fishing trips with Vessel I and Vessel II and reported those trips to ADF&G.<sup>8</sup> Nine of the twenty-four trips were reported from Vessel I and fifteen of the twenty-four trips were reported from Vessel II.<sup>9</sup>

For 2008, Appellant reported no logbook trips. However, the RA found Appellant met the requirements of the unavoidable circumstances provision in the CHLAP regulations and was therefore eligible for a permit(s). To determine whether a permit should be transferable, the unavoidable circumstance provision<sup>10</sup> of the CHLAP regulations directs

<sup>3</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, page 2.

<sup>4</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, page 2. Evidence Tab, Logbook Data pursuant to email exchange between NAO and NMFS's ISD Application Group, January 2012.

<sup>5</sup> Evidence Tab, Logbook Data pursuant to email exchange between NAO and NMFS's ISD Application Group, January 2012.

<sup>6</sup> 50 C.F.R. § 300.67(f)(1) and (g)(1)(v).

<sup>7</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, page 2.

<sup>8</sup> Original File Tab, IAD dated June 17, 2010.

<sup>9</sup> Evidence Tab, Logbook Data pursuant to email exchange between NAO and NMFS's ISD Application Group, January 2012.

<sup>10</sup> 50 C.F.R. § 300.67(g)(1)(v).

one to apply paragraph (d) of section 300.67. Paragraph (d) requires a minimum of fifteen logbook trips in both participation periods (i.e., 2004 or 2005 and 2008) in order for an applicant to be eligible for a transferable permit.<sup>11</sup> However, by definition an applicant who meets the requirements of the unavoidable circumstances provision is missing the requisite trips in one of the participation periods.<sup>12</sup> NMFS contemplated that type of scenario in drafting the CHLAP regulations and explained in the preamble to the Proposed Rule:

Assuming...the applicant...successfully...demonstrate[s]...it meets the criteria for an unavoidable circumstance, NMFS proposes to award the applicant the number and type of permits...the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period.<sup>13</sup>

In short, I am instructed to assume Appellant's participation in 2008 would be the same as it was in the qualifying period. Appellant reported nine logbook trips taken on Vessel I in 2005.<sup>14</sup> Accordingly, for 2008, I impute Vessel I would have taken nine logbook trips, the number logged for 2005.<sup>15</sup> Since Vessel I did not have the minimum fifteen trips in both participation periods, Appellant is not eligible for a transferable permit based on Vessel I's participation history. However, the CHLAP regulations require a minimum of only five logbook trips in each period of participation in order to qualify for a nontransferable permit.<sup>16</sup> Since Appellant does have the minimum of five trips in both participation periods, he is eligible for a nontransferable permit based on Vessel I's participation history.

With respect to Vessel II, I have found Appellant reported fifteen logbook trips for that vessel in the qualifying year of 2005.<sup>17</sup> Accordingly, for 2008, I impute Vessel II would have taken fifteen logbook trips, the number logged for 2005. Since Vessel II has the minimum fifteen trips in both participation periods, Appellant is eligible for a transferable permit based on Vessel II's participation history.<sup>18</sup>

Angler Endorsement. In Appellant's submission to NAO of February 3, 2012, he states he is eligible for angler endorsements of six on two permits. I disagree.

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<sup>11</sup> 50 C.F.R. § 300.67(d).

<sup>12</sup> See 50 C.F.R. § 300.67(f)(1) and (g)(1).

<sup>13</sup> Proposed Rule, 75 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009).

<sup>14</sup> Evidence Tab, Logbook Data pursuant to email exchange between NAO and NMFS's ISD Application Group, January 2012.

<sup>15</sup> In 2005, Appellant logged nine trips, but obviously, that is also insufficient to meet the fifteen-trip minimum for a transferable permit.

<sup>16</sup> See 50 C.F.R. § 300.67(b)(1)(ii).

<sup>17</sup> For 2004, Appellant reported no logbook trips for Vessel II. Evidence Tab, Logbook Data pursuant to email exchange between NAO and NMFS's ISD Application Group, January 2012.

<sup>18</sup> Appellant appears to agree that he is eligible for one nontransferable and one transferable permit. See Original File Tab, Appellant's letter, second page, received by RAM on March 26, 2010 and apparently attached to Appellant's application.

Under paragraph (e) of the CHLAP regulations, the number of anglers for which the first transferable permit will be endorsed is equal to the greatest number of anglers on any logbook trip reported during the qualifying period (2004 or 2005).<sup>19</sup>

The greatest number of anglers Appellant reported for Vessel I in the qualifying period is five.<sup>20</sup> Therefore, Appellant's transferable permit will be endorsed for five anglers.

Also under paragraph (e) of the CHLAP regulations, the number of anglers for which the first nontransferable permit will be endorsed is equal to the greatest number of anglers on any logbook trip reported during the qualifying period (2004 or 2005) based on a vessel's history not already used to determine an angler endorsement number.<sup>21</sup> However, if the vessel with remaining history did not have any reported anglers in the applicant-selected year then the first nontransferable permit is endorsed for four.<sup>22</sup>

The only vessel whose history has not been used to determine an angler endorsement is Vessel II. That vessel reported no anglers on its logbook trips in Appellant's applicant-selected year of 2005.<sup>23</sup> Therefore, Appellant's nontransferable permit will be endorsed for four anglers.

In reaching my decision on the angler endorsements, I realize Appellant would like endorsements for six anglers. However, in NAO's Order, Appellant was advised that: "[T]he Official Record shows the highest number of anglers Appellant reported for a trip on [Vessel I] was five, but Appellant reported no number of anglers on trips taken by [Vessel II]." In response to the Order to Show Cause, Appellant did not identify evidence in the record or submit new evidence that would refute the Official Record; therefore, Appellant has not carried the burden of showing his permits should be endorsed for six anglers. The Official Record shows Vessel I's largest number of anglers as five, and Vessel II did not report angler numbers. I have carefully reviewed the file and other than Appellant's statements, I do not see evidence that would support granting Appellant permits endorsed for six anglers.

## ORDER

Per the RA's Final Decision, the IAD dated June 17, 2010 is reversed. Subject to the RA's review, RAM shall issue Appellant two permits, one transferable and one nontransferable. The transferable permit shall have an angler endorsement of five. The nontransferable permit shall have an angler endorsement of four.

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<sup>19</sup> See 50 C.F.R. § 300.67(e). See 75 Fed. Reg. 38758, 38760 (July 6, 2010).

<sup>20</sup> Evidence Tab, Logbook Data pursuant to email exchange between NAO and NMFS's ISD Application Group, January 2012.

<sup>21</sup> See 50 C.F.R. § 300.67(e).

<sup>22</sup> See 50 C.F.R. § 300.67(e)(5).

<sup>23</sup> Evidence Tab, Logbook Data pursuant to email exchange between NAO and NMFS's ISD Application Group, January 2012. Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, page 2.

This decision takes effect thirty days from the date issued, March 19, 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 reverses, modifies, or remands 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 27, 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.



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Eileen G. Jones  
Chief Administrative Judge

Date Issued: February 17, 2012