

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

In re Application of)
)
) Appeal No. [REDACTED]
 [REDACTED])
) DECISION
)
 Appellant)
)

STATEMENT OF THE CASE

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 OAA. The undersigned is the administrative judge assigned to review and decide this matter.¹

On February 15, 2011, [REDACTED] doing business as [REDACTED] (Appellant), timely filed an appeal with NAO. In its appeal, Appellant challenges a Restricted Access Management program (RAM) Initial Administrative Determination (IAD) dated December 17, 2010.² In the IAD, RAM denied Appellant's application for Charter Halibut Permit (CHP) pursuant to the regulations governing the Charter Halibut Limited Access Program (CHLAP).

The procedural history of this appeal began when RAM received Appellant's application for a CHP on March 1, 2010.³ On the application, Appellant indicated he was the owner of [REDACTED] (Business). Appellant also listed he had been the owner of Business in 2004, 2005, and 2008 under his State of Alaska Department of Fish and Game (ADF&G) Business Owner License [REDACTED]. In addition, Appellant indicated he operated vessels [REDACTED] (Vessel I) and [REDACTED] (Vessel II) in 2004, 2005, and 2008, as well as [REDACTED] in 2008. Appellant also attached a letter that explained his purchase of Business from his parents in 2008.

¹ See 50 C.F.R. § 679.43.

² Pleadings Tab, Appellant's appeal submission received February 15, 2011; Original File Tab, IAD dated December 17, 2010. RAM is responsible for administering the Charter Halibut Limited Access Program (CHLAP).

³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (application).

[REDACTED]

On April 2, 2010, RAM received an application from Appellant's father [REDACTED] (Seller) who sold Appellant Business in 2008. On May 25, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).⁴ In the Notice, RAM provided Appellant thirty days to submit additional information in support of his application that could establish his eligibility for a CHP.⁵ According to RAM, the Official Record indicated that Seller had obtained an ADF&G Business Owner License under Business' name in 2004, 2005, and 2008.⁶ Seller had also obtained an ADF&G Saltwater Charter Vessel Logbook for Vessel I and Vessel II in 2005 and Vessel II in 2008.⁷ Seller was subsequently given two non-transferable CHP's on behalf of Business.

On June 23, 2010, Appellant's attorney submitted additional documents which included the Agreement for Sale of Business and Property signed by Appellant and Seller, Findings and Conclusions of Case [REDACTED] (Appellant's parents' divorce), ADG&F Business Owner License [REDACTED] for Business and Logbook data for 2004, 2005, and 2008.⁸

On December 17, 2010, RAM released the IAD at issue in this appeal.⁹ In the IAD, RAM denied Appellant's application and reasoned that the Official Record, which RAM uses to determine applicants eligibility, indicated that Appellant was not the individual or entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner License that authorized the logbook fishing trips that met the minimum participation requirements.¹⁰ RAM found that although Appellant had been operating a business with the same name as Seller, it was not the same business.¹¹

On February 15, 2011, Appellant's attorney timely appealed the IAD to NAO.¹² In the appeal, Appellant argues he purchased Seller's business in February of 2008.¹³ Due to this purchase Appellant contends that the Official Record erred in its business designation and legal rights of the parties. Appellant seeks to establish that Seller was in breach of the sale agreement when he applied for CHP in 2010. Appellant further argues that he is a successor in interest to Seller's business and therefore under the Charter Halibut Limited Access Program (CHLAP) regulations may rely on Seller's history in obtaining a CHP and should be declared eligible for such.¹⁴

On April 21, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until May 23, 2011, to supplement the record.¹⁵ On May 16, 2011, Appellant's

⁴ Original File Tab, Notice of Opportunity to Submit Evidence dated May 25, 2010.

⁵ Original File Tab, Notice of Opportunity to Submit Evidence dated May 25, 2010.

⁶ Original File Tab, Notice of Opportunity to Submit Evidence dated May 25, 2010.

⁷ Original File Tab, Notice of Opportunity to Submit Evidence dated May 25, 2010.

⁸ Pleadings File Tab, Letter from Appellant's Attorney dated June 23, 2010.

⁹ Original File Tab, IAD dated December 17, 2010.

¹⁰ Original File Tab, IAD dated December 17, 2010.

¹¹ Original File Tab, IAD dated December 17, 2010.

¹² Pleadings Tab, Appellant's appeal submission received February 16, 2011.

¹³ Pleadings Tab, Appellant's appeal submission received February 16, 2011.

¹⁴ Pleadings Tab, Appellant's appeal submission received February 16, 2011.

¹⁵ Appeals Correspondence Tab, NAO letter dated April 21, 2011.

[REDACTED]

attorney submitted Seller's permits with a letter attached explaining that Seller had volunteered to forfeit his permits so that Appellant could receive them.¹⁶

Upon review of Appellant's appeal and case record, I have determined that the record contains sufficient information on which to reach a final judgment. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.¹⁷

ISSUES

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

Did Appellant establish by a preponderance of the evidence that Seller properly recorded and reported the minimum amount of logbook fishing trips in 2008 thereby making it eligible as a successor-in-interest to receive a CHP?

If the answer to the question is "no," I must uphold the IAD and conclude that Appellant does not qualify for a CHP.

FINDINGS OF FACT

1. In 2004, Seller timely and properly reported thirty-four logbook fishing trips to ADF&G.¹⁸
2. In 2005, Seller timely and properly reported forty-two logbook fishing trips to ADF&G.¹⁹
3. In 2008, ADF&G issued Seller an ADF&G Business Owner License as a partnership that operated under the authority of a valid State of Alaska Business License.²⁰
4. In February 2008, Seller sold Appellant Business but retained Vessel II.²¹
5. In 2008, ADF&G issued Appellant an ADF&G Business Owner License as a sole proprietorship that operated under the authority of a valid State of Alaska Business License.²²

¹⁶ Pleadings Tab, Letter from Appellant's attorney dated May 16, 2011.

¹⁷ See 50 C.F.R. § 679.43 (g) and (k).

¹⁸ Original File, Print Summary, created on January 26, 2010.

¹⁹ Original File, Print Summary, created on January 26, 2010.

²⁰ Original File Tab, Notice of Opportunity to Submit Evidence dated August 3, 2010.

²¹ Original File Tab, Agreement for Sale and Property dated February 1, 2008.

²² Original File Tab, Notice of Opportunity to Submit Evidence dated August 3, 2010.

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6. In 2008, Seller timely and properly reported five logbook fishing trips to ADF&G for Vessel II under his ADF&G Business Owner License.²³
 7. In 2008, Appellant reported logbook fishing trips to ADF&G under his ADF&G Business Owner License as a sole proprietor.²⁴
 8. On March 1, 2010, Appellant submitted his Application to RAM for a CHP.²⁵
 9. On April 2, 2010, Seller submitted his application to RAM for a CHP.²⁶ As a result, Seller was awarded two non transferable permits.

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, 2008.²⁷

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut 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.²⁸

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to ADF&G 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 trip” means a logbook fishing trip in the recent participation period that was reported to ADF&G 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

²³ Original File, Print Summary, created on January 26, 2010.

²⁴ Original File Tab, IAD.

²⁵ Original File Tab, Agreement for Sale and Property dated February 1, 2008.

²⁶ Original File Tab, IAD.

²⁷ 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).

²⁸ See 50 C.F.R. § 300.67(f)(4).

²⁹ See 50 C.F.R. § 300.67(f)(2).

³⁰ See 50 C.F.R. § 300.67(f)(3).

[REDACTED]

Logbooks trips are reported in ADF&G issued logbooks to persons who hold an ADF&G Business Owner License.³¹

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS used the Official Record to implement the CHLAP, including evaluating applications for charter halibut permits.³²

ANALYSIS

The issue I must resolve in this appeal is whether Appellant can obtain a CHP as a successor-in-interest.³³ Under the CHLAP regulations the 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, 2008.³⁴ The CHLAP regulations require Seller to have had a Business Owner License which was used to obtain an ADF&G logbook. Then Seller must have used that logbook to report at least five qualifying trips in either 2004 or 2005 and 2008.³⁵

Appellant in this case purchased his business from Seller on February 1, 2008. At the point of sale, Seller was not eligible for a CHP since he had not yet satisfied the recent participation requirement of reporting five halibut logbook fishing trips in 2008. According to the Official record, Seller reported five halibut logbook fishing trips that occurred starting in August 2008, which was after the sale to Appellant. As a result, Appellant cannot establish eligibility based on the successor-in-interest provisions of the CHLAP regulations.

In his appeal, Appellant's attorney argues that Seller had no right under the Agreement for Sale and Property signed by both parties to apply for an ADF&G Business Owner License in 2008 and apply for a CHP in 2010. However, this is an issue that NAO does not have the authority to rule on. From the documentation submitted it does appear that a sale took place. However, by Seller applying for an ADF&G Business Owner License in 2008, and remaining active by reporting trips, it appears that Seller never ceased operating the business but simply sold some of his property.

Although Appellant states on appeal he is the successor-in-interest to Raspberry Island Remote Camps, as explained above, he does not qualify as a successor-in-interest due to his purchase of Seller's business on February 1, 2008. This is dispositive. Since

³¹ See 50 C.F.R. § 300.67(b)(1)(ii) and (b)(3).

³² See 50 C.F.R. § 300.67(f)(5).

³³ See 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).

³⁴ See 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]

Seller did not meet the regulatory requirements under 50 C.F.R. § 300.67(b)(1)(ii)(B) prior to selling Business, Appellant cannot be awarded a permit.

In reaching my decision about this case, I have carefully reviewed the entire record and have been mindful of Appellant's efforts to stay in compliance with the CHLAP regulations. I have also considered the entire record, including the voluminous appeal filed by Appellant's attorney. Appellant's counsel's arguments go to establishing almost exclusively that Appellant is a successor-in-interest to Seller. However, what is dispositive in this appeal is whether the putative predecessor met the participation requirement for the qualifying period of participation 2004 or 2005, and 2008. I recognize Appellant's 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 has not established by a preponderance of the evidence that its predecessor-in-interest had met the requirements of 50 C.F.R. § 300.67(b)(1)(ii)(B).

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated December 17, 2010 is upheld. This decision takes effect thirty days from the date issued, December 19, 2011,³⁶ 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 elects to reverse, modify, or remand this decision pursuant to 50 C.F.R. § 679.43(k) and (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 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 in support of the motion.

[REDACTED]

Steven Goodman
Administrative Judge

Date Issued: November 18, 2011

³⁶ 50 C.F.R. § 679.43(k) and (o).