

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

In re Application of

[REDACTED]

Appellant

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Appeal No. [REDACTED]

DECISION

STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, Maryland 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 are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.¹

[REDACTED] doing business as [REDACTED] (Appellant), filed the appeal under review. Appellants are appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellants' application for a Charter Halibut Permit (permit or CHP).

On February 10, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).² The application was filed with RAM, who is responsible for reviewing and determining whether an applicant will receive a permit or permits.

In response to Appellant's application, on August 6, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).³ In the Notice, RAM explained that for the recent participation year of 2008, Appellant was the owner of the business to which the Alaska Department of Fish and Game (ADF&G) issued the ADF&G business Owner License authorizing logbook fishing trips for [REDACTED] and that business met the criterion of a minimum of five halibut logbook fishing trips that year. RAM also indicated, however, that for Appellant's "applicant selected qualifying year" of 2005, Appellant was not the owner of [REDACTED] to which ADF&G issued the ADF&G Business Owner License authorizing logbook fishing trips for that year for

¹ 50 C.F.R. § 679.43.

² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed February 7, 2010, received February 10, 2010.

³ Original File Tab, Notice of Opportunity to Submit Evidence, dated August 6, 2010.

[REDACTED]

that business. The Notice also stated Appellant had not made or adequately supported a successor-in-interest claim. RAM set a September 7, 2010, deadline for Appellant to submit additional evidence in support of her claim.

On August 31, 2011, Appellant, through her attorney, responded to the Notice.⁴ Appellant indicated that in 2007, she purchased [REDACTED] from [REDACTED] (Prior Owner). Additionally, Appellant asserted that [REDACTED] was dissolved and Appellant was a successor-in-interest to [REDACTED]. On September 7, 2010, Appellant, through her attorney, sent additional documentation regarding an AFD&G Business Owner License for which Prior Owner applied.⁵ On December 28, 2010, Appellant, through her attorney, provided additional documentation stating that [REDACTED] had been officially dissolved.⁶

On January 11, 2011, RAM sent Appellant the IAD at issue in this case.⁷ In its IAD, RAM denied Applicant a permit because she lacked the requisite logbooks as explained in the Notice. RAM also stated that Appellant did not qualify as a successor-in-interest. RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by March 14, 2011.

On March 16, 2011, Appellant appealed the IAD.⁸ Included in her notice of appeal were sixteen evidentiary exhibits. On April 21, 2011, NAO sent Appellant a letter notifying her that the office had received her appeal and requesting that any additional documentation or information in support of her appeal be submitted to NAO by May 23, 2011.⁹ NAO did not receive any additional material from Appellant supporting her claim.

I have reviewed Appellant's appeal and the case record, and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing.¹⁰

ISSUES

At issue in this appeal is whether Appellant is eligible for a CHP. To resolve this issue, I must evaluate the following:

⁴ Original File Tab, type-written letter from Appellant's attorney, [REDACTED] dated August 24, 2010, received August 31, 2010.

⁵ Original File Tab, type-written letter from Appellant's attorney, [REDACTED] dated September 3, 2010, received September 7, 2010.

⁶ Original File Tab, type-written letter from Appellant's attorney, [REDACTED] dated December 23, 2010, received December 28, 2010.

⁷ Original File Tab, IAD dated January 11, 2011.

⁸ Pleadings Tab, Appellant's Notice of Appeal from her attorney, [REDACTED] dated March 14, 2010, received March 14, 2011.

⁹ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

¹⁰ 50 C.F.R. § 679.43 (g)(2), (k).

- [REDACTED]
1. Did Appellant prove by a preponderance of the evidence that she timely and properly reported to ADF&G at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005)?
 2. If the answer to the above question is “no,” did Appellant establish by a preponderance of the evidence that she is a successor-in-interest making her eligible to receive a CHP?
 3. If the answer to that question is “no,” I must uphold the IAD and conclude Appellant does not qualify for a CHP.

FINDINGS OF FACT

1. From January 21, 2005, until December 31, 2008, Prior Owner operated [REDACTED] (State of Alaska Business License Number [REDACTED]).
2. On January 31, 2005, Eager Beavers, Inc., applied for a 2005 Sport Fish Business Owner/Guide License.¹² On that application, Prior Owner was listed as the name of the business owner and the State of Alaska Business License Number was listed as [REDACTED].¹³
3. In 2005, [REDACTED] timely and properly recorded twenty-seven bottomfish logbook fishing trips to ADF&G.¹⁴
4. In 2007, [REDACTED] sold several business assets to [REDACTED] doing business as [REDACTED].
5. Since February 28, 2007, Appellant has operated [REDACTED] a sole proprietorship (State of Alaska Business License Number [REDACTED]).
6. On January 12, 2008, Appellant filed for a 2008 Sport Fish Business Owner/Guide License.¹⁷ [REDACTED] was listed as the business owner and the State of Alaska Business License Number was listed as [REDACTED].¹⁸

¹¹ Original File Tab, Alaska Division of Corporations, Businesses, and Professional Licenses License Detail for [REDACTED]

¹² Original File Tab, 2005 Sport Fish Business Owner/Guide License Application, dated January 31, 2005, received March 16, 2011.

¹³ Original File Tab, 2005 Sport Fish Business Owner/Guide License Application, dated January 31, 2005, received March 16, 2011.

¹⁴ Original File Tab, printed summary.

¹⁵ Original File Tab, Agreement to Purchase Business Assets.

¹⁶ Original File Tab, Alaska Division of Corporations, Businesses, and Professional Licenses License Detail for [REDACTED]

¹⁷ Original File Tab, 2008 Sport Fish Business Owner/Guide License Application, dated January 12, 2008, received March 16, 2011.

- [REDACTED]
7. In 2004, [REDACTED] timely and properly recorded four bottomfish logbook fishing trips to ADF&G.¹⁹
 8. In 2004, [REDACTED] timely and properly recorded no bottomfish logbook fishing trips to ADF&G.
 9. In 2005, [REDACTED] timely and properly recorded no bottomfish logbook fishing trips to ADF&G.
 10. In 2008, [REDACTED] timely and properly recorded ninety-seven bottomfish logbook fishing trips to ADF&G.²²

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if an applicant meets certain requirements. If an Appellant seeks a permit because he is a successor-in-interest, among the requirements for establishing his claim is proof that the predecessor reported five or more bottomfish logbook fishing trips during one year of the qualifying period, either 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, 2008.²³

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued the ADF&G Business Owner License.²⁴ This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.²⁵

Minimum participation requirements to qualify for a charter halibut permit are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008.²⁶

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter

¹⁸ Original File Tab, 2008 Sport Fish Business Owner/Guide License Application, dated January 12, 2008, received March 16, 2011.

¹⁹ Original File Tab, printed summary.

²⁰ Original File Tab, printed summary.

²¹ Original File Tab, printed summary.

²² Original File Tab, printed summary.

²³ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B)(iii); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

²⁴ An ADF&G Business Owner License includes a business registration, a sport fish business owner license, a sport fish business license, and an ADF&G business license. 50 C.F.R. § 300.67(b)(3).

²⁵ 50 C.F.R. § 300.67(b)(1)(ii).

²⁶ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

Logbook within the time limits for reporting the trip in effect at the time of the trip.²⁷ The time limit to submit logbook fishing trips reports in 2008 was eight to fourteen days, as delineated in the 2008 Saltwater Charter Logbook.²⁸

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: the statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²⁹

A “halibut logbook fishing tip” means a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: the number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.³⁰

ANALYSIS

The first issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to be eligible for a CHP. Under the CHLAP regulations, minimum participation requirements for a CHP are five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and five or more halibut logbook fishing trips during the recent participation period, namely 2008.

While Appellant properly reported ninety-seven halibut logbook fishing trips during 2008, she reported no bottomfish logbook fishing trips during either 2004 or 2005. Since the CHLAP regulations require minimum participation in both 2004 or 2005, and 2008, Appellant does not meet the minimum participation requirements for a CHP.

The next issue I must resolve in this appeal is whether Appellant can obtain a CHP as a successor-in-interest.³¹ Under the CHLAP regulations, a putative successor-in-interest must prove that its predecessor reported five or more bottomfish logbook fishing trips during one year of the qualifying period, either 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, 2008.³² As NMFS states in pertinent part in the CHLAP regulations: “If [a] person is applying [for a permit] as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook trips *that meet the participation requirements described in paragraphs (b)(1)(ii) of this section,*” NMFS will require certain proof of the

²⁷ 50 C.F.R. § 300.67(f)(4).

²⁸ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

²⁹ 50 C.F.R. § 300.67(f)(2).

³⁰ 50 C.F.R. § 300.67(f)(3).

³¹ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B)(iii); 50 C.F.R. § 300.67(f)(6) and (7); 50 C.F.R. § 300.67(d)(1).

³² 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

[REDACTED]

applicant's status as successor-in-interest.³³ The participation requirements found in paragraph (b)(1)(ii) are "five (5) bottomfish logbook fishing trips or more during one year of the qualifying period [2004 or 2005]; and...five (5) halibut logbook fishing trips or more during the recent participation period [2008]."³⁴ NMFS explained in the Final Rule that it would "issue the number of permits *for which the dissolved entity qualified* in the names of the successor-in-interest."³⁵

Appellant purchased her business from Prior Owner in 2007. At the point of sale, Prior Owner was not eligible for a CHP since it had not satisfied the recent participation requirement of reporting at least five halibut logbook fishing trips in 2008. As a result, Appellant cannot establish eligibility based on the successor-in-interest provisions of the CHLAP regulations.

On appeal, Appellant argues that [REDACTED] and [REDACTED] [REDACTED] are the same non-individual entity and so the requirements of 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B) were met. Appellant contends that a non-individual entities are the same for purposes of 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B) if the entities, despite changing name and ownership, continue the same line of business. However, according to 50 C.F.R. § 300.67(b)(1)(ii), the non-individual entities must be the same "non-individual entity to which the State of Alaska Department of Fish and Game issued the ADF&G Business Owners Licenses...."³⁶ Thus, the relevant inquiry is whether the entities are the same, not whether the same business was carried on. Here, the entities have two different names, different owners, and different State of Alaska Business License Numbers. Therefore, while Appellant may have conducted the same business [REDACTED] those two businesses are not the same entity and the requirements of 50 C.F.R. § 300.67(b)(1)(iii) are not met.

Appellant also makes several arguments as to the construction of the term "successor-in-interest." However, because Appellant does not meet the minimum requirements of 50 C.F.R. § 300.67(b)(1)(iii), Appellant has not established that she is a successor-in-interest under the CHLAP regulations.

In reaching my decision, I have carefully reviewed the entire record. I recognize Appellant's interest in her business. However, I am bound to follow the CHLAP regulations, and as such, Appellant does not qualify for a permit.

³³ 50 C.F.R. § 300.67(b)(1)(iii)(emphasis added).

³⁴ 50 C.F.R. § 300.67(b)(1)(ii).

³⁵ 75 Fed. Reg. 554, 557 (January 5, 2010)(emphasis added).

³⁶ 50 C.F.R. § 300.67(b)(1)(ii).



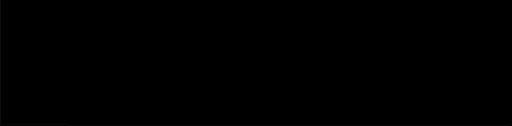
CONCLUSIONS OF LAW

Appellant is not eligible for a permit under the CHLAP rules as she did not prove by a preponderance of the evidence that she reported at least five bottomfish logbook fishing trips during either 2004 or 2005. Appellant has not established by a preponderance of the evidence that she met the requirements of 50 C.F.R. § 300.67(b)(1)(iii)(B). Appellant is not eligible for a CHP as a successor-in-interest to Prior Owner. The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated January 11, 2011, is upheld. This decision takes effect thirty days from the date issued, December 15, 2011, 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 November 25, 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.



Steven Goodman
Administrative Judge

Date Issued: November 15, 2011