

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

On March 8, 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 3, 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 2004, 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 that business.

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 March 4, 2010, received March 8, 2010.

³ Original File Tab, Notice of Opportunity to Submit Evidence.

[REDACTED]

The Notice also stated Appellant had not made or adequately supported a successor-in-interest claim. RAM set a September 2, 2010, deadline for Appellant to submit additional evidence in support of his claim.

On August 31, 2010, Appellant responded to the Notice.⁴ Appellant indicated he purchased an existing charter business in 2004, as a partner in [REDACTED] but sold his interest in that business in 2006, and at that time purchased [REDACTED] from [REDACTED] (Prior Owner). Appellant stated that since 2004, he has continuously operated a charter fishing business and he attended RAM meetings where he was told “private sales of charter businesses would be honored”.

On December 20, 2010, RAM sent Appellant the IAD at issue in this case.⁵ In its IAD, RAM denied Appellant a permit because he lacked the requisite logbook trips as explained in the Notice. RAM stated Appellant did not qualify for a permit 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 February 18, 2011.

On February 18, 2011, Appellant appealed the IAD.⁶ Included in his appeal was Appellant’s Agreement to Purchase Business Assets⁷, and a letter from Prior Owner.⁸ On April 21, 2011, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by May 23, 2011.⁹ NAO did not receive any additional material from Appellant supporting his 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, dated August 30, 2010, received August 31, 2010.

⁵ Original File Tab, IAD dated December 20, 2010.

⁶ Pleadings Tab, Appellant’s letter of appeal from his attorney, [REDACTED] dated February 15, 2011, received February 18, 2011.

⁷ Pleading Tab, Agreement to Purchase Business Assets, signed February 15, 2011, received February 18, 2011; Appellant’s attorney explained in her letter of appeal that the signature page to the original Agreement to Purchase Business Assets was lost and that Appellant and Prior Owner signed a new signature page in February 2011, to demonstrate the validity of the original document.

⁸ Pleadings Tab, type-written letter from Prior Owner, dated February 10, 2011, received February 18, 2011.

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

¹⁰ 50 C.F.R. § 679.43 (g)(2), (k).

Did Appellant prove by a preponderance of the evidence that he timely and properly reported to ADF&G at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005)?

If the answer to the above question is “no,” did Appellant establish by a preponderance of the evidence that Prior Owner properly recorded and reported the minimum amount of logbook fishing trips in 2004 or 2005 and in 2008 thereby making Appellant eligible as a successor-in-interest to receive a CHP?

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. In 2004, Prior Owner timely and properly reported sixty-nine bottomfish logbook fishing trips to ADF&G.¹¹
2. In 2005, Prior Owner timely and properly reported forty-two bottomfish logbook fishing trips to ADF&G.¹²
3. In 2004, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.¹³
4. In 2005, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.¹⁴
5. In 2008, Appellant timely and properly reported twenty halibut logbook fishing trips to ADF&G.¹⁵
6. On May 16, 2007, Appellant purchased [REDACTED] from Prior Owner.¹⁶

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

¹¹ Original File Tab, printed summary.

¹² Original File Tab, printed summary.

¹³ Original File Tab, printed summary.

¹⁴ Original File Tab, printed summary.

¹⁵ Original File Tab, printed summary.

¹⁶ Original File Tab, type-written letter from Prior Owner, dated February 10, 2011, received February 18, 2011.

the qualifying period, either 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, 2008.¹⁷

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 2008.¹⁸

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 Logbook within the time limits for reporting the trip in effect at the time of the trip.¹⁹ The time limit to submit logbook fishing trips reports in 2008 was eight to fourteen days, as delineated in the 2008 Saltwater Charter Logbook.²⁰

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.²¹

A “halibut logbook fishing trip” 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.²²

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 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 2008.²³

Appellant properly reported twenty logbook fishing trips to ADF&G for 2008. Thus, Appellant meets minimum participation requirements for 2008. However, Appellant reported no qualifying trips for 2004 or 2005 to ADF&G. Since the CHLAP regulations

¹⁷ 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).

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

¹⁹ 50 C.F.R. § 300.67(f)(4).

²⁰ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

²¹ 50 C.F.R. § 300.67(f)(2).

²² 50 C.F.R. § 300.67(f)(3).

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

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.²⁴ 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, 2008.²⁵ 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 applicant’s status as successor-in-interest.²⁶ 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].”²⁷ 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.”²⁸

Appellant purchased his business from Prior Owner on May 16, 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 it was Appellant’s and Prior Owner’s intent that Appellant would be the successor-in-interest to Prior Owner’s business, that he purchased this business relying on statements from RAM officials “that his sale would be honored as qualifying under the statutes,” and that he would suffer financial loss if not issued a CHP. Appellant supplied a letter from Previous Owner stating he sold his business to Appellant on May 16, 2007.

Although it was Appellant’s and Prior Owner’s intent that Appellant would be the successor-in-interest to Prior Owner’s business, such intent, or such an agreement, does not establish Appellant is a successor-in-interest under the CHLAP regulations.

Appellant states he purchased Prior Owner’s business relying on statements from a RAM official “that his sale would be honored as qualifying under the statutes”. It is not clear from Appellant’s testimony whether RAM officials informed Appellant that he would receive a CHP as a successor-interest based on his purchase from Prior Owner, however, if this is what Appellant meant he did not offer any corroborating evidence that

²⁴ 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).

²⁵ 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).

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

²⁷ 50 C.F.R. § 300.67(b)(1)(ii).

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

RAM officials made such a statement or statements. It is Appellant's burden to show he qualifies for a CHP under the CHLAP regulations. Although Appellant claims he qualifies for a CHP as a successor-in-interest; he has not established that he is a successor-in-interest under the CHLAP regulations.

Although Appellant claims he achieved minimum participation for the recent participation period of 2008, the CHLAP regulations do not allow successor-in-interest claims in which the applicant is not a successor-in-interest for both the qualifying and recent participation periods. CHLAP regulations provide that the person must be applying as a successor-in-interest "to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet *the participation requirements described in paragraphs (b)(1)(ii) of this section.*" (Emphasis added.) The participation requirements in paragraphs (b)(1)(ii) are the participation requirements in the qualifying period and the recent period. 50 C.F.R. § 300.67(b)(1)(ii)(A) (qualifying period) & (B) (recent period).

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

CONCLUSIONS OF LAW

Appellant is not eligible for a permit under the CHLAP rules as he did not prove by a preponderance of the evidence that he reported at least five bottomfish logbook fishing trips during either 2004 or 2005. Appellant has not established by a preponderance of the evidence that Prior Owner met the requirements of 50 C.F.R. § 300.67(b)(1)(ii)-(iii). 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 December 20, 2010, is upheld. This decision takes effect thirty days from the date issued, December 16, 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 28, 2011, 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

[REDACTED]

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.

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—
Steven Goodman
Administrative Judge

Date Issued: November 16, 2011