

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 13-0101

DECISION

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STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget, and is located in NOAA's headquarters in Silver Spring, Maryland. The Regional Administrator (RA) of NMFS' Southeast Regional Office (SERO) will review this decision and advise Appellant of NMFS' final decision.<sup>1</sup>

This appeal concerns SERO's determination that Appellant's South Atlantic snapper-grouper permit number [REDACTED] (Permit), issued to vessel [REDACTED] (Vessel), does not qualify for a commercial golden tilefish longline endorsement (GTLE). SERO considered Appellant's qualification for a GTLE pursuant to the Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States; Amendment 18B (Regulation).<sup>2</sup> The SERO RA is responsible for determining who is eligible to receive a GTLE.<sup>3</sup>

On May 1, 2013, SERO sent Appellant the Decision Letter (DL) at issue in this case.<sup>4</sup> In the DL, SERO denied Appellant a GTLE for his Permit after determining the amount of golden tilefish landings associated with his Permit did not have an average of 5,000 pounds gutted weight of golden tilefish caught with longline gear for the best of 3 years within the period of 2006 through 2011.<sup>5</sup> SERO informed Appellant he could appeal this determination.

On June 27, 2013, Appellant appealed the DL.<sup>6</sup> In his appeal letter, Appellant states he harvested 45,464 pounds of golden tilefish between 2003 and 2004, but stopped fishing for them after 2004 because an unstable market made it economically unfeasible to fish

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<sup>1</sup> 50 C.F.R. § 622.170(f)(3); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>2</sup> 50 C.F.R. § 622.170(f); 78 Fed. Reg. 23858-01, 23858 (2013).

<sup>3</sup> 50 C.F.R. § 622.170(f) (2013).

<sup>4</sup> Denial Letter Tab, DL, dated May 1, 2013.

<sup>5</sup> Denial Letter Tab, DL, dated May 1, 2013.

<sup>6</sup> Pleadings Tab, Appellant's Appeal Letter, received June 27, 2013.

that species.<sup>7</sup> Appellant further states the golden tilefish price is now stable and he wishes to resume fishing the species.<sup>8</sup>

On July 9, 2013, SERO sent Appellant a response letter requesting he submit evidence of his golden tilefish landings history.<sup>9</sup> On August 11, 2013, Appellant sent an email response to SERO reiterating the arguments raised in his appeal letter.<sup>10</sup>

On September 5, 2013, NAO sent Appellant a letter notifying him the office had received his appeal and requesting he submit any additional documentation or information in support of his appeal by September 26, 2013.<sup>11</sup> NAO did not receive additional material supporting Appellant's claim.

On October 23, 2013, NAO sent Appellant a Notice Scheduling a Hearing, which was returned as unclaimed.<sup>12</sup> On November 26, 2013, NAO sent Appellant a Notice of Rescheduled Hearing.<sup>13</sup> On January 6, 2014, Appellant testified during his scheduled hearing that NMFS failed to conduct a proper economic impact analysis prior to enacting the Regulation, and that his golden tilefish landings from 2003 and 2004 should qualify him for a GTLE.<sup>14</sup>

## ISSUE

The broad issue in this case is whether Appellant qualifies for a GTLE under the Regulation. To resolve that issue, I must answer the following:

Did Appellant have an average of at least 5,000 pounds of golden tilefish (gutted weight) landings using longline gear over the best 3 years within the period of 2006 through 2011?

If the answer to this question is "no," Appellant is not eligible for a GTLE, and I must uphold the DL.

## FINDINGS OF FACT

1. Appellant holds a valid South Atlantic snapper-grouper permit.<sup>15</sup>

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<sup>7</sup> Pleadings Tab, Appellant's Appeal Letter, received June 27, 2013.

<sup>8</sup> Pleadings Tab, Appellant's Appeal Letter, received June 27, 2013.

<sup>9</sup> Appeals Correspondence Tab, Request for Additional Information, dated July 9, 2013.

<sup>10</sup> Pleadings Tab, Email Response from Appellant, dated and received August 11, 2013.

<sup>11</sup> Appeals Correspondence Tab, Letter from NAO to Appellant, dated September 5, 2013.

<sup>12</sup> Hearing Tab, Notice Scheduling Hearing, dated October 23, 2013.

<sup>13</sup> Hearing Tab, Notice of Rescheduled Hearing, dated November 26, 2013.

<sup>14</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>15</sup> Denial Letter Tab, DL, dated May 1, 2013.

2. Appellant landed approximately 46,000 pounds of golden tilefish over a 15-month span between 2003 and 2004.<sup>16</sup>
3. Appellant stopped fishing for golden tilefish after 2004.<sup>17</sup>
4. NMFS' logbook records indicate Appellant's Permit had no golden tilefish landings using longline gear from 2006 to 2011.<sup>18</sup>

## PRINCIPLES OF LAW

Under the Regulation, to be initially eligible for an GTLE a person must possess a valid or renewable commercial vessel permit for South Atlantic snapper-grouper that has golden tilefish landings using longline gear averaging at least 5,000 pounds (2,268 kg), gutted weight, over the best 3 years within the period of 2006 to 2011.<sup>19</sup> NMFS bases its initial eligibility determination on all the applicable golden tilefish landings associated with a person's South Atlantic snapper-grouper permit, including those reported by a prior permit holder.<sup>20</sup>

Under the Regulation, NMFS' logbook records will determine landings data for appeals.<sup>21</sup> If NMFS' logbooks are unavailable, the reviewing official may use state landings records or data that comply with applicable Federal and state regulations.<sup>22</sup>

The Regulation limits an appeal to: 1) ownership of a qualifying permit, 2) the accuracy of the amount of landings, and 3) the correct assignment of landings to the permittee.<sup>23</sup> Hardship is not a basis for appeal.<sup>24</sup>

## ANALYSIS

### **Did Appellant have an average of at least 5,000 pounds of golden tilefish (gutted weight) landings using longline gear over the best 3 years within the period of 2006 through 2011?**

Under the Regulation, to qualify for a GTLE, Appellant must establish his Permit had golden tilefish landings associated with it that averaged at least 5,000 pounds (gutted weight) over the best 3 years within the period of 2006 through 2011.<sup>25</sup> The Regulation

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<sup>16</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>17</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>18</sup> Denial Letter Tab, DL, dated May 1, 2013.

<sup>19</sup> 50 C.F.R. § 622.170(f)(1); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>20</sup> 50 C.F.R. § 622.170(f)(1); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>21</sup> 50 C.F.R. § 622.170(f)(3)(ii); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>22</sup> 50 C.F.R. § 622.170(f)(3)(ii); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>23</sup> 50 C.F.R. § 622.170(f)(3); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>24</sup> 50 C.F.R. § 622.170(f)(3); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>25</sup> 50 C.F.R. § 622.170(f)(1); 78 Fed. Reg. 23858-01, 23862 (2013).

indicates that NMFS' logbook records submitted on or before October 31, 2012, will determine appeals regarding landings data.<sup>26</sup> If NMFS' logbooks are unavailable, the RA may use state landings records or data submitted on or before October 31, 2012, that comply with applicable Federal and state regulations.<sup>27</sup>

The record demonstrates Appellant holds a valid South Atlantic snapper-grouper permit.<sup>28</sup> However, it also reflects Appellant's Permit had no golden tilefish landings associated with it from 2006 to 2011.<sup>29</sup> Appellant testified during his scheduled hearing that he stopped fishing for golden tilefish after the 2004 season.<sup>30</sup> Based on this evidence, I conclude Appellant's Permit does not have golden tilefish landings associated with it that average at least 5,000 pounds (gutted weight) over the best three years of the period of 2006 through 2011. Therefore, his Permit does not qualify for a GTLE.

In reaching my decision, I have carefully reviewed the entire record, including Appellant's arguments. Some of Appellant's arguments focus on the South Atlantic Fishery Management Council (Council). Appellant argues the Council did not properly consider the economic impact the Regulation would have on small businesses such as his.<sup>31</sup> According to Appellant, the golden tilefish regulations imposed by the Council have decimated his business and rendered his boats worthless, which is why he had to stop fishing for golden tilefish in 2004. Appellant also claims the Council picks and chooses the rules it wants to adopt.<sup>32</sup> Appellant adds that he expressed his opinions about proposed regulations at Council meetings, but the Council ignored his views.<sup>33</sup>

Appellant further contends NMFS is mismanaging the ocean's resources.<sup>34</sup> Appellant states this mismanagement is a result of NMFS doing whatever politicians and special interest groups tell NMFS to do. As an example, Appellant recounts having previously applied to participate in a federal program to repower his fishing boats with environmentally safe engines, but not receiving federal approval because he lacked the necessary political influence. Appellant states he may have been able to stay in business had he received approval for the environmentally safe engines.

Appellant also argues fishery regulations have caused him to go bankrupt.<sup>35</sup> According to Appellant, fishery regulations: (1) caused him to lose all but one of his snapper-grouper permits, as well as all but one of his fishing boats; (2) forced him to turn his fish packing house over to someone else because he could no longer afford to pay the bills

<sup>26</sup> 50 C.F.R. § 622.170(f)(3)(ii); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>27</sup> 50 C.F.R. § 622.170(f)(3)(ii); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>28</sup> Denial Letter Tab, DL, dated May 1, 2013.

<sup>29</sup> Denial Letter Tab, DL, dated May 1, 2013.

<sup>30</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>31</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>32</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>33</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>34</sup> Pleadings Tab, Appellant's Appeal Letter, received June 27, 2013.

<sup>35</sup> Pleadings Tab, Appellant's Appeal Letter, received June 27, 2013; Pleadings Tab, Email Response from Appellant, dated and received August 11, 2013.

to run the packing house; (3) targeted large boats like his, resulting in his boats being unprofitable; and (4) taken away substantial portions of his business by making vermillion a derby fish and imposing 1,500 pound trip limits. Appellant claims fishery regulations are putting hard working fishermen, such as himself, out of work. As a result, Appellant contends he is now facing retirement age with no source of income other than Social Security. Appellant states his Social Security income is not enough to cover his monthly mortgage payments. Appellant avers without a GTLE he will become homeless and will be unable to retire.

I empathize with Appellant's difficult financial situation and his frustration with the regulatory process. However, the administrative appeals process is not the appropriate vehicle to resolve these challenges. Instead, the sole issue I am authorized to resolve in this appeal is whether NMFS correctly determined the amount of golden tilefish landings associated with Appellant's Permit. Appellant's above arguments do not address whether NMFS correctly determined the amount of golden tilefish landings associated with his Permit, and, therefore, do not provide a basis for me to reverse SERO's DL. Further, the Regulation bars me from considering hardship as a basis for appeal.

Next, Appellant argues NMFS should issue him a GTLE based on his previous fishing history.<sup>36</sup> Appellant contends he landed approximately 46,000 pounds of golden tilefish over a 15-month span between 2003 and 2004. However, the unstable price and loss of his fishing gear forced Appellant to stop fishing for golden tilefish after 2004. Appellant further indicates he caught over 100,000 pounds of vermillion from 2007 to 2009, but was unable to continue fishing for it after NMFS imposed trip limits of 15,000 pounds. Appellant argues NMFS should consider his vermillion landings when deciding whether he qualifies for a GTLE.<sup>37</sup>

While I have carefully considered Appellant's arguments about his catch in 2003 and 2004, the Regulation specifies that I may only consider those golden tilefish landings occurring from 2006 to 2011 when determining GTLE eligibility.<sup>38</sup> According to NMFS' logbook records, Appellant's Permit averaged 0 pounds of golden tilefish landings for the best three years from 2006 to 2011.<sup>39</sup> Regrettably, without sufficient golden tilefish landings Appellant cannot qualify for a GTLE. Additionally, the Regulation provides no avenue for NMFS to consider Appellant's vermillion landings history in making its GTLE eligibility determination.

In a similar vein, Appellant argues NMFS should restore at least one of the three sea bass trapping permits he previously held.<sup>40</sup> According to Appellant, he lost his sea bass permits after falling only 40 to 60 pounds short of satisfying the regulatory 10-year

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<sup>36</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>37</sup> Audio Recording of January 6, 2014, scheduled hearing.

<sup>38</sup> 50 C.F.R. § 622.170(f)(1); 78 Fed. Reg. 23858-01, 23862 (2013).

<sup>39</sup> Denial Letter Tab, NMFS' summary of landings history for Permit ██████████.

<sup>40</sup> Pleadings Tab, Appellant's Appeal Letter, received June 27, 2013.

average requirement on each permit. Appellant states without a sea bass trapping permit he will no longer be able to fish with Vessel and will lose his home.

Unfortunately, this appeal is limited to SERO's DL dated May 1, 2013, concerning Appellant's eligibility for a GTLE under the Regulation. Therefore, I regret I am unable to entertain Appellant's request for a sea bass trapping permit. Nothing in this decision bars Appellant from seeking information from SERO about applying for a sea bass trapping permit.

In summary, Appellant has not established the DL issued to him was inconsistent with the Regulation. I have reviewed Appellant's concerns and understand the challenges he faces. However, I must uphold the DL because Appellant did not have average landings of at least 5,000 pounds of golden tilefish (gutted weight) over the best 3 years within the period of 2006 through 2011.

#### CONCLUSIONS OF LAW

Appellant is not eligible for a GTLE because he did not prove by a preponderance of the evidence that his Permit had an average of at least 5,000 pounds (gutted weight) of golden tilefish landings over the best 3 years within the period of 2006 through 2011.

The DL is consistent with the Regulation.

#### ORDER

The DL dated May 1, 2013, is upheld. The SERO RA will review this appeal and advise Appellant of NMFS' final decision.

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Steven Goodman  
Administrative Judge

Date Issued: March 18, 2014