

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0020

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, 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 are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.¹

The appeal under review was filed by [REDACTED] doing business as [REDACTED] (Appellant). 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 February 22, 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 July 29, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).³ In the Notice, RAM advised Appellant that the Official Record showed he met the CHLAP participation requirements for 2008, but that he did not meet the CHLAP requirements for 2004 or 2005. RAM set an August 30, 2010, deadline for Appellant to submit evidence demonstrating his eligibility for a CHP. On August 23, 2010, Appellant responded to the Notice.⁴ Appellant stated that within the past few years he purchased a charter boat with the required logbook entries and

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 11, 2010, and received February 22, 2010.

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

⁴ Original File tab, type-written letter, received August 23, 2010.

Alaska State business licenses for 2004 and 2005. Appellant submitted letters from members of his community supporting his application.⁵

On December 1, 2010, RAM sent Appellant the IAD at issue in this case.⁶ In its IAD, RAM denied Appellant a permit because he lacked the requisite logbook trips as explained in the Notice. RAM notified Appellant that according to information in the Official Record, Appellant met the participation requirements for 2008. However, RAM also stated that Appellant did not meet the minimum participation requirements in the qualifying period (2004 or 2005). RAM stated that there is no indication in the Official Record that Appellant was issued an ADF&G Business Owner License to operate in 2004 or 2005. RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by January 31, 2011.

On January 25, 2011, Appellant appealed the IAD.⁷ 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, 2011.⁸ 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.⁹

ISSUES

The broad issue in this case is whether Appellant is eligible for a permit under the CHLAP rules. To resolve that issue, I must answer the following:

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 question is "no," Appellant is not eligible for a permit, and I must uphold the IAD.

⁵ Original File tab, supporting letters, received August 23, 2010.

⁶ Original File Tab, IAD.

⁷ Pleadings Tab, appeal letter, dated January 8, 2011, received January 25, 2011.

⁸ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

⁹ 50 C.F.R. § 679.43 (g)(2), (k).

FINDINGS OF FACT

1. In 2004, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.¹⁰
2. In 2005, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.¹¹
3. In 2008, Appellant timely and properly reported sixty-one halibut logbook fishing trips to ADF&G.¹²

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.¹³ This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.¹⁴

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 2008.¹⁵

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.¹⁶ The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.¹⁷

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.¹⁸

¹⁰ Original File Tab, IAD; printed summary.

¹¹ Original File Tab, IAD; printed summary.

¹² Original File Tab, IAD; printed summary.

¹³ 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).

¹⁴ 50 C.F.R. § 300.67(b)(1)(ii).

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

¹⁶ 50 C.F.R. § 300.67(f)(4).

¹⁷ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

¹⁸ 50 C.F.R. § 300.67(f)(2).

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.¹⁹

“Applicant selected year” means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and non transferable permits.²⁰

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits.²¹

ANALYSIS

The 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 2008.²²

Appellant properly reported sixty-one halibut logbook fishing trips to ADF&G for 2008. Thus, Appellant meets minimum participation requirements for 2008. However, Appellant reported no qualifying trips to ADF&G in 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.

On appeal, Appellant argues his understanding when he purchased his boat in 2008 was that he would qualify for a CHP based on his purchase of a boat from someone who had operated a charter halibut business during the qualifying years, that the rules and regulations regarding the transfer of CHPs were unclear when he purchased his boat, that 2004 or 2005, and 2008, are arbitrary years for purposes of determining CHP eligibility, and that the denial of CHP will cause a devastating effect on his ability to provide for his family.

Although Appellant argues he should qualify for a CHP based on his purchase of a boat from someone who had operated a charter halibut business during the qualifying years, Appellant’s lack of awareness regarding eligibility for a CHP is not a sufficient reason for overturning the IAD.

¹⁹ 50 C.F.R. § 300.67(f)(3).

²⁰ 50 C.F.R. § 300.67(f)(1).

²¹ 50 C.F.R. § 300.67(f)(5).

²² 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).

Appellant argues that the rules and regulations regarding the transfer of CHPs were unclear when he purchased his boat. In December 2005, the North Pacific Fishery Management Council (Council) adopted a control date of December 9, 2005, and NMFS published notice of the control date in the Federal Register in February 2006.²³ In the control date notice, NMFS explained that:

anyone entering the charter sport fishery for Pacific halibut in and off Alaska after December 9, 2005 (control date) will not be assured of future access to that fishery. . . . This notice is intended to promote public awareness. . . and to discourage new entrants into the charter halibut fishery while the Council discusses whether and how access to the halibut resource by the charter sport fishery should be controlled.²⁴

Appellant entered the charter fishing industry in 2008, well after the publicized control date. I also note that the charter halibut fishing industry has been highly regulated for many years and that Appellant was on constructive notice of further developments. NMFS further explained this in response to a comment on the CHLAP's final rule:

[T]he Council has a long history of developing management measures for the charter halibut fishery, as described in the preamble to the proposed rule (74 FR 18178, April 21, 2009), and the control date notice published February 8, 2005 (71 FR 6442). Persons entering the charter halibut fishery for the first time after 2005 were on notice that their future access to that fishery was not assured.²⁵

Appellant argues that 2004 or 2005, and 2008, are arbitrary years for purposes of determining CHP eligibility. When it published the Final Rule implementing the CHLAP, NMFS considered the issue of CHP eligibility requiring demonstration of historical participation in halibut charter fisheries. After due consideration of comments received on the Proposed Rule, NMFS stated:

The Council selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on participation in the charter halibut fishery when it acted in early 2007. The Council did not select a larger number of qualifying years because the normal entry and exit from the charter halibut fishery from year to year could result in more charter halibut permits than vessels participating in any one year with a qualifying period of too many years. The choice of combining minimum participation during a qualifying year and the recent

²³ Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 61 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>.

²⁴ Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 71 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>. See *also* Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 563-64 (Jan. 5, 2010).

²⁵ Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 563-64 (Jan. 5, 2010).

participation year further serves the purpose of limiting charter halibut permits to those businesses that have demonstrated a long-term commitment to the charter halibut fishery and gives consideration to present participation and historical dependence, factors that must be considered pursuant to the Halibut Act.²⁶

I note that Appellant has not made a successor-in-interest claim. However, even if Appellant made such a claim this argument would lack merit. An applicant applying as a successor-in-interest would need to supply written documentation that (A) If the applicant is applying on behalf of a deceased individual, the applicant must document that the individual is deceased, that the applicant is the personal representative of the deceased's estate appointed by a court, and that the applicant specifies who, pursuant to the applicant's personal representative duties, should receive the permit(s) for which application is made; or (B) If the applicant is applying as a successor-in-interest to an entity that is not an individual, the applicant must document that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.²⁷ Appellant has not provided any written documentation evidencing either of the above.

Merely purchasing a boat from someone who had operated a charter halibut business during the qualifying years is not sufficient to meet participation requirements. The regulations require that bottomfish fishing trips were a) timely reported, b) in a logbook assigned to Appellant based on his business license, and c) with appropriate information. Appellant has not shown that he submitted logbook pages to ADF&G reporting at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005).

It is Appellant's burden to show he properly reported to ADF&G at least five bottomfish fishing trips in a logbook with the requisite information during the 2004 or 2005 qualifying period.

In reaching my decision, I have carefully reviewed the entire record. I recognize Appellant's financial hardship and his interest in continuing to fish for halibut. 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. The IAD is consistent with CHLAP regulations.

²⁶ Final Rule, 75 Fed. Reg. 554, 563 (January 5, 2010).

²⁷ 50 CFR § 300.67 (b)(1)(iii)

ORDER

The IAD dated December 1, 2010, is upheld. This decision takes effect thirty days from the date issued, December 29, 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 December 9, 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 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 29, 2011