

that RAM determined that Appellant had six vessels that each made fifteen bottomfish logbook fishing trips in 2004 and fifteen halibut logbook fishing trips in 2008.⁶

According to the official charter halibut record, Appellant took 278 bottomfish logbook fishing trips on six vessels in 2004, 43 bottomfish logbook fishing trips on two vessels in 2005, and 382 halibut logbook fishing trips on seven vessels in 2008.⁷

Before RAM, Appellant sought an angler endorsement of fourteen on one permit.⁸ RAM determined that it could not put an angler endorsement of fourteen on any of Appellant's permits under the terms of federal regulation 50 C.F.R. § 300.67(e). Under that regulation, NMFS must determine an angler endorsement according to the highest number of anglers that the applicant reported on a bottomfish logbook fishing trip in 2004 or 2005 with the trip history of one vessel being used to determine the angler endorsement on one permit.⁹ RAM determined that each of Appellant's permits would have an angler endorsement of six because the highest number of clients that Appellant reported on any bottomfish logbook fishing trip in 2004 or 2005 with each of his six vessels was six.¹⁰

On appeal, Appellant contends that five of his six transferable permits should have an angler endorsement of eight, rather than six. Appellant bases his appeal on the fact that on at least one trip in 2004 or 2005, with five of his vessels, he reported eight persons fishing: six clients and two crew members.¹¹ Appellant argues that NMFS should count crew members when it determines angler endorsements.

Appellant can file this appeal because the IAD directly and adversely affects his interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that five of his six permits should be endorsed for eight anglers.

Since Appellant did not make the "crew member" argument to RAM, I asked RAM to supplement the record with its evaluation of that claim.¹² RAM did that and concluded: "The regulations governing the Charter Halibut Limited Access Program . . . do not authorize inclusion of crew in determination of the Angler Endorsements that are an integral part of Charter Halibut Permits (CHPs) under its authority. Had [Appellant] actually raised this issue while his case was under consideration by RAM, RAM would have denied that claim."¹³

two vessels in 2005 and only one of them made fifteen or more halibut logbook fishing trips in 2005. IAD at 7.

⁶ 50 C.F.R. § 300.67(d)(1) – (2).

⁷ Official Record for Appellant (Jan. 27, 2010).

⁸ Letter from Appellant with Application (Mar. 19, 2010).

⁹ IAD at 7.

¹⁰ IAD at 7 - 8.

¹¹ Appellant's Appeal (Mar. 15, 2011).

¹² Request for Supplement to Record by RAM and Providing Opportunity to Respond by Appellant (Dec. 21, 2011).

¹³ RAM Response to Request for Supplement to Record at 1 (Dec. 21, 2011)(emphasis in original).

I also gave Appellant notice that, in deciding his appeal, I would consider the following material and gave him the opportunity to submit additional evidence and argument:

[1] Decision in Appeal 10-0093, where the administrative judge upheld an IAD that did not include crew members in determining the angler endorsement on a permit;¹⁴

[2] the final rule that NMFS adopted in September 2010 changing the method for determining angler endorsements when an applicant receives more than one permit and, in particular, NMFS's Response to Comment 2, that NMFS determined angler endorsements by the number of clients, not the number of clients and crew;¹⁵

[3] the interpretive rule that NMFS adopted in April 2011 as to when a vessel operator must have a charter halibut permit on board the vessel.¹⁶

Appellant provided further evidence and argument.¹⁷

Appellant requested a hearing.¹⁸ I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue five transferable charter halibut permits with angler endorsements of eight.¹⁹ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision. I have carefully considered the entire record, including Appellant's supplemental evidence.²⁰

For the reasons that follow, I affirm the IAD. I conclude, pursuant to federal regulation 50 C.F.R. § 300.67(e), that Appellant eligible to receive six transferable charter halibut permits based on the number of charter vessel clients that he reported in the qualifying period, not the number of clients and crew members. Appellant is therefore eligible to receive six transferable permits each with an angler endorsement of six.

¹⁴ Decision in Appeal 10-0093 (Nov. 18, 2011), Exhibit 1 to Request for Supplement to Record by RAM and Providing Opportunity to Respond by Appellant (Dec. 21, 2011). The Regional Administrator for NMFS Alaska Region did not reverse, modify or remand this Decision so it became final agency action on December 19, 2011, pursuant to federal regulation 50 C.F.R. § 679.43(k) and (o).

¹⁵ Order Granting Extension and Taking Official Notice of Final Rule Changing Angler Endorsement Provision (Jan. 6, 2012). See Final Rule, 75 Fed. Reg. 56,903 (Sep. 17, 2010).

¹⁶ Final Rule, 76 Fed. Reg. 19,708 (Apr. 8, 2011). This rule was supposed to be Exhibit 2 to Request for Supplement to Record by RAM (Dec. 21, 2011) but, by mistake, I attached an interpretive rule that NMFS adopted on another provision of the charter halibut program, Final Rule, 76 Fed. Reg. 34,890 (June 15, 2011). I provided Appellant the correct Exhibit 2 and the opportunity to respond to it. Order Providing Correct Exhibit (Jan. 27, 2012). I granted Appellant's request for an extension. Order Granting Extension (Feb. 3, 2012). Appellant did not submit any argument or evidence beyond his submission of January 18, 2012.

¹⁷ Supplemental Evidence by Appellant (Jan. 18, 2012).

¹⁸ Appellant's Appeal (Mar. 15, 2011).

¹⁹ 50 C.F.R. § 679.43(g)(3).

²⁰ Supplemental Evidence by Appellant (Jan. 18, 2012).

ISSUE

Under federal regulation 50 C.F.R. § 300.67(e), should Appellant receive angler endorsements on his permits based on the highest number of clients that he reported on a bottomfish logbook fishing trip in the qualifying period or the highest number of clients and crew members?

FINDINGS OF FACT

1. On August 6, 2004, Appellant reported fishing by six clients and two crew members from Vessel 1 on a bottomfish logbook fishing trip.²¹
2. On July 20, 2004, Appellant reported fishing by six clients and two crew members from Vessel 2 on a bottomfish logbook fishing trip.²²
3. On August 12, 2004, Appellant reported fishing by six clients and two crew members from Vessel 3 on a bottomfish logbook fishing trip.²³
4. On July 2, 2004, Appellant reported fishing by six clients and two crew members from Vessel 4 on a bottomfish logbook fishing trip.²⁴
5. On July 13, 2004, Appellant reported fishing by six clients and two crew members from VESSEL 5 on a bottomfish logbook fishing trip.²⁵
6. In 2004, the greatest number of clients reported by Appellant on a bottomfish logbook fishing trip with any of his vessels was six.²⁶
7. In 2005, the greatest number of clients reported by Appellant on a bottomfish logbook fishing trip with any of his vessels was six.²⁷

PRINCIPLES OF LAW

In March 2007, pursuant to section 773c(c) of The Halibut Act, the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.²⁸

²¹ 2004 Saltwater Vessel Logbook [REDACTED] for VESSEL 1 (submitted by Appellant, Mar. 15, 2011).

²² 2004 Saltwater Vessel Logbook [REDACTED] for VESSEL 2 (submitted by Appellant, Mar. 15, 2011).

²³ 2004 Saltwater Vessel Logbook [REDACTED] for VESSEL 3 (submitted by Appellant, Mar. 15, 2011).

²⁴ 2004 Saltwater Vessel Logbook [REDACTED] for VESSEL 4 (submitted by Appellant, Mar. 15, 2011).

²⁵ 2004 Saltwater Vessel Logbook [REDACTED] for VESSEL 5 (submitted by Appellant, Mar. 15, 2011).

²⁶ Official Charter Halibut Record for Appellant (Jan. 27, 2010).

²⁷ Official Charter Halibut Record for Appellant (Jan. 27, 2010).

²⁸ Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A, (Mar. 31, 2007), hereinafter Council Motion, available on http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

In January 2010, pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program.²⁹ The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67.

Under the Charter Halibut Limited Access Program, an operator of a vessel cannot have charter anglers on board the vessel who are catching and retaining halibut unless the vessel operator has a charter halibut permit endorsed for that number of charter vessel anglers.³⁰ Each charter halibut permit has an angler endorsement number that establishes the maximum number of charter vessel anglers that may be on board a vessel pursuant to that permit.³¹

Under the charter halibut regulation that the Secretary adopted in January 2010, NMFS determined the angler endorsement on all of the permits issued to an applicant by the highest number of anglers that the applicant reported on any bottomfish logbook fishing trip with any vessel in the qualifying period.³² The qualifying period is the sport fish season established by the International Pacific Halibut Commission (IPHC) in 2004 and 2005.³³

In April 2010, pursuant to The Halibut Act, the Council adopted a motion that this method of determining angler endorsements was not consistent with Council intent, and resulted in excessive fishing capacity in the charter halibut fishery, when an applicant was receiving more than one permit.³⁴ The reason is that, when an applicant receives more than one permit, the applicant used more than one vessel in the qualifying period (2004 or 2005)³⁵ But, under the charter halibut regulation, as originally adopted, an applicant received the angler endorsement on *all* of the applicant's permits based on the highest number of clients reported **by a single vessel**.

To correct this, the Council requested, and NMFS proposed, a regulation that revised the method of determining angler endorsements when the applicant received more than one permit.³⁶ The Secretary adopted it September 2010.³⁷

Under the revised regulation, NMFS determines angler endorsements by the “one vessel/one permit method.” The angler endorsement on an applicant’s first transferable charter halibut permit is the highest number of anglers reported on a bottomfish logbook

²⁹ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

³⁰ 50 C.F.R. § 300.67(a)(1); 50 C.F.R. § 300.66(s).

³¹ 50 C.F.R. § 300.67(a)(1); 50 C.F.R. § 300.66(s).

³² Final Rule, 75 Fed. Reg. 554, 601 (Jan. 5, 2010) *adopting* 50 C.F.R. § 300.67(e). This provision was the subject of NMFS’s response to Comment 89 in the final rule. 75 Fed. Reg. at 582.

³³ 50 C.F.R. § 300.67(f)(6) It is February 1 through December 31 in 2004 and 2005.

³⁴ Council Minutes at 6 (Meeting April 8 – 13, 2010), available on Council website:

www.fakr.noaa.gov/npfmc/PDFdocuments/minutes/410Council.pdf.

³⁵ 50 C.F.R. 300.67(c)(applicant cannot receive a number of permits greater than the number of vessels that the applicant used in the applicant-selected year of the qualifying period, 2004 or 2005).

³⁶ Proposed Rule, 75 Fed. Reg. 38,758 (July 6, 2010).

³⁷ Final Rule, 75 Fed. Reg. 56,903 (Sep. 17, 2010).

fishing trip in either year of the qualifying period (2004 or 2005) by a vessel used by the applicant, subject to a minimum angler endorsement of four.³⁸

The angler endorsement on each subsequent permit is the highest number of anglers reported on a bottomfish logbook fishing trip in either 2004 or 2005 by a vessel not already used to determine an angler endorsement on a permit issued to the applicant.³⁹ NMFS assigns angler endorsements to all the applicant's transferable permits and then to all the applicant's non-transferable permits.⁴⁰

NMFS must determine the angler endorsement on a charter halibut permit in accord with the regulations adopted by the Secretary of Commerce pursuant to The Halibut Act.

ANALYSIS

Should an applicant receive angler endorsements based on the highest number of clients that the applicant reported on a bottomfish logbook fishing trip in the qualifying period or the highest number of clients and crew members?

The regulation at issue, 50 C.F.R. § 300.67(e), provides, in relevant part:

(e) *Angler endorsement.* A charter halibut permit will be endorsed as follows:

(1) The angler endorsement 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.

(2) The angler endorsement for each subsequent transferable permit issued to the same applicant for the same area will be ***the greatest number of charter vessel anglers reported by the applicant on any logbook trip in the qualifying period*** for a vessel not already used in that area to determine an angler endorsement, until all transferable permits issued to the applicant are assigned an angler endorsement.⁴¹

RAM interprets “the greatest number of charter vessel anglers” in 50 C.F.R. § 300.67(e) to mean “the greatest number of charter vessel clients.” The greatest number of clients that Appellant reported on any trip in the qualifying period was six. Under RAM's interpretation, Appellant receives an angler endorsement of six on each of his permits.

³⁸ 50 C.F.R. § 300.67(e)(1). If the highest number reported by any vessel was less than four, the applicant receives an angler endorsement of four on the permit whose angler endorsement is determined by that vessel. 50 C.F.R. § 300.67(e)(5).

³⁹ 50 C.F.R. § 300.67(e)(2) – (4).

⁴⁰ 50 C.F.R. § 300.67(e)(1) – (4).

⁴¹ 50 C.F.R. § 300.67(e)(1) & (2)(emphasis added).

Appellant interprets “the great number of charter vessel anglers” to mean “the greatest number of clients and crew members reported by the applicant on any logbook trip in the qualifying period.” The greatest number of clients and crew members that Appellant reported on any trip in the qualifying period was eight: six clients and two crew members. Under Appellant’s interpretation, Appellant would receive an angler endorsement of eight on five of his six permits.

I conclude that RAM’s interpretation is correct and that Appellant should receive angler endorsements on his permits that are based on the greatest number of clients that he reported with each of his vessels on a bottomfish logbook fishing trip in 2004 or 2005.

I evaluate the language of the regulation construed in light of other provisions in the charter halibut regulation and the purpose of the regulation. I conclude that RAM’s interpretation is correct for three reasons. First, the language of the regulation, 50 C.F.R. § 300.67(e), by itself, is ambiguous. Second, RAM’s interpretation is consistent within this appeal and with other statements by NMFS. Third, RAM’s interpretation puts into effect the purpose of the angler endorsement provision. Appellant’s interpretation undermines the purpose of the angler endorsement provision by allowing permit holders to use their permits to carry more clients than they did for any trip in the qualifying period. Finally, Appellant’s argument that other persons have received angler endorsements based on fishing by crew members is not a basis for Appellant to receive an angler endorsement on that basis.

1. The language of the regulation, 50 C.F.R. § 300.67(e), is ambiguous.

The language of the regulation, by itself, is ambiguous. An ambiguous regulation means that the language of the regulation can reasonably be interpreted in more than one way.⁴²

Under 50 C.F.R. 300.67(e), NMFS must determine angler endorsements by the “greatest number of charter vessel reported on any logbook fishing trip in the qualifying period.” This requires us to examine other terms in the charter halibut regulation. A “charter vessel angler” is defined as “a person, paying or non-paying, using the services of a charter vessel guide.”⁴³ This points us to what it means to be using the “services” of a “charter vessel guide.” The term “charter vessel guide” is “a person who holds an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.”⁴⁴ The term “sport fishing guide services” means

⁴² See 2A Sutherland Statutory Construction § 45.2 at 13 (2007)(“Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.”) (footnote omitted). This principle applies to regulations.

⁴³ 50 C.F.R. § 300.61 (emphasis added).

⁴⁴ 50 C.F.R. § 300.61 (emphasis added).

assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.⁴⁵

The term “crew member” has a separate, and different, definition from charter vessel angler:

Crew member, for purposes of §§ 300.65(d), and 300.67, means an assistant, deckhand, or similar person who works directly under the supervision of, and on the same vessel as, a charter vessel guide or operator of a vessel **with one or more charter vessel anglers on board**.⁴⁶

Thus, the language, “greatest number of charter vessel anglers” in 50 C.F.R. § 300.67(e), by itself, is ambiguous. It reasonably admits of Appellant’s interpretation and RAM’s interpretation. Appellant’s interpretation is that a crew member is a “charter vessel angler” because a crew member would be “a person, paying or non-paying, using the services of a charter vessel guide.”⁴⁷ Appellant would say that a crew member would be a non-paying person using the services of a charter vessel guide.

RAM’s interpretation is that a crew member is not a charter vessel angler because the crew member did not compensate the charter vessel guide for assistance in catching halibut and therefore did not use the services of a guide.⁴⁸ A crew member is separately defined from charter vessel angler and is a person working for the guide while one or more charter vessel anglers are also on board.⁴⁹ The language of the regulation, 50 C.F.R. §300.67(e), by itself, does not resolve the issue.

2. RAM’s interpretation of charter vessel angler in 50 C.F.R. § 300.67(e) is consistent within this appeal and with other statements by NMFS.

In deciding the angler endorsements on Appellant’s permits, RAM used the highest number of clients that Appellant reported on any trips with each of his six vessels. RAM stated that, if Appellant had raised the crew member claim during the application process, RAM would have denied the claim.⁵⁰

⁴⁵ 50 C.F.R. § 300.61.

⁴⁶ 50 C.F.R. § 300.61 (emphasis added).

⁴⁷ 50 C.F.R. § 300.61 (emphasis added)

⁴⁸ This is the interpretation of “charter vessel angler” that NMFS adopted in interpreting 50 C.F.R. § 300.67(r), namely a vessel operator does not have to have a permit on board if he is taking family and friends fishing for halibut as long as the family members or friends are not compensating the vessel operator for assistance with fishing. Final Rule, 76 Fed. Reg. 19,709 (Apr. 8, 2011).

⁴⁹ 50 C.F.R. § 300.61 (definition of crew member)

⁵⁰ RAM Response to Request for Supplement to Record at 1 (Dec. 21, 2011).

RAM's interpretation is consistent with other statements by NMFS of how it determined the angler endorsement on charter halibut permits. In analyzing the revised angler endorsement rule the Council, NMFS stated:

The Alaska Department of Fish and Game (ADF&G) provided NMFS with saltwater charter logbook data to implement the limited entry program. NMFS used the "total clients" field, for individual fishing trips reported by charter operators, in ADF&G logbooks to determine angler endorsements on permits.⁵¹

In the final rule adopting the revised angler endorsement method, NMFS stated in response to a specific comment that it did not include crew data in determining angler endorsements:

Comment 2. We understand under the final rule implementing the limited access program that some angler endorsements included skipper and crew participation recorded in the logbooks. The skipper and crew were providing services to charter vessel anglers and should not be counted toward the history of the vessel for determining angler endorsements

Response. NMFS used the "total clients" field in the logbook data received from ADF&G to determine the angler endorsements on a charter halibut permit under the former regulations. NMFS will continue to use the "total clients" field to determine the number of angler endorsements assigned to a charter halibut permit under this final rule. The 2004 and 2005 logbooks contained a "total crew" field for charter operators to record the number of crew fishing, and the logbook instructions directed operators not to combine client and crew information. NMFS did not use the "total crew" field for determining angler endorsements.⁵²

In the Small Entity Compliance Guide for the Charter Halibut Program, NMFS stated:

13. How did NMFS determine my angler endorsement number for my CHP [charter halibut permit]?

To determine angler endorsements, NMFS used the greatest number of clients reported in logbooks submitted timely to ADF&G for each vessel used for the qualifying years (2004 and 2005). Whatever your CHP angler

⁵¹ Draft for Secretarial Review of Regulatory Amendment to Revise Permit Endorsements for Charter Halibut Business that are Qualified to Receive Multiple Permits, Regulatory Impact Review – Final Regulatory Flexibility Analysis, Lead Agency: NMFS (August 2010) at 12 note 1, hereinafter Analysis of Angler Endorsement Amendment, available at http://www.fakr.noaa.gov/analyses/halibut/draft-rir-frfa_082610.pdf.

⁵² Final Rule, 75 Fed. Reg. 56,903, 56,907 (Sep. 17, 2010).

endorsement, your ability to carry passengers or charter vessel anglers may be limited by other state or federal law.⁵³

Appellant states, “[S]ome companies have been awarded Angler Endorsements that included crewmembers, while other companies have had to go **through the appeals process** in order to get the Angler Endorsement which has been applied to other companies.”⁵⁴

I consider Appellant’s claim that some companies have angler endorsements that included fishing by crew members below,⁵⁵ but Appellant is incorrect that any administrative judge in the appeals process ruled that an angler endorsement on a charter halibut permit should be based on crew data.

This Office has decided one appeal where the applicant sought an angler endorsement based on the highest number of crew members *and* clients that the applicant reported in the qualifying period, rather than the highest number of clients. That appeal was Appeal Number 10-0093, which became final agency action without change by the Regional Administrator for the Alaska Region.⁵⁶

In Appeal Number 10-0093, the administrative judge ruled that RAM properly determined the angler endorsement on an applicant’s second permit by using the highest number of clients that the applicant reported on a bottomfish logbook fishing trip in the qualifying period with the applicant’s second vessel.⁵⁷

Based on the foregoing authoritative, consistent statements by NMFS in public documents, by RAM in this appeal and by a prior administrative judge in another appeal, I conclude that NMFS has consistently interpreted 50 C.F.R. § 300.67(e) to mean that the angler endorsement on a charter halibut permit is the highest number of clients that the applicant reported on a bottomfish logbook fishing trip in the qualifying period, not the highest number of clients and crew members. The consistency of an interpretation is a factor in favor of that interpretation.⁵⁸

3. RAM’s interpretation furthers the purpose of the angler endorsement provision.

To determine the purpose of the regulation, I examine the history of the angler endorsement provision. The entire Charter Halibut Program, including the angler endorsement provision, resulted from the action by the North Pacific Fishery Management Council in the Council Motion of March 2007.⁵⁹

⁵³ Small Entity Compliance Guide for CHLAP (rev. June 29, 2011), available on NMFS Alaska Region website: <http://www.fakr.noaa.gov/sustainablefisheries/halibut/charter/faq.pdf>

⁵⁴ Appellant’s Supplemental Evidence at 5 (emphasis added).

⁵⁵ See pages 12- 13 *infra*.

⁵⁶ Decision in Appeal No. 10-0093 (Nov. 18, 2011), Exhibit 1 to Request for Supplement to Record by Ram and Providing Opportunity to Respond by Appellant (Dec. 21, 2011).

⁵⁷ Decision in Appeal No. 10-0093 (Nov. 18, 2011).

⁵⁸ *Skidmore v. Swift*, 323 U.S.134, 140 (1944).

⁵⁹ Proposed Rule, 74 Fed. Reg. 18,178, 18,181 – 18,182 (Apr. 21, 2009).

In Issue 7, the Council Motion stated that a charter halibut permit should have an endorsement that would specify the number of clients that the permit holder could have on board and that the number on the charter halibut permit would be the highest number of halibut clients that the applicant had taken on any trip in 2004 or 2005, with a minimum endorsement of four.⁶⁰

In analyzing the original Charter Halibut Program, the Council and NMFS looked at **client data** from 2004 and 2005 to estimate the total number of clients that could be carried on charter halibut permits, if the Council took action.⁶¹ In analyzing the “one vessel/one permit” amendment to the angler provision, the Council and NMFS relied on the same **client data** from 2004 and 2005 to estimate the effect of changing the method for determining angler endorsements to a “one vessel/one permit” method.⁶² Every single bit of analysis for the Charter Halibut Program has used client data, not client and crew data.

The Analysis of the Council action stated:

The intent of this action is to limit the number of **clients** fishing halibut a vessel may carry on a trip. Each permit would be endorsed with the maximum number of such **clients** the vessel would be allowed to carry while charter fishing for halibut. The maximum number of **clients** fishing halibut, carried by the vessel generating the permit during the qualifying period, determines the maximum number of **clients** fishing halibut that may be carried in the future.⁶³

Thus, the purpose of the angler endorsement is twofold: to limit the number of persons that the applicant may take on a future charter halibut trip, based on past client trip data, and to provide the applicant with a measure of expansion, based on past client trip data.⁶⁴ The measure of expansion is that, with a charter halibut permit, the applicant can take on *every* trip with that permit the highest number of clients that the applicant took on *any* trip in the qualifying period with the vessel that gave rise to the angler endorsement on that permit.

By assigning endorsements based on client data, RAM acted in accord with the purpose of the angler endorsement provision. The highest number of clients that Appellant took

⁶⁰ Council Motion (emphasis in original), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

⁶¹ Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A, NMFS (Nov. 6, 2009) at 59, Table 13, hereinafter Analysis of Charter Halibut Program, available at: http://alaskafisheries.noaa.gov/analyses/halibut/earirfpa_charter_vessel_moratorium110609.pdf. The Analysis considered the number of clients that could be carried on charter halibut permits depending on whether the Council recommended one trip, five trips, ten trips, fifteen trips or twenty trips as the minimum participation requirement to receive a permit. The Council recommended five trips in 2004 or 2005 as the minimum participation requirement to receive a non-transferable permit. Council Motion, Issue 10.

⁶² Analysis of the Angler Endorsement Amendment, *supra* note 51, at 20.

⁶³ Analysis of Charter Halibut program, *supra* note 61, at 26.

⁶⁴ Proposed Rule, 75 Fed. Reg. 18,178, 18,184 (Apr. 21, 2009)

with each of his vessels on any trip in the qualifying period was six. Therefore, Appellant can take six clients on every trip with a permit that results from the trip history of a vessel that took six clients on at least one trip in 2004 or 2005.

Appellant seeks permits with angler endorsements of eight and that would allow him to take eight clients on trips taken pursuant to those permits. But Appellant did not take more than six clients on any trip until he purchased a larger vessel in 2007.⁶⁵ The purpose of the angler endorsement is not to allow an applicant to take the number of clients that the applicant took on trips *after* the qualifying period, which is 2004 and 2005. The Council Motion, and the resulting charter halibut rule, were

meant to reflect the fleet composition and practices as they were in the qualifying period (2004 and 2005). The recent participation year [2008] was meant to screen out operations that had not continued to be active in recent years and is not included to reflect capacity upgrades since the qualifying periods. As a result, permit endorsements reflect business activity levels in 2004 and 2005.⁶⁶

If NMFS awarded angler endorsements based on crew data, it would expand the capacity of the charter halibut fishery in excess of what applicants did in the qualifying period, in excess of what the Council and NMFS analyzed and intended, and in contravention of the purposes of the angler endorsement provision.

4. Appellant's argument regarding other applicants is not a basis for him to receive angler endorsements greater than six.

Appellant argues as follows⁶⁷ Appellant lists ten permit holders who have received permits with angler endorsements greater than six. Appellant states that these applicants were using "six-pack vessels" in the qualifying period. A "six-pack" vessel is a vessel that is authorized, by law, to carry a maximum of six passengers and two crew members.⁶⁸ Therefore, Appellant argues, these applicants must have received angler endorsements based on fishing by crew members and he should also.

If NMFS were intentionally determining angler endorsements for some applicants by the number of clients and for other applicants by the number of crew and clients, that would be a problem. But I have concluded, and the record is quite clear, that NMFS has consistently interpreted the angler endorsement regulation to determine angler endorsements by the total number of clients that the applicant reported in a trip in the qualifying period, not the total number of clients and crew. Assuming for the sake of argument that NMFS erroneously issued angler endorsements on some permits based on the number of clients and crew, that is not a basis for me to recommend that NMFS make the same error with another applicant.

⁶⁵ Letter from Appellant to Jessica Gharrett, RAM Program Administrator (Aug. 10, 2010).

⁶⁶ Final Rule, 75 Fed. Reg. at 582 (NMFS Response to Comment 89 in relevant part)

⁶⁷ Appellant's Supplemental Evidence (Jan. 18, 2012).

⁶⁸ Analysis of Charter Halibut Program, *supra* note 61, at 22.

I do, however, wish to note several points about Appellant's claim. First, in analyzing the angler endorsements that would likely result from Council action, NMFS estimated that 103 permits out of 611 permits in Area 3A would have angler endorsements greater than six.⁶⁹ NMFS based these estimates on *client data* only.⁷⁰ Thus, NMFS anticipated quite a few permits with angler endorsements greater than six in Area 3A based on client data. The existence of permits with angler endorsements greater than six does not mean that NMFS awarded permits based on crew data.

Second, vessels may be authorized to carry more than six passengers. A vessel operating under a Super-T License may carry up to twelve passengers (and two crew members).⁷¹ A "Head Boat" is an inspected vessel where the Coast Guard issues a Certificate of Inspection, unique to that vessel, which describes the number of passengers and crew that may be on board the vessel.⁷²

Third, Appellant states that ADF&G Instructions were confusing and many companies included crew members in their angler count.⁷³ The ADF&G logbook forms had a separate place to report fishing by "clients" and by "crew." ADF&G Instructions for 2004 and 2005 stated: "DO NOT add crew information to client information."⁷⁴ Each logbook page required that the sport fish guide to certify that the information reported was true and correct to the best of their knowledge.⁷⁵ In spite of the Instructions and the certification, it is possible that some vessel operators misreported fishing by clients and crew members as fishing by clients.

Fourth, *if* an applicant operating under a "six-pack license" reported fishing by more than six clients, which is what Appellant claims, I cannot determine, based on the record in this appeal, how ADF&G might have treated that in its database or how NMFS might have treated that in the official charter halibut record. But I do not have an appeal with those facts before me. Appellant did not report fishing by more than six clients on any trip with any vessel in 2004 or 2005.

I therefore conclude that RAM correctly determined "the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period" in 50 C.F.R. § 300.67(e) by "the greatest number of charter vessel clients reported on any logbook trip in the qualifying period." I conclude that RAM properly awarded Appellant six charter vessel permits that authorize him to carry six charter vessel anglers on every trip taken pursuant to those permits.

⁶⁹ Analysis of Charter Halibut Program, *supra* note 61, at 59, Table 13.

⁷⁰ See text accompanying notes 61 and 62 *supra*.

⁷¹ Analysis of Charter Halibut Program, *supra* note 61, at 22.

⁷² Analysis of Charter Halibut Program, *supra* note 61, at 22.

⁷³ Appellant's Supplemental Evidence at 4 – 5.

⁷⁴ The 2004 and 2005 Instructions are available on the NMFS Alaska Region, Administrative Appeals Website: http://www.fakr.noaa.gov/appeals/adfg_logbooks/2004.pdf; http://www.fakr.noaa.gov/appeals/adfg_logbooks/2005.pdf. This website has ADF&G Logbooks and Logbook Instructions, which are part of every logbook, from 2002 to 2011.

⁷⁵ The record has many pages from logbooks that Appellant submitted.

CONCLUSIONS OF LAW

1. NMFS has consistently interpreted 50 C.F.R. § 300.67(e) to mean that the angler endorsement on a charter halibut permit is the highest number of clients that the applicant reported on a bottomfish logbook fishing trip in the qualifying period, not the highest number of clients and crew members.
2. RAM correctly interpreted “the greatest number of charter vessel anglers reported by the applicant on any logbook trip in the qualifying period” in 50 C.F.R. § 300.67(e) to mean “the greatest number of charter vessel clients reported by the applicant on any logbook trip in the qualifying period.”
3. Under 50 C.F.R. § 300.67(e), Appellant should receive angler endorsements on his charter halibut permits based on the highest number of clients that he reported on a bottomfish logbook fishing trip in the qualifying period, not the highest number of clients and crew members.
4. The correct angler endorsement on each of Appellant’s six transferable permits is six.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This Decision is effective on June 28, 2012, unless by that date the Regional Administrator reverses, remands, or modifies the 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 the tenth day after the date of this Decision, June 8, 2012. 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 issuance of a Decision on Reconsideration.



Mary Alice McKeen
Administrative Judge

Date issued: May 29, 2012