

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 on REMAND

STATEMENT OF THE CASE

On October 21, 2011, NAO issued a Decision for the captioned appeal. On January 17, 2012, the Regional Administrator (RA) for the National Marine Fisheries Service (NMFS), Alaska Regional Office, remanded the appeal to NAO. In his Remand, the RA ordered NAO to “resolve the merits of Appellant’s claims for a charter halibut permit as a ‘successor-in-interest’ to the previous owner of the vessel [REDACTED] (Vessel).

After receiving the remand, NAO asked RAM to analyze whether it believed Appellant qualified as a successor-in-interest since RAM had not previously done so. In response, RAM opined Appellant did not so qualify, among other reasons because seller’s business [REDACTED] (LD’s) and Appellant were not legally the same entity; there was no evidence seller (Seller) of LD’s was deceased (based on the theory that the individual owner of and business entity of solo proprietorship are one and the same), and; LD’s was not qualified to receive a charter halibut permit (CHP).

Appellant was provided with an opportunity to respond to RAM’s opinion. Appellant responded by stating he would rely on his previously submitted pleadings and documentation.

In addition to RAM’s opinion, Appellant was on notice by the CHP regulations that Seller had to meet the participation requirements in both periods in order for Appellant to be a successor-in-interest within the meaning of the CHP regulations. This was explained in the original Decision dated October 21, 2011:

...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.¹ 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 2008.² 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.

Throughout the proceedings of this appeal, including while pending before the RA and then after remand to NAO, Appellant has not presented evidence that Seller met the participation requirements for the recent participation period of 2008. Appellant bears that burden, and without presenting evidence that Seller met the participation requirements in 2008, Appellant cannot prevail.

In order to constitute a "predecessor" from whom Appellant could succeed, Seller needed to meet the participation requirements in both the qualifying period and recent participation period.³ I have found as a fact that Seller did not report any halibut logbook fishing trips in 2008;⁴ therefore, I conclude Seller did not meet the participation requirements to be eligible for a CHP. To be a "predecessor" from whom one may succeed, the predecessor has to meet the participation requirements in both periods, 2004 or 2005, and 2008. Since there is no evidence Seller completed and properly reported to the Alaska Department of Fish and Game (ADF&G) at least five halibut logbook fishing trips in 2008, Appellant cannot prevail in this appeal.

As indicated, in Appellant's response to RAM's response to NAO's Order for Written Opinion, he states he will be relying on the arguments and evidence in the record. Appellant presented his arguments by letter brief dated March 8, 2011.⁵

In the letter brief, Appellant's central arguments are first, that in or around the end of 2006, Appellant "merged" his business to one he bought, LD's. As part of the sale, Appellant argues, he bought LD's logbooks and vessel catch history. Appellant explains during the 2008 recent participation period Appellant's LLC operated LD's. From Appellant's perspective, Appellant's business and LD's are one and the same business entity: "[T]he term [in the CHP regulation] 'individual or non-individual

¹ 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.").

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

³ See 50 C.F.R. § 300.67(b)(1)(iii)(predecessor must meet "participation requirements described in paragraphs (b)(1)(ii)," namely five or more logbook trips in 2004 or 2005 and 2008).

⁴ See Finding of Fact 12 of original Decision incorporated into this Decision on Remand.

⁵ Pleadings Tab.

entity' should be interpreted as the business itself, and the current owner [Appellant] awarded the corresponding CHP."⁶

Second, Appellant argues he (or his business) are the successor-in-interest to LD's. In support of that argument, Appellant summarizes his interpretation of case-law definitions of the term "successor-in-interest." Appellant is cognizant of NMFS's policy not to allow two businesses to combine their logbooks as a means to qualify for a CHP.⁷ Appellant states that is not the situation at hand as he bought the entire business, not just Seller's catch history. Appellant notes that the Seller-individual ceased operations when he sold LD's to Appellant.

As discussed above, there is no dispute LD's did not meet the participation requirements for 2008. Therefore, Appellant has not shown the putative predecessor, LD's, qualified for a CHP. Since the regulations set the threshold criteria for a successor-in-interest claim as the putative predecessor meeting the participation requirements, logically, there is no need to reach other potential regulatory issues.

I note, however, the CHP regulations do not recognize Appellant's "merger" theory, and in fact, a solo proprietorship, like LD's, is a distinct legal entity from a limited liability corporation, as is Appellant's business.

Below, I quote the portions of the original Decision which are made part of this Decision on Remand. New text appears in italics.

The relevant events leading to this appeal begin on March 18, 2010 when [REDACTED] on behalf of [REDACTED] (collectively referred to in this Decision as Appellant) filed an application for a permit with NMFS's Restricted Access Management program (RAM).⁸ In response to Appellant's application, on August 3, 2010, RAM sent Appellant a "Notice of Opportunity to Submit Evidence" (Notice).⁹ 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.

Also in the Notice, RAM stated Appellant did not make a claim, nor was there adequate support in the record for, a finding that Appellant was

⁶ Pleadings Tab, letter brief dated March 8, 2011, page 4.

⁷ Pleadings Tab, letter brief dated March 8, 2011, page 5.

⁸ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with two-page attachment.

⁹ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010.

the successor-in-interest to Seller's business. RAM notified Appellant he had until September 2, 2010 to provide additional information in support of his claim. The record does not show Appellant submitted additional information in response to the Notice.

On January 7, 2011, RAM issued its denial of Appellant's permit application in an Initial Administrative Determination (IAD).¹⁰ RAM confirmed Appellant was eligible for one transferable permit. RAM also determined to not issue Appellant an additional transferable permit based on Vessel's logbook history: "Your claim is based upon your purchase of [Vessel] from Seller in 2006. Unfortunately, because [Appellant did not] obtain[] 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]."¹¹

On March 8, 2011, Appellant filed an appeal of the IAD with OAA [*Office of Administrative Appeals*]. On appeal, for the first time Appellant raises the contention he is the successor-in-interest to Seller's business, [REDACTED] (LD's). Appellant also asks for a hearing to demonstrate that in point of fact he qualifies as a successor-in-interest.

On April 21, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until May 23, 2011 to supplement the record.¹² The record does not show Appellant submitted additional information in response to NAO's April 21, 2011 letter.

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. I decline to order an oral hearing, as this case can be resolved on a legal issue and uncontested facts, as more fully explained in the Analysis section of this Decision. Accordingly, I close the record and issue this decision without ordering a hearing.¹³

ISSUES

The general dispute is whether Appellant is eligible for an additional transferable permit. To resolve the dispute, I must decide whether

¹⁰ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011.

¹¹ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011, page 4.

¹² Appeals Correspondence Tab, NAO letter dated April 21, 2011.

¹³ 50 C.F.R. § 679.43(g)(2) and (k).

Appellant has shown by a preponderance of the evidence that reported at least fifteen logbook fishing trips taken on Vessel in both 2005 and 2008.

Alternatively, I must decide whether Appellant is not a successor-in-interest to Seller because Seller did not meet the participation requirements in the recent participation period of 2008.

If the answer to th[ose] question[s] is “no,” then I must uphold the IAD.
FINDINGS OF FACT (FOFs)

1. In 2005, Appellant properly reported thirty-eight logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].¹⁴
2. In 2008, Appellant properly reported seventy-seven logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].¹⁵
 - 2a. *LD's is a solo proprietorship owned by Seller.*¹⁶
3. In 2005, LD's properly reported thirty-nine logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].¹⁷
4. In 2008, LD's reported no logbook fishing trips to ADF&G under Alaska Business License number [REDACTED].¹⁸
5. On March 18, 2010 Appellant timely filed his application with RAM for a CHP.¹⁹ 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

¹⁴ Original File Tab, Print Summary created January 26, 2010; Original File Tab, Charter Halibut Permit (CHP) Program, summary of Official Charter Halibut Record.

¹⁵ Original File Tab, Print Summary created January 26, 2010; Original File Tab, Charter Halibut Permit (CHP) Program, summary of Official Charter Halibut Record.

¹⁶ Pleadings Tab, Appellant's letter brief dated March 8, 2011, Exhibits A and E. Appeals' Correspondence Tab, RAM's Response to Order for Written Opinion, 3rd page. I also base this finding on the lack of evidence Appellant presented to prove the contrary.

¹⁷ 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.

¹⁸ Original File Tab, Print Summary created January 26, 2010. [I also base this finding on the lack of evidence Appellant presented to prove the contrary.]

¹⁹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with two-page attachment.

logbook fishing trips in 2008 that were reported under the applicant's ADF&G Business License."²⁰

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."²¹

7. Also on the application, under the block for claims, Appellant typed in: "Please see attache [sic] letter of explanation requesting second permit."²²

8. On the letter attached to Appellant's application, Appellant argued he should be credited with the logbook trips reported from Vessel in 2005.²³ Also attached to the application was a statement dated November 21, 2006 purportedly confirming the sale of Vessel to Appellant.²⁴

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).²⁵

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.²⁶

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 2005.²⁷ Based on the trips reported to ADF&G from Appellant's vessel, he was thought eligible for one transferable permit.²⁸

²⁰ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C, page 6.

²¹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C, page 1.

²² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C, page 2.

²³ Original File Tab, letter dated February 19, 2010 attached to Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

²⁴ Original File Tab, statement dated November 21, 2006 attached to Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

²⁵ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010.

²⁶ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010.

²⁷ 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.

²⁸ 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.

12. RAM stated in the Notice: “[Y]ou have not provided sufficient evidence to cause RAM to change the official record.”²⁹

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.³⁰ 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.”³¹

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.³²

15. Appellant did not respond with additional evidence in support of his claims by the September 2, 2010 deadline.³³

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.³⁴

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.³⁵

²⁹ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 1.

³⁰ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 2.

³¹ Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 3.

³² Original File Tab, Notice of Opportunity to Submit Evidence (Notice) dated August 3, 2010, page 4.

³³ 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.”

³⁴ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011.

³⁵ 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).

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].³⁶

19. Based on that analysis, RAM denied Appellant's request for a second transferable permit.³⁷

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 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).³⁸

To qualify for a CHP, a fundamental requirement is that an applicant must have proof of qualifying "bottomfish logbook fishing trips."³⁹ 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.⁴⁰

³⁶ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011, page 4.

³⁷ Original File Tab, Initial Administrative Determination, Notice of Right to Appeal, dated January 7, 2011, page 4.

³⁸ 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.")).

³⁹ 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).

⁴⁰ See 50 C.F.R. § 300.67(b)(1)(ii) and (c)(1).

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.⁴¹ 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.⁴²

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 2008.⁴³

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.⁴⁴

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.⁴⁵

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 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.⁴⁶

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS

⁴¹ See 50 C.F.R. § 300.67(b)(1).

⁴² See 50 C.F.R. § 300.67(b)(1)(iii).

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

⁴⁴ 50 C.F.R. § 300.67(f)(4).

⁴⁵ 50 C.F.R. § 300.67(f)(2).

⁴⁶ 50 C.F.R. § 300.67(f)(3).

uses the Official Record to implement the Charter Halibut Limited Access Program (CHLAP), including evaluating applications for charter halibut permits.⁴⁷

ANALYSIS

The *[first]* 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 License⁴⁸ 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).⁴⁹ 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).

The second issue is addressed in the first three pages of this Decision on Remand. Appellant is not eligible for a CHP based on his successor-in-interest claim.

CONCLUSIONS OF LAW

Appellant has not shown by a preponderance of the evidence that he held an ADF&G Business Owner License pursuant to which he was issued a logbook in which he reported at least fifteen logbook fishing trips taken on Vessel in both 2005 and 2008.

⁴⁷ 50 C.F.R. § 300.67(f)(5).

⁴⁸ 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).

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

Appellant has not shown by a preponderance of the evidence that he is the successor-in-interest to LD's because Appellant has not shown LD's met the participation requirements for 2008.

ORDER

NAO's Decision dated October 21, 2011 is vacated.

The IAD dated January 7, 2011 is upheld. This *Decision on Remand* takes effect thirty days from the date issued, May 7, 2012,⁵⁰ 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) 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 the tenth day after the date of this Decision, April 16, 2012. 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.



Eileen G. Jones
Chief Administrative Judge

Date issued: April 6, 2012

⁵⁰ 50 C.F.R. § 679.43(k) and (o).