

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0058

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 pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

This case involves the Charter Halibut Limited Access Program (CHLAP) regulations that govern the requirements for charter halibut permits (CHP or permit). Appellant was denied a permit and now asks NAO to review that denial.

The relevant events leading to this appeal begin on March 18, 2010 when [REDACTED] C (collectively referred to in this Decision as Appellant) filed an application for a permit with NMFS's Restricted Access Management program (RAM).¹ In response to Appellant's application, on August 3, 2010, RAM sent Appellant a "Notice of Opportunity to Submit Evidence" (Notice).² In the Notice, RAM advised Appellant it thought he would be eligible for one transferable permit, but not two transferable permits as Appellant had requested. RAM stated Appellant did not own the boat [REDACTED] (Vessel), the trips from which Appellant wanted credit. RAM explained that the logbook associated with Vessel was issued to another person, [REDACTED] (Seller), who also held the corresponding Business Owners License that authorized the qualifying trips.

¹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with two-page attachment.

² Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010.

FINDINGS OF FACT

1. In 2005, Appellant properly reported thirty-eight logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].⁷
2. In 2008, Appellant properly reported seventy-seven logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].⁸
3. In 2005, LD's properly reported seventy-nine logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].⁹
4. In 2008, LD's reported no logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].¹⁰
5. On March 18, 2010 Appellant timely filed his application with RAM for a CHP.¹¹ By signing the application, Appellant certified he "examined the information and the claims provided on this application and, to the best of my knowledge, all statements in the application are true. The applicant complied with all legal requirements that pertained to the bottomfish logbook fishing trips in 2004 and 2005 and the halibut logbook fishing trips in 2008 that were reported under the applicant's ADF&G Business License."¹²
6. On the application, Appellant checked the box for "no," to the question: "Is the applicant a successor-in-interest...to a dissolved non-individual entity?" Below that statement, on the printed form was the following sentence: "If YES, attach evidence of...dissolution and evidence supporting successor-in-interest status."¹³
7. Also on the application, under the block for claims, Appellant typed in: "Please see attached [sic] letter of explanation requesting second permit."¹⁴
8. On the letter attached to Appellant's application, Appellant argued he should be credited with the logbook trips reported from Vessel in 2005.¹⁵ Also attached to the

⁷ Original File Tab, Print Summary created January 26, 2010; Original File Tab, Charter Halibut Permit (CHP) Program, summary of Official Charter Halibut Record.

⁸ Original File Tab, Print Summary created January 26, 2010; Original File Tab, Charter Halibut Permit (CHP) Program, summary of Official Charter Halibut Record.

⁹ Original File Tab, Print Summary created January 26, 2010; Signout Sheet/Logbooks for LD's for 2005; Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011.

¹⁰ Original File Tab, Print Summary created January 26, 2010.

¹¹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with two-page attachment.

¹² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C, page 6.

¹³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C, page 1.

¹⁴ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C, page 2.

¹⁵ Original File Tab, letter dated February 19, 2010 attached to Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

application was a statement dated November 21, 2006 purportedly confirming the sale of Vessel to Appellant.¹⁶

9. On August 3, 2010 RAM sent via certified return receipt mail its Notice of Opportunity to Submit Evidence (formerly referred to in this Decision as Notice).¹⁷

10. In said Notice, RAM notified Appellant that its preliminary or tentative decision about Appellant's application was that he was eligible for one, but not two, transferable permits.¹⁸

11. RAM based its preliminary decision on the Official Record that showed Appellant's business names held one business license, number [REDACTED], and used only one vessel (Appellant's vessel) in 2004 and one vessel in 2005. [REDACTED] Based on the trips reported to ADF&G from Appellant's vessel, he was thought eligible for one transferable permit.²⁰

12. RAM stated in the Notice: "[Y]ou have not provided sufficient evidence to cause RAM to change the official record."²¹

13. Also in the Notice, RAM acknowledged Appellant's claim that he should be credited with the 2005 logbook trips made by Vessel under a logbook issued to LD's, owned by Seller.²² RAM explained: "You were not the owner of [LD's], the business to which the ADF&G issued the ADF&G Business Owner License that authorized the logbook fishing trips in 2004 and 2005 for [Vessel] that you are claiming. The NMFS Official Record lists [Seller] as that owner. You also have not made, or not adequately supported, a claim to be a successor-in-interest to the business described above. Regulations implementing this program do not authorize NMFS to credit charter halibut trips by a business to persons who were not the business owners except under the successor-in-interest provisions."²³

14. RAM advised Appellant in the Notice that he had until September 2, 2010 to present evidence in support of the claims outlined in the Notice.²⁴

15. Appellant did not respond with additional evidence in support of his claims by the September 2, 2010 deadline.²⁵

¹⁶ Original File Tab, statement dated November 21, 2006 attached to Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

¹⁷ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010.

¹⁸ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010.

¹⁹ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010; Original File Tab, Charter Halibut Permit (CHP) Program, summary of Official Charter Halibut Record.

²⁰ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 2; Original File Tab, Charter Halibut Permit (CHP) Program, summary of Official Charter Halibut Record.

²¹ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 1.

²² Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 2.

²³ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 3.

²⁴ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 4.

16. On January 17, 2011, RAM issued the IAD at issue in this appeal. In the IAD, RAM denied Appellant's request for an additional transferable permit.²⁶

17. RAM reasoned that Appellant had only one vessel (Appellant's vessel) and one logbook issued pursuant to Appellant's business license. Under the CHLAP regulations, Appellant could only receive credit for its own logbook issued pursuant to Appellant's Business Owner License. Based on Appellant's vessel properly logged fishing trips in 2005 and 2008, Appellant would receive one transferable permit.²⁷

18. In response to Appellant's claim that he should be credited with the trips recorded in Seller's logbook, RAM stated:

You are claiming an additional transferable permit based on logbook fishing trips reported to the ADF&G in Saltwater Charter Vessel Logbooks issued for [Vessel]...in 2004 and 2005. The Official Record indicates the ADF&G Saltwater Charter Vessel Logbooks issued for [Vessel]...in 2004 and 2005 were issued under the authority of the ADF&G Business Owner License issued to [Seller] for [LD's]. Your claim is based upon your purchase of the vessel from Seller in 2006. Unfortunately, because neither [Appellant as an individual or his business] obtained the ADF&G Business Owner License that authorized the 2004 or 2005 logbook fishing trips for [Vessel], RAM may not credit any of the bottomfish logbook fishing trips reported to the ADF&G in those years to [Appellant].²⁸

19. Based on that analysis, RAM denied Appellant's request for a second transferable permit.²⁹

PRINCIPLES OF LAW

Generally, NMFS is only authorized to issue CHPs to the individual or entity to which ADF&G issued the ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that

²⁵ This finding is based on the absence of evidence to support a finding that Appellant did timely respond to the Notice and RAM's statement in the IAD on the second page that "[a]s of the date of this IAD we have received no response to [the] Notice."

²⁶ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011.

²⁷ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011, page 3, quoting 50 C.F.R. § 300.67(c).

²⁸ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011, page 4.

²⁹ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011, page 4.

was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).³⁰

To qualify for a CHP, a fundamental requirement is that an applicant must have proof of qualifying “bottomfish logbook fishing trips.”³¹ To establish one’s history of “bottomfish logbook fishing trips,” one must record qualifying trips in a state-issued logbook. ADF&G issues logbooks to those who hold an ADF&G Business Owner License.³²

As an exception to the general rule articulated above, NMFS could issue a CHP to a successor-in-interest to an entity that was issued a logbook that could be used to provide data on participation in the fishery.³³ If the applicant applies as a successor-in-interest to the person or entity to which ADF&G issued the Business Owner Licenses that authorized qualifying logbook fishing trips, in order to qualify as a successor-in-interest, the applicant must document that the entity met the participation requirements for a permit, the entity has been dissolved, and that the applicant is the successor-in-interest to the dissolved entity.³⁴

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 participation period, namely 2008.³⁵

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 [ADF&G] in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.³⁶

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska [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.³⁷

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to the State of Alaska [ADF&G] in a Saltwater Charter Logbook

³⁰ 50 C.F.R. §§ 300.67(b)(1) and (3) and 300.67(c)(1). See also 75 Fed. Reg. 554, 556 (January 5, 2010) (CHPs “will be issued to persons that were the ADF&G licensed business owners that met the minimum qualifications.”).

³¹ A “bottomfish logbook fishing trip” is one timely reported to ADF&G in a Saltwater Charter Logbook and includes information about the statistical area where bottomfish fishing occurred, the boat hours the vessel was used for bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing. See 50 C.F.R. § 300.67(f)(2) and (4).

³² See 50 C.F.R. § 300.67(b)(1)(ii) and (c)(1).

³³ See 50 C.F.R. § 300.67(b)(1).

³⁴ See 50 C.F.R. § 300.67(b)(1)(iii).

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

³⁶ 50 C.F.R. § 300.67(f)(4).

³⁷ 50 C.F.R. § 300.67(f)(2).

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.³⁸

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS uses the Official Record to implement the CHLAP, including evaluating applications for charter halibut permits.³⁹

ANALYSIS

The issue before me is whether Appellant has shown by a preponderance of the evidence that he reported at least fifteen logbook fishing trips taken on Vessel in both 2005 and 2008. The applicable law, the CHLAP regulations, limit CHPs to the individual or entity to which ADF&G issued the ADF&G Business License⁴⁰ that was also the license authorizing qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).⁴¹ Thus under applicable regulations, I ask whether the Appellant in this case was issued an ADF&G Business License pursuant to which was issued a logbook, which in turn was used to report qualifying fishing trips.

The record in the case shows Appellant had one such Business License, number [REDACTED], using only Appellant's vessel in 2005 and in 2008. RAM credited Appellant with trips from Appellant's vessel taken pursuant to business license [REDACTED]. Since Appellant had only one Business License, it can only benefit from the properly recorded fishing trips associated with that Business License. RAM did in fact credit Appellant with the trips associated with Appellant's Business License, and because of those credits, RAM stated Appellant was eligible for one transferable permit. Based on my independent review of the case record, I see no error in RAM's analysis in the IAD as it is consistent with the CHLAP regulations (FOFs 1 and 2).

In reaching my decision, I am cognizant of the efforts Appellant's counsel makes on appeal to establish a claim based on the successor-in-interest provisions of the CHLAP regulations. For reasons that follow, however, I am not persuaded that Appellant can be deemed eligible for a second transferable permit based on a successor-in-interest theory.

Under the CHLAP regulations and the regulations that govern appeals from NMFS Alaska Regional office, a person who is adversely affected by an IAD may appeal to

³⁸ 50 C.F.R. § 300.67(f)(3).

³⁹ 50 C.F.R. § 300.67(f)(5).

⁴⁰ i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license. 50 C.F.R. § 300.67(b)(3).

⁴¹ 50 C.F.R. §§ 300.67(b)(1) and (3) and 300.67(c)(1).

OAA, now NAO.⁴² In the IAD, RAM based the denial of Appellant's request for a second transferable permit on the fact that the logbook history for which Appellant wanted credit, was associated with Seller's (not Appellant's) Business License and logbook. RAM took no position on whether Appellant was a successor-in-interest to Seller (FOFs 16, 17, and 18).

I am not in a position to resolve Appellant's successor-in-interest claim raised for the first time on appeal as it was not fully developed below. Initially, Appellant signed a sworn statement that he was not a successor-in-interest to anyone (FOF 6). RAM probed Appellant's intent in the Notice, mentioning a potential claim based on the successor-in-interest provisions of the CHLAP regulations, and providing Appellant with notice and opportunity to submit evidence to support a successor-in-interest claim (FOFs 13 and 14). Appellant did not respond to the Notice. RAM was not obliged to pursue the potential successor-in-interest matter further. In its IAD, there is no mention of a claim based on successor-in-interest because in fact there was no such claim before it. Similarly, I cannot review what is not before me.

I understand that Appellant's counsel went to some length to explain how Appellant could be seen as a successor-in-interest to Seller or Seller's business. However, NAO's function is to review IADs and determine if they are consistent with applicable regulations. Very rarely, and unless explicitly stated in applicable regulations, NAO's function is to make initial determinations about the merits of an application. RAM has the expertise and program knowledge and is charged with making initial determinations. In this case, RAM did not make an initial determination with respect to a successor-in-interest claim because Appellant did not assert such a claim.

Lastly, I note that although the issue is not before me as indicated above, LD's, to whom Appellant for the first time argues on appeal he is the successor-in-interest, has no reported logbook fishing trips for 2008. Appellant has not contested the fact that Seller/LD's did not report logbook trips in 2008. Yet one of the most fundamental regulatory requirements for a successor-in-interest claim is proof that the putative predecessor (in this case Seller/LD's), met the participation requirements for a permit.⁴³ Stated in summary fashion, those participation requirements are reporting five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and reporting five or more halibut logbook fishing trips during the recent participation period, namely 2008.⁴⁴ Since the record shows Seller/LD's reported no qualifying trips in 2008 (FOF 4), even if I entertained a claim for successor-in-interest on the merits, Appellant would not prevail.

⁴² 50 C.F.R. §§ 300.67(h)(6) and 679.43(b).

⁴³ 50 C.F.R. § 300.67(b)(1)(iii). See also 74 Fed. Reg. 18178, 18187 (April 21, 2009): 75 Fed. Reg. 554, 557 (January 5, 2010)(NMFS "will issue the number of permits for which the dissolved entity qualified"); 75 Fed. Reg. 554, 578, 585)(January 5, 2010)("NMFS will not recognize agreements that allow two businesses to match their logbook history to qualify for one or more charter halibut permits.").

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

