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

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| In re Application of<br><br>[redacted]<br><br>Appellant | )<br>)<br>)<br>)<br>)<br>)<br>) | Appeal No. 11-0044<br><br>DECISION |

## 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 17, 2011, [redacted] doing business as [redacted] (Appellant), timely filed an appeal with NAO. In his appeal, Appellant challenges a Restricted Access Management program (RAM) Initial Administrative Determination (IAD) dated December 22, 2010.[2] In the IAD, RAM denied Appellant's application for a charter halibut permit (CHP or permit) based on his own Alaska Department of Fish and Game (ADF&G) Business Owner License logbook history.[3] RAM also denied Appellant's application because RAM found that Appellant was not a successor-in-interest to the person to whom ADF&G issued the logbook upon which Appellant relied.[4]

The procedural history of this appeal began when RAM received Appellant's application for a CHP on April 2, 2010.[5] Appellant attached to his application, a copy of a Bill of Sale for [redacted] (Business) dated July 6, 2007, and an Affidavit in Support of the Application of Business signed by [redacted]

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[1] See 50 C.F.R. § 679.43.
[2] Pleadings File Tab, Appellant's appeal received on February 17, 2011; Original File Tab, IAD dated December 22, 2010. RAM is responsible for administering the Charter Halibut Limited Access Program (CHLAP).
[3] Original File Tab, IAD dated December 22, 2010.
[4] Original File Tab, IAD dated December 22, 2010.
[5] Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (application).

[redacted] (Sellers), and the logbook for vessels [redacted] (Vessel I) and [redacted] (Vessel II).

In response to Appellant's application, on August 6, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).[6] In the Notice, RAM provided Appellant thirty days to submit additional information in support of his application that could establish its eligibility for a CHP.[7] On September 2, 2010, Appellant's attorney submitted a letter on behalf of Appellant explaining that Appellant purchased Business from Sellers, included the logbook history of the company, and that Appellant was applying for a CHP on behalf of Business.[8]

On December 22, 2010, RAM issued the IAD at issue in this appeal.[9] In the IAD, RAM denied Appellant's application reasoning that the Official Record, which RAM uses to determine an applicant's eligibility, indicated Appellant was not the individual or entity to which ADF&G issued the ADF&G Business Owner License that authorized the logbook fishing trips that met the minimum participation requirements.[10]

On February 23, 2011, Appellant's attorney timely appealed the IAD to NAO.[11] In the appeal, Appellant argues that when he purchased Seller's business, it simply filled the shoes of the prior owner and maintained the business as it had been.[12] Appellant asserts the only difference was the owner of the business and the ADF&G Business Owner Licenses for 2004 and 2005 were issued under the same business name.[13] Appellant further argued he was a successor-in-interest to Seller's business and therefore under the Charter Halibut Limited Access Program (CHLAP) regulations he 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] NAO received no additional documentation from Appellant or Appellant's attorney.

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.[16]

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[6] Original File Tab, Notice of Opportunity to Submit Evidence dated August 6, 2010.
[7] Original File Tab, Notice of Opportunity to Submit Evidence dated August 6, 2010.
[8] Original File Tab, Appellant's Attorney Letter, dated September 2, 2010, received September 27, 2010.
[9] Original File Tab, IAD.
[10] Original File Tab, IAD.
[11] Pleadings File Tab, Appellant's appeal received on February 23, 2011.
[12] Pleadings File Tab, Appellant's appeal received on February 23, 2011.
[13] Pleadings File Tab, Appellant's appeal received on February 23, 2011.
[14] Pleadings File Tab, Appellant's appeal received on February 23, 2011.
[15] Appeals Correspondence Tab, NAO letter dated April 21, 2011.
[16] 50 C.F.R. § 679.43 (g)(2), (k).

## 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 prove by a preponderance of the evidence he timely and properly reported to ADF&G at least five bottomfish 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 Seller properly recorded and reported the minimum amount of logbook fishing trips 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 that Appellant does not qualify for a CHP.

## FINDINGS OF FACT

1. In 2004, Seller timely and properly reported fifty-one logbook fishing trips to ADF&G.[17]

2. In 2005, Seller timely and properly reported forty-seven logbook fishing trips to ADF&G.[18]

3. On July 6, 2007, Seller sold Business to Appellant.[19]

4. In 2008, ADF&G issued Appellant a license to operate its charter fishing business.[20]

5. In 2004, Appellant reported no logbook fishing trips to ADF&G.[21]

6. In 2005, Appellant reported no logbook fishing trips to ADF&G.[22]

7. In 2008, Appellant timely and properly reported forty-one halibut logbook fishing trips to ADF&G.[23]

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[17] Original File, Print Summary, created on January 26, 2010.
[18] Original File, Print Summary, created on January 26, 2010.
[19] Original File Tab, Bill of Sale dated July 6, 2007.
[20] Original File Tab, Notice of Opportunity to Submit Evidence dated August 6, 2010.
[21] Original File, Print Summary, created on January 26, 2010.
[22] Original File, Print Summary, created on January 26, 2010.
[23] Original File Tab, Print Summary, created on January 26, 2010.

## PRINCIPLES OF LAW

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 CHP 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 publication period, namely 2008.[26]

To prevail in a case based on successor-in-interest, an Appellant must prove 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]

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

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

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 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.[33]

Appellant properly reported forty-one 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 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.[34] 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.[35] 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.[36] 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]."[37]

Appellant in this case purchased his business from Seller in 2007. At the point of sale, Seller was not eligible for a CHP since it had not yet satisfied the recent participation requirement of reporting five halibut logbook fishing trips in 2008. As a result, Appellant cannot be awarded a CHP.

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[32] *See* 50 C.F.R. § 300.67(f)(5).
[33] 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).
[34] 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).
[35] 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).
[36] 50 C.F.R. § 300.67(b)(1)(iii)(emphasis added).
[37] 50 C.F.R. § 300.67(b)(1)(ii).

In his appeal, Appellant's attorney argues Appellant is the successor-in-interest to Business and that the ADF&G license form is ambiguous on its face, and therefore a CHP should be awarded to Appellant. Even if this is true it still does not negate the fact that prior to the sale, Seller had not satisfied all of the requirements listed in the CHLAP regulations. Thus, even if I find that Appellant is in fact the successor-in-interest to Seller's business, since Seller did not meet the regulatory requirements under 50 C.F.R. § 300.67(b)(1)(ii)(B), Appellant cannot be awarded a permit under the successor-in-interest provision. 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 thoughtfully 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 the fact that Seller did not meet the minimum participation requirements for the recent period, 2008, as required by the successor-in-interest provision. As it is beyond dispute that Seller did not meet the participation requirements for 2008, I am bound to follow the CHLAP regulations, and as such, am not authorized to provide Appellant relief under the regulations and the facts of this case.

## 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 22, 2010, is upheld. This decision takes effect thirty days from the date issued, December 23, 2011,[38] 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 December 5, 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

[38] 50 C.F.R. § 679.43(k) and (o).

or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.

[redacted]

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Steven Goodman
Administrative Judge

Date Issued: November 23, 2011