

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0068

ORDER DENYING MOTION  
for RECONSIDERATION

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This appeal is before the National Appeals Office (NAO) a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On September 29, 2010, [REDACTED] doing business as [REDACTED] (Appellant) filed an appeal with the National Marine Fisheries Service (NMFS). I determined that the information in the record was sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(g)(2). I exercised my discretion to not order an oral hearing because it was not necessary to resolve the regulatory issues in the case. See 50 C.F.R. § 679.43(g). On February 11, 2011, I issued the Decision in this matter.

In his Motion for Reconsideration dated February 17, 2011, Appellant concedes his business only has four halibut logbook fishing trips. The central argument in Appellant's Motion for Reconsideration is that I abused my discretion by not ordering a hearing. At a hearing, Appellant contends, he could explain to me how for a business like his, taking four qualifying trips in a year would be normal because he is in a remote location with limited visitors/clients. Appellant thinks the regulations are unfair for not considering businesses like his on a case-by-case basis and making appropriate allowances accordingly.

I carefully considered Appellant's statement that given the nature of his clientele, he generally could not make the regulatory minimal participation requirements of five qualifying trips. Yet, the regulations have a minimum requirement that to establish participation in 2004, 2005 or 2008 at least five qualifying trips are shown in the record.<sup>1</sup> Further, under the Charter Halibut Limited Access Program (CHLAP) regulations, I am not authorized to deviate from the requirements of the program. Rather, I am charged with applying the regulations to each set of facts presented in an appeal. In the matter before me, I fully considered the entire record before rendering my Decision. The evidence of record does not prove Appellant meets the regulatory requirements for a charter halibut permit; indeed, Appellant's statements show he does not meet the regulatory eligibility requirements for a permit. That evidence is discussed in more detail in the Decision and need not be repeated here.

Further, Appellant was given multiple opportunities to submit evidence in support of his appeal,<sup>2</sup> and I concluded that a hearing was not necessary given Appellant's claims. As I stated in the Decision, even assuming Appellant's claims were accurate, under the applicable regulations, Appellant would not qualify for a permit. That is, even if I were to assume that the CHLAP regulations "unfairly favor[ ] one group over another," that Appellant spent his "entire life savings in order to buy a historic cannery" in a remote location to establish a lodge where all clients must be flown in, and that Appellant "may only see 20 clients in one summer," only four or five of whom will go halibut fishing, that would not change the fact that the regulations require a minimum of five qualifying trips to establish participation in the industry.

As stated in my Decision, I considered all of Appellant's arguments presented on appeal, including his concerns about his investment, delay in getting a captain's license that he attributes to his age, and his perception that the regulations are unfair to remote operators. Appellant's concerns expressed in his Motion for Reconsideration are of an equitable or policy nature. However, I am not authorized to base my decision on the perceived inequitable effects of or policy behind a regulation.

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<sup>1</sup> Were one to meet the participation requirements for one of those years in a particular participation period, one may be able to lack proof of qualifying trips in a different participation and still qualify for a permit. This concept is codified as an exception to the general rules and is known as the "unavoidable circumstance" rule. See 50 C.F.R. § 300.67(g). If one does not qualify under the qualifying period (2004 or 2005) or the recent participation period (2008), however, one is not eligible under the unavoidable circumstances exception. See 50 C.F.R. § 300.67(g). Since Appellant in this case does not have qualifying trips for either participation period, he is not eligible under the unavoidable circumstances rule.

<sup>2</sup> Those opportunities included RAM's pre-IAD letter dated May 5, 2010. In that letter RAM provided Appellant with its preliminary opinion that he would not qualify for a permit. However, RAM also notified Appellant that he could submit additional evidence to show why he did qualify. In response, Appellant supplied RAM with twelve pages of documentation. Original File, Page 15-26. On November 19, 2010, NAO notified Appellant that it had received his appeal and that any additional information he wanted to submit should be sent to NAO by December 10, 2010.

ORDER

Appellant's motion for reconsideration is denied. Pursuant to NAO policy, the effective date of the Decision is now May 31, 2011. The Regional Administrator has thirty days from April 29, 2011 for review of the Decision pursuant to 50 C.F.R. § 679.43(o).

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Eileen G. Jones  
Chief Administrative Judge

Date Issued: April 29, 2011