

for the Decision on Remand.³ I stayed the effective date until August 24, 2012, to provide me with additional time to complete my review of the Decision on Remand.⁴

I have considered the entire record on this matter and completed my review of the Decision on Remand. Based on my review, I have determined that I cannot concur with the Decision on Remand. For the reasons provided below, I conclude that Appellant reported a total of six bottomfish logbook fishing trips in 2004, that the Official Record is incorrect, and that the Official Record as amended demonstrates that Appellant is eligible to receive a non-transferrable charter halibut permit. Pursuant to my authority under 50 C.F.R. § 679.43(o)(1), I reverse the July 13, 2012 Decision on Remand and that portion of the Decision dealing with Appellant's general eligibility claim. I also remand this matter to NAO and direct NAO to work with the Restricted Access Management Division as necessary in determining the area and angler endorsements to which the Appellant is entitled.

The regulations state that NMFS will issue a charter halibut permit to a person who timely applies and who is the individual or non-individual entity to which the Alaska Department of Fish and Game ("ADF&G") issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements for both the qualifying period and the recent participation period.⁵ The minimum number of trips that must be reported in both the qualifying period (2004 or 2005) and the recent participation period (2008) is five.⁶

According to information contained in the record, ██████████ submitted a timely charter halibut permit application in the names of ██████████ doing business as ██████████.⁷ ██████████ was formed in 2001⁸ and ██████████ has been the sole shareholder, director, and officer of ██████████ since its creation.⁹ ADF&G issued a Business Owner License to ██████████ in 2004.¹⁰ According to the Official Charter Halibut Record ("Official Record"), ██████████ reported four bottomfish logbook fishing trips in 2004.¹¹ In 2007, ██████████ sold several business assets to ██████████ doing business as ██████████.¹² According to the Alaska Division of Corporations, Business and Professional Licensing, ██████████ was a sole proprietorship owned by ██████████ in 2008.¹³ The record includes statements from Appellant that ██████████ owns ██████████ and that ██████████ was doing business as ██████████

³ Decision on Remand, at 4.

⁴ Order Staying Decision on Remand dated August 10, 2012.

⁵ 50 CFR 300.67(b)(1)(ii).

⁶ 50 CFR 300.67(b)(1)(ii)(A) and (B).

⁷ Original File Tab, Charter Halibut Permit Application of ██████████, at 1.

⁸ Decision on Remand, Finding of Fact #1.

⁹ Original File Tab, Letter from ██████████ to Tracy Buck dated August 24, 2010, Exhibit A, Affidavit of ██████████; Pleadings File Tab, Letter from ██████████ to NMFS dated March 14, 2011, Exhibit F; and Evidence File Tab, Response to Request for Information from ██████████, at 6 and Exhibits A, E, and F.

¹⁰ Evidence File Tab, Response to Request for Information from ██████████, Exhibit G.

¹¹ Original File Tab printed summary; see also Decision, Finding of Fact #7.

¹² Decision, Finding of Fact #4; also, Original File Tab Agreement to Purchase Business Assets.

¹³ Original File Tab, Alaska Division of Corporations, Business, and Professional Licensing License Detail dated February 25, 2010.

██████████.¹⁴ ADF&G issued a Business Owner License to ██████████ in 2008.¹⁵ According to the Official Record, ██████████ reported ninety-seven halibut logbook fishing trips in 2008.¹⁶

Appellant responded to NAO's request for information with several documents. First, Appellant submitted a copy of the 2004 Saltwater Charter Vessel Logbook used by ██████████ to record bottomfish trips conducted in 2004.¹⁷ Logbook sheet S-4 shows entries for two bottomfish logbook trips, one on September 28 and one on September 29.¹⁸ Second, Appellant submitted a notarized affidavit explaining that her normal practice for reporting logbook fishing trips was to remove the top, or white, sheet of the logbook and promptly mail it to ADF&G.¹⁹ Appellant stated that because she does not have any top white sheets for those 2004 logbook pages on which she recorded trips, including the top white sheet for S-4, she must have mailed the top white sheet for S-4 to ADF&G as per her normal practice.²⁰ Appellant stated that if she had forgotten to mail the top white sheet for S-4, "it would still be in the book."²¹ Appellant's affidavit also explains the relationship between ██████████ and ██████████.²² Third, Appellant submitted a notarized statement from ██████████ one of the clients Appellant took fishing on September 28, 2004.²³ The client explains that she was onboard Appellant's vessel that day with two relatives for a charter fishing trip and that they caught salmon, halibut and rockfish.²⁴ Finally, Appellant submitted a copy of her appointment book for September 28 and 29, 2004, with the words ██████████ written for September 28 and the words ██████████ written for September 29.²⁵

The Decision on Remand appropriately examined the question of whether Appellant's businesses are the same business to which ADF&G issued the ADF&G Business Owner Licenses in 2004 and 2008. The Decision on Remand determined that the ADF&G Business Owner Licenses were not issued to the same business because ██████████ and ██████████ are two distinct persons with different names, organizational forms, and ownership structures.²⁶ The Decision on Remand also referred to the final rule implementing the

¹⁴ Original File Tab, Letter from ██████████ to Tracy Buck dated August 24, 2010; Original File Tab, Evidentiary Support For Application of ██████████

██████████ President; Evidence File Tab, Response to Request for Information from ██████████, Exhibit A.

¹⁵ Original File Tab, Logbook Business Summary for ██████████ for 2008 and Print Summary created on January 26, 2010; Evidence File Tab, Response to Request for Information from ██████████ Exhibit I.

¹⁶ Original File Tab, printed summary; see also Decision, Finding of Fact #10.

¹⁷ Evidence File Tab, Response to Request for Information from ██████████, Exhibit A.

¹⁸ *Id.*, at S-4.

¹⁹ Evidence File Tab, Response to Request for Information from ██████████ Supplemental Affidavit of ██████████ at 2.

²⁰ *Id.*

²¹ *Id.*

²² Evidence File Tab, Response to Request for Information from ██████████, Supplemental Affidavit of ██████████ at 2-4.

²³ Evidence File Tab, Letter from ██████████ to Steven Hinkle, NAO, dated February 29, 2012.

²⁴ *Id.*

²⁵ Evidence File Tab, Response to Request for Information from ██████████ Exhibit C.

²⁶ Decision on Remand at 3.

Appellant has shown that it is more likely than not that she reported these two additional September trips.

The instructions in the 2004 Saltwater Charter Vessel Logbook required the owner of the vessel to which the logbook has been issued to return completed logbook sheets per the schedule provided in the logbook.³² For logbook trips taken before April 19, the owner was required to mail the top white sheet to ADF&G with a postmark by May 3; for logbook trips taken between April 19 and September 26, the owner was required to mail the top white sheet to ADF&G with a postmark by the date specified on the logbook sheet; and for logbook trips taken after September 26, the owner was required to mail the top white sheet to ADF&G monthly.³³ There is no requirement in the instructions that some form of receipt, or proof of mailing, of the logbook sheets be retained by the owner. Program regulations at 50 CFR 300.67(f)(4) define “logbook fishing trip” as “a bottomfish logbook fishing trip . . . that was reported as a trip to [ADF&G] in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip” As described earlier, Appellant states that her “normal practice” was to remove the white top sheets for each week that had fishing activity and promptly mail them into ADF&G and that logbook sheet S-4 was probably mailed like the others “in the ordinary course of business soon after the last trip occurred and well within the one month deadline for doing so.”³⁴ Because all of the top white sheets in Appellant’s 2004 Saltwater Charter Logbook are removed for those pages with trips recorded, Appellant concludes that if she had forgotten to mail in the sheet, “it would still be in the book.”³⁵

Appellant presents a compelling argument with evidence tending to show that Appellant did report the September trips as she states. The copy of Appellant’s 2004 Saltwater Charter Logbook has Post-It Notes that have the word “carbon” written on the note on each page of the logbook that has a trip recorded.³⁶ With the exception of the trips made on logbook sheet S-4, all of the trips recorded in Appellant’s 2004 logbook are reflected in the ADF&G recap.³⁷ Appellant had to make four separate submissions by mail to ADF&G for the four bottomfish logbook fishing trips reflected in the Official Record because none of those trips occurred during the same weekly reporting period. Appellant also had to make two additional submissions by mail to ADF&G for those logbook fishing trips that were not bottomfish fishing trips. The Official Record and the evidence submitted by Appellant demonstrate that Appellant had a consistent practice of timely reporting logbook fishing trips by mailing them to ADF&G and tend to show that Appellant reported the September trips by mailing sheet S-4 within the one-month deadline consistent with her normal established practice and with Program regulations.

The evidence tending to show that Appellant did not report the two September bottomfish fishing trips is the fact that Appellant did not produce proof of mailing and that ADF&G did not

³² Evidence File Tab, Response to Request for Information from [REDACTED] Exhibit A at iii.

³³ *Id.* According to instructions at page iii, there also appears to be an option to submit logbook sheets directly to an ADF&G office by the required date.

³⁴ Evidence File Tab, Response to Request for Information from [REDACTED] Supplemental Affidavit of [REDACTED] at 2.

³⁵ *Id.*

³⁶ Evidence File Tab, Response to Request for Information from [REDACTED] Exhibit A at 4, 5, 8, 9, 16, S-4, and S-5.

³⁷ Evidence File Tab, Response to Request for Information from [REDACTED] Exhibit B.

enter these trips in its database. I do not take either of these facts lightly. I recognize it is possible that Appellant removed the top white sheet for S-4 but failed to actually mail it to ADF&G. The evidence also shows that ADF&G accurately processed all of the charter trips reported by Appellant with the exception of those recorded on sheet S-4. However, as described above, the Program regulations require that the logbook sheets with trip data be reported to ADF&G in the manner and by the time prescribed by ADF&G, not that the logbook sheets be received by ADF&G. All Appellant must prove by a preponderance of evidence is that she reported the trips to ADF&G by the prescribed deadline. Appellant does not need to prove that ADF&G received the logbook sheets. While some form of receipt demonstrating that Appellant mailed the September logbook sheet as she states she did would be strong evidence supporting Appellant's claim, it is not a required piece of evidence or the only compelling evidence. The logbook instructions did not require owners to obtain and retain proof of mailing. We are without information as to why the Official Record does not include Appellant's September trips. But we have ample evidence demonstrating that Appellant routinely reported her logbook fishing trips in 2004 to ADF&G in a manner consistent with the logbook instructions. Nothing in the information submitted by Appellant or contained in the record for this appeal is internally inconsistent or contradicts other information in the record. And nothing in the record indicates that Appellant did not follow her normal practice of mailing the logbook sheets in the case of the September trips.

Based on my review of the record and the explanation provided above, I find that Appellant's businesses are the same business. I also find that Appellant has provided a preponderance of evidence demonstrating that Appellant timely and properly reported two additional bottomfish logbook fishing trips to ADF&G in 2004, and that the official record is incorrect. I amend the Official Record to reflect that Appellant reported a total of six bottomfish logbook fishing trips in 2004, thus making Appellant eligible to receive a non-transferrable charter halibut permit. With this finding, I reverse the July 13, 2012 Decision on Remand and that portion of the Decision dealing with Appellant's general eligibility claim. I also remand this matter to NAO and direct NAO to work with the Restricted Access Management Division as necessary in determining the area and angler endorsements to which the Appellant is entitled.

IT IS SO ORDERED

Date: _____

8/20/12

James W. Balsiger, Ph.D.
Regional Administrator

ja