

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

In re Application of

████████████████████

Appellant

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Appeal No. 11-0026

DECISION

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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 filed with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.<sup>1</sup>

████████████████████ (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 10, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup> 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 7, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>3</sup> In the Notice, RAM advised Appellant that the information provided in his permit application did not match the information in the Official Record. It noted that Appellant claimed to be the owner of Alaska Raven Guides, LLC (LLC), in 2004, 2005, and 2008. However, the Official Record showed that Appellant owned a sole proprietorship named ██████████ (Business) in 2004 and 2005. In 2008, Appellant reported trips as LLC and shared ownership of LLC with two other individuals. RAM set an August 6, 2010, deadline for Appellant to explain the relationship between Business and LLC, and Appellant's ownership interest in both. On August 3, 2010, Appellant responded to the Notice by submitting a letter explaining the

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<sup>1</sup> 50 C.F.R. § 679.43.

<sup>2</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 8, 2010, and received March 10, 2010.

<sup>3</sup> Original File Tab, Notice of Opportunity to Submit Evidence.

relationship between LLC and Business, along with additional documents in support of his application for a permit.<sup>4</sup>

On December 2, 2010, RAM sent Appellant the IAD at issue in this case.<sup>5</sup> In its IAD, RAM denied Appellant a permit. RAM found that Business met the participation requirement in both of the qualifying years, but not in the recent participation period. On the other hand, RAM found that LLC met the participation requirement in the recent participation period, but not in the qualifying period. RAM explained that because Business and LLC had different names, had different organizational forms, and were owned by different individuals, they were different businesses for determining eligibility for a permit. Because they were different businesses, each one needed to satisfy the CHLAP participation requirements independently to receive a permit. As neither business did this on its own, RAM denied Appellant a permit. 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 31, 2011, Appellant, through his Representative, appealed the IAD.<sup>6</sup> In his appeal, Appellant argues that Appellant was the person to whom the State of Alaska Department of Fish and Game (ADF&G) issued Business Owner Licenses during both participation periods. Appellant also argues that Appellant's business was largely the same despite the reorganization as a limited liability company in 2005.<sup>7</sup> Finally, Appellant claims that the IAD is inconsistent with actions taken by RAM in similar cases.

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.<sup>8</sup> NAO received additional material supporting Appellant's claim on May 20, 2011.<sup>9</sup> Appellant also motioned to depose representatives from RAM.<sup>10</sup> However, the procedural rules governing the CHLAP do not require witnesses to be made available for depositions.<sup>11</sup> After I have reviewed Appellant's appeal and the case record, I deny Appellant's motion because 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.<sup>12</sup>

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<sup>4</sup> Original File Tab, Appellant's letter to NMFS/AKR/RAM with additional documents, signed August 2, and received August 3, 2010.

<sup>5</sup> Original File Tab, IAD dated December 2, 2010.

<sup>6</sup> Pleadings Tab, Appellant's appeal received January 31, 2011.

<sup>7</sup> Business was reorganized as an LLC in 2005. However, Appellant did not receive an ADF&G Business Owner License for LLC in 2005.

<sup>8</sup> Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

<sup>9</sup> Pleadings Tab, Appellant's submission of additional materials dated May 20, 2011.

<sup>10</sup> Pleadings Tab, Appellant's motion for deposition, signed by Representative May 5, 2011, received May 6, 2011.

<sup>11</sup> See 50 C.F.R. § 679.43.

<sup>12</sup> 50 C.F.R. § 679.43 (g)(2), (k).

## ISSUE

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

Is Appellant the same person (individual or non-individual entity) to which ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements in both the qualifying period, 2004 or 2005, and the recent participation period, 2008?

If this answer to this question is “no,” Appellant is not eligible for a permit, and I must uphold the IAD.

## FINDINGS OF FACT

1. In 2004, Appellant timely and properly reported thirty-one bottomfish logbook fishing trips to ADF&G based on trips taken by Business, a sole proprietorship owned wholly by Appellant.<sup>13</sup>
2. In 2005, Appellant timely and properly reported fourteen bottomfish logbook fishing trips to ADF&G based on trips taken by Business.<sup>14</sup>
3. In 2008, Appellant did not timely and properly report any halibut logbook fishing trips to ADF&G.<sup>15</sup>
4. In 2008, LLC timely and properly reported forty-one halibut logbook fishing trips to ADF&G based on trips taken by LLC.<sup>16</sup>
5. LLC is a limited liability company owned by Appellant and two other individuals.<sup>17</sup>

## PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS may only issue a charter halibut permit to 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 for a charter halibut permit.<sup>18</sup> 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.<sup>19</sup> Minimum participation

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<sup>13</sup> Original File Tab, IAD dated December 2, 2010; printed summary.

<sup>14</sup> Original File Tab, IAD dated December 2, 2010; printed summary.

<sup>15</sup> Original File Tab, IAD dated December 2, 2010; printed summary.

<sup>16</sup> Original File Tab, IAD dated December 2, 2010; printed summary.

<sup>17</sup> Original File Tab, IAD dated December 2, 2010; printed summary; Pleadings Tab, Appellant’s appeal received January 31, 2011.

<sup>18</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>19</sup> 50 C.F.R. § 300.67(b)(3).

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 publication period, namely 2008.<sup>20</sup>

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.<sup>21</sup> The time limit to submit logbook fishing trips reports in 2008 was eight to fourteen days, as delineated in the 2008 Saltwater Charter Logbook.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup>

## ANALYSIS

**Is Appellant the same person (individual or non-individual entity) to which ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements in the qualifying period, 2004 or 2005, and the recent participation period, 2008?**

In general, an applicant must meet 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.<sup>26</sup> The regulations explain that a

<sup>20</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

<sup>21</sup> 50 C.F.R. § 300.67(f)(4).

<sup>22</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

<sup>23</sup> 50 C.F.R. § 300.67(f)(2).

<sup>24</sup> 50 C.F.R. § 300.67(f)(3).

<sup>25</sup> 50 C.F.R. § 300.67(f)(5).

<sup>26</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B); 50 C.F.R. § 300.67(f)(6) and (7); 50 C.F.R. § 300.67(d)(1).

CHP will only be awarded to the person who: first, applies for a permit and second, is the person (individual or non-individual entity) to which ADF&G issued the license that authorized logbook fishing trips.<sup>27</sup>

Appellant argues that he was the person to whom ADF&G issued Business Owner Licenses in both participation periods. Appellant cites the Alaska Administrative Code to support his claim. Appellant argues that he was the owner of the businesses that applied for ADF&G Business Owner Licenses in 2004, 2005, and 2008, and as such, he is eligible for a permit under the CHLAP regulations.

Under the CHLAP regulations, a person is the individual, corporation, firm, or association to which ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips.<sup>28</sup>

The Final Rule on the CHLAP explains that two different businesses cannot combine their logbook history to qualify for a permit, notwithstanding similarities in ownership in the qualifying period and the recent participation period.

This rule makes clear that NMFS will not recognize agreements that allow two businesses to match their logbook history to qualify for one or more charter halibut permits. . . . NMFS will issue a charter halibut permit to the person or entity—individual, corporation, firm, or association—that held the ADF&G Business Owner License that authorized the logbook fishing trips that met the participation requirements in *both* participation periods, qualifying and recent.<sup>29</sup>

Business was a sole proprietorship owned in full by Appellant, while LLC was a formally organized limited liability company with ownership shared between three individuals. These businesses, with different organizational forms and ownership structures, are two distinct “persons” under the CHLAP regulations. Though Appellant was the sole owner of Business in 2005 and a part owner of LLC in 2008, their logbook history may not be combined to satisfy the minimum participation requirements for a permit.

Appellant next argues that even if Business and LLC are not the same person under the CHLAP regulations, Business and LLC used the same vessel, had the same address, and were both run as a family enterprise.

While I find that Business and LLC had similar operations, this argument is without merit under the CHLAP regulations. Nothing in the regulations allows me to grant a permit to Appellant based on the fact that Business and LLC share assets or an address.

Finally, Appellant argues that the IAD is inconsistent with RAM’s actions in other CHP applications. The scope of this appeal does not extend to establishing error in another applicant’s case. Rather, the issue on appeal is whether the regulations were correctly

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<sup>27</sup> 50 C.F.R. § 300.67(b)(1)(i)-(ii).

<sup>28</sup> See 50 C.F.R. §§ 300.61, 300.67. ADF&G Business Owner License is a regulator term that includes a sport fish business registration and a sport fish business owner license. See 50 C.F.R. § 300.67(b)(3).

<sup>29</sup> 75 Fed. Reg. 578 (January 5, 2010) (emphasis added).

applied to Appellant. Appellant has not established that the IAD issued to him was inconsistent with CHLAP regulations. Based on my review, I uphold the IAD because Business and LLC are not the same person within the meaning of the CHLAP regulations and the regulations do not allow two businesses to combine their logbook history to meet the minimum participation requirements for a permit.

In reaching my decision in this case, I carefully reviewed the entire record. Based on the evidence provided and applicable regulatory provisions, Appellant does not qualify for a CHP.

### CONCLUSIONS OF LAW

Appellant is not eligible for a permit because he did not prove by a preponderance of the evidence that he is the same person that was issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements in both 2004 or 2005 and 2008.

The IAD is consistent with CHLAP regulations.

### ORDER

The IAD dated December 2, 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.

[REDACTED]

Steven Goodman  
Administrative Judge

Date Issued: November 29, 2011