

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

In re Application of

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Appellant

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Appeal No. 11-0044

ORDER DENYING MOTION
FOR RECONSIDERATION

On November 23, 2011, the National Appeals Office (NAO), a division within the National Marine Fisheries Service (NMFS), issued a Decision in this appeal. On December 5, 2011, NAO received Appellant's Motion for Reconsideration (Motion). Appellant's Motion was filed timely.

Pursuant to NAO's policy, a Motion for Reconsideration must state material issues of law or fact that the appellant believes the Administrative Judge misunderstood or overlooked and must contain an argument, or points and authorities, in support thereof.¹ I have carefully reviewed the Decision in this case and Appellant's Motion. I conclude the Decision does not contain material errors of law or fact. Accordingly, I deny Appellant's Motion.

Appellant makes the following arguments in his Motion: 1) that by requiring an applicant to have bottomfish charter recordings in a logbook that does not provide for recording halibut charter trips, NMFS, when determining Charter Halibut Permit (CHP) eligibility, is violating Appellant's due process and equal protection rights; 2) that Appellant qualifies as a successor-in-interest, that he did not buy only the catch history of another entity or buy the entity only to qualify for a CHP, and that he purchased the entire business several years prior to the CHP program; and 3) that because Appellant is a natural person rather than a corporate entity his equal protection rights have been violated. Appellant argues this is because the CHLAP regulations are inconsistent with the statute it interprets or implements.

Appellant also argues in his Motion that he should have received a hearing in his case. Appellant argues that at a hearing ADF&G personnel responsible for logbooks would testify why 2004 and 2005 logbooks did not include halibut, and why halibut charter reporting in logbooks was unreliable and wrongfully manipulated by false reporting. Appellant also argues that the lack of a hearing and subpoena power prevented him from obtaining 2004 and 2005 NMFS catch history and other evidence regarding the charter business he purchased from the seller.

¹ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>.

Appellant argues in his Motion that it is a violation of due process and equal protection for NMFS to require bottomfish charter recordings in a logbook that does not provide for recording halibut charter trips.

Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.² With respect to recording bottomfish trips, including halibut, those instructions provided as follows:

Bottomfish	
Primary Stat Area (Incl. Halibut)	The 6-digit area code where you caught most of the bottomfish on this trip. If you fished for bottomfish, but caught none, write the 6-digit code for the location fished the most time on this date and trip.
Maximum Rods Fished	The maximum number of rods/lines fished when targeting bottomfish (incl. halibut) and targeting salmon and halibut simultaneously. . . .
No. Boat Hours Fished	The number of boat hours that at least one rod/line was targeting bottomfish (incl. halibut) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew. . . . Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected. . . .
Notes and Examples – Rods, Boat Hours	
What species group was targeted? Example 1: One Target Salmon	. . . NOTE: If bottomfish are caught when targeting salmon only, record the number of bottomfish in the appropriate columns in the bottomfish section. . . .
Example 3: Two Targets Salmon <u>and</u> Bottomfish (including halibut) Simultaneously (i.e., mooching)	. . . [R]ecord the maximum number of rods and boat hours spent fishing simultaneously for salmon and bottomfish in the appropriate columns in BOTH the salmon and bottomfish sections.

² ADF&G Saltwater Logbooks for the years 2001 through 2011 are displayed on the NMFS, Alaska Region, website at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

<p>Example 4:</p> <p>A combination of any of the above</p>	<p>. . . [R]ecord the maximum number of rods and boat hours spent targeting salmon AND targeting both salmon and bottomfish (including halibut) simultaneously in the appropriate columns in the salmon section, and the maximum number of rod and boat hours spent targeting bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.</p>
<p>Special Notes and Instructions</p>	
<p>“Halibut”</p>	<p>The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to record your effort. Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (state area, no. rods, and boat hrs).</p>

The logbooks required individuals to record all bottomfish trips, including those in which halibut was the target. The instructions explained how an individual should record bottomfish trips targeting halibut. There were similar instructions in the 2005 ADF&G Saltwater Charter Vessel Logbook.

Appellant did not submit logbook pages to ADF&G reporting at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005). As stated in the Decision, since Appellant reported no qualifying trips for this period, he does not meet the minimum participation requirements for a CHP.³

Appellant also argues in his Motion that he qualifies as a successor-in-interest. As stated in the Decision, 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, 2008.⁴ Appellant purchased his business from the seller in 2007. At the point of sale, the seller did not satisfy the 2008 recent participation requirements. This is dispositive. Appellant does not qualify as a successor-in-interest. Appellant’s motive in acquiring his business from the seller is moot.

Appellant also argues in his Motion the CHLAP regulations are inconsistent with the statute it interprets or implements. The scope of the appeal process does not extend to evaluating the validity of the CHLAP regulations. Rather, the issue on appeal is whether the CHLAP regulations were correctly applied to Appellant.

³ Decision issued, page 5.

⁴ Decision issued, page 5.

Appellant claims he should have received a hearing. Appellant had multiple opportunities to submit evidence in support of his appeal. On February 23, 2011, Appellant's appeal was received.⁵ On April 21, 2011, NAO sent Appellant a letter notifying him that the office had received his appeal and requested that any additional documentation or information in support of his appeal be submitted to NAO by May 23, 2011.⁶ As noted in the Decision, because Appellant's record contained sufficient information on which to reach final judgment, a hearing was not needed in his case.⁷ Further, a hearing may only be ordered if Appellant demonstrated a genuine and substantial issue of adjudicative fact for resolution.⁸ Appellant did not articulate a material issue of fact, which if he proved, would help him prevail in his appeal. Appellant's arguments on appeal concerned alleged incorrect application of the law, definitions of legal terms, and alleged ambiguities in the ADF&G licensing process. Although these arguments raise legal and policy issues, a hearing will not be ordered on issues of policy or law.⁹

In summary, on reconsideration Appellant does not raise an issue that was overlooked in rendering the Decision. 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 is not eligible for a CHP as a successor-in-interest.

The new effective date of the Decision is March 12, 2012 subject to the Regional Administrator's review.¹⁰



Steven Goodman
Administrative Judge

Date Issued: February 10, 2012

⁵ Pleadings Tab, Appellant's appeal received February 23, 2011.

⁶ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

⁷ Decision issued, page 2.

⁸ 50 C.F.R. § 679.43(g)(3)(i).

⁹ 50 C.F.R. § 679.43(g)(3)(i).

¹⁰ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>; 50 C.F.R. § 679.43(o).