

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0086

ORDER DENYING MOTION  
FOR RECONSIDERATION

On October 21, 2011, I issued a Decision in this appeal.<sup>1</sup> I concluded that Appellant did not meet the participation requirement in the qualifying period and therefore was not eligible for a permit by initial issuance. As explained in the Decision, it would become final agency action on November 21, 2011, subject to the right of the appellant or Restricted Access Management Program (RAM) to seek reconsideration and subject to the right of the Regional Administrator for the Alaska Region to reverse, remand or modify the decision.<sup>2</sup>

Appellant requested an extension of time to file a motion for reconsideration.<sup>3</sup> I granted Appellant's request and extended the deadline to November 10, 2011.<sup>4</sup> On November 10, 2011, Appellant timely filed his Motion for Reconsideration.<sup>5</sup>

The National Appeals Office policy on reconsideration provides that the motion for reconsideration must state material matters of law or fact that the appellant believes the Administrative Judge misunderstood or overlooked.<sup>6</sup> I have carefully reviewed the Decision in this appeal and Appellant's Motion for Reconsideration.

For reasons that follow, I conclude that Appellant has not shown that the original Decision contains a material mistake of law or fact. Appellant did point out a mistaken reference on page 1 of the original Decision to Area 2C and, with this Order, I issue a Decision which corrects this error and an incomplete citation in note 26. I conclude that Appellant has not shown grounds for any other change in the original Decision.

1. Mistaken reference to Area 2C on page 1 of Decision.

Appellant points out that on page 1 of the Decision, I stated incorrectly that Appellant was seeking a permit for International Pacific Halibut Commission (IPHC) Area 2C,

<sup>1</sup> Decision (Oct. 31, 2011). All references to Decision will be to this Decision.

<sup>2</sup> Decision at 9. The Regional Administrator has that right pursuant to 50 C.F.R. § 679.73(k) and (o).

<sup>3</sup> Email from Appellant's Attorney, [REDACTED] to Mary Alice McKeen (Oct. 31, 2011).

<sup>4</sup> Email from Mary Alice McKeen to [REDACTED] (Oct. 31, 2011).

<sup>5</sup> Motion for Reconsideration (dated Nov. 10, 2011, rec'd Nov. 10, 2011).

<sup>6</sup> <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>.

which is roughly Southeast Alaska.<sup>7</sup> Appellant is seeking a permit for IPHC Area 3A, which is roughly Southcentral Alaska.<sup>8</sup> This was not a material mistake because the Decision analyzed Appellant's arguments and evidence which were directed toward Area 3A. The Decision noted that Appellant met the participation for a non-transferable permit through fourteen halibut logbook fishing trips in 2008, which occurred in Area 3A.<sup>9</sup> The Decision analyzed Appellant's arguments regarding his purchase of VESSEL. I apologize for the mistake but it did not affect anything material in the analysis of Appellant's arguments or evidence.

2. Appellant argues that he should receive credit for VESSEL's trips in 2004 and 2005 as a successor-in-interest to the prior owner of VESSEL.<sup>10</sup>

Although Appellant did not make this argument explicitly in his appeal, Appellant did argue that he purchased the [REDACTED] (VESSEL) and VESSEL's catch history from the prior owner of VESSEL. In his motion for reconsideration, he argues that he is a successor-in-interest based on the purchase of VESSEL and VESSEL's catch history. I will evaluate Appellant's successor-in-interest argument.

The successor-in-interest provision in the charter halibut regulation, 50 C.F.R. § 300.67(b)(iii), provides:

(iii) If the person is applying as a successor-in-interest to **the person** to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet **the participation requirements described in paragraphs (b)(1)(ii) of this section for one or more charter halibut permits**, NMFS will require the following written documentation:

(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. [emphasis added]

Appellant is not a successor-in-interest under this regulation for two reasons. First, to be a successor-in-interest, the applicant must be applying as successor to "the person"

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<sup>7</sup> Decision at 1 & note 3.

<sup>8</sup> For precise coordinates of Area 3A, see 50 C.F.R. § 300.61.

<sup>9</sup> Decision at 3, Finding of Fact 3 *citing* Official Record Print Summary (dated created Jan. 26, 2010) which credited Appellant with fourteen halibut logbook fishing trips *in Area 3A*.

<sup>10</sup> Appellant's Motion for Reconsideration at 6 – 11 (Nov. 10, 2011).

<sup>11</sup> Letter of Appeal from Appellant's Attorney (Dec. 28, 2010).

that met the participation requirements described in paragraphs (b)(1)(ii) of this section. Those requirements are the participation requirement in the qualifying period in paragraph (b)(1)(ii)(A)<sup>12</sup> and the participation requirement in the recent period in paragraph (b)(1)(ii)(B).<sup>13</sup>

Put another way, an applicant cannot be a successor-in-interest to a partial qualifying history. The applicant must be a successor-in-interest to “the person” that met both participation requirements. The “interest” must be an interest that would have been sufficient for the predecessor to receive a permit, had the predecessor not died, in the case of an individual, or the predecessor not been dissolved, in the case of a legal entity, such as a corporation.

Appellant is not a successor-in-interest because the prior owner of VESSEL is not a person that met the participation requirements in both periods. The prior owner did not meet the participation requirement in the recent period. Since the prior owner of VESSEL could not have earned a permit, Appellant cannot receive a permit as a successor-in-interest to the prior owner of VESSEL.

Second, and more obviously, Appellant is not a successor-in-interest because Appellant has not shown that the prior owner of VESSEL is an individual who has died or a legal entity that has been dissolved.

The successor-in-interest provision is completely consistent with the general, basic participation requirement that NMFS will issue a permit to “a person” that meets the timely application requirement and the participation requirements in the qualifying period and the recent period.<sup>14</sup> The successor-in-interest provision is completely consistent with the unequivocal regulatory history that NMFS may not issue a permit to a person who meets only one participation requirement through their own participation.<sup>15</sup>

### 3. Appellant argues that the lack of a hearing violates his right to due process.<sup>16</sup>

I did not hold a hearing because Appellant did not allege facts which, if true, authorize NMFS to issue him a charter halibut permit.<sup>17</sup> I am deciding this appeal pursuant to federal regulation 50 C.F.R. § 679.43. Under that regulation, an applicant does not have the right to a hearing if the applicant could not obtain the relief he requests through a hearing.<sup>18</sup> Appellant alleges that he meets the participation requirement in the

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<sup>12</sup> 50 C.F.R. § 300.67(b)(ii)(A).

<sup>13</sup> 50 C.F.R. § 300.67(b)(ii)(B).

<sup>14</sup> 50 C.F.R. § 300.67(b)(1)

<sup>15</sup> Decision 5 – 7. At note 26, the original decision quoted the proposed rule but the citation omitted the page number. The full citation in note 26 should have been Proposed Rule, 75 Fed. Reg. 18,178, 18,182 – 18,183 (Apr. 21, 2009). I made that change in the corrected Decision.

<sup>16</sup> Motion for Reconsideration at 3 – 4.

<sup>17</sup> Decision at 2 & note 8 *citing* 50 C.F.R. § 679.43(g)(3).

<sup>18</sup> 50 C.F.R. § 679.43(g)(3)(iii) (“ . . . A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate.”); 50 C.F.R. § 679.43(g)(3)(iv)(an appellant officer may order a hearing only if “[r]esolution of the factual issue in the way sought by the applicant is

qualifying period through trips taken by VESSEL because he purchased VESSEL, and VESSEL's catch history, in January 2008 and he believes that VESSEL took five or more bottomfish logbook fishing trips in 2004 or 2005.<sup>19</sup>

For purposes of deciding this motion, I assume that VESSEL did take five or more bottomfish logbook fishing trips in 2004 or 2005.<sup>20</sup> I also assume that Appellant and the prior owner of VESSEL intended to sell VESSEL's catch history with the vessel.<sup>21</sup>

Assuming those facts are true, Appellant did not show that the Decision overlooked any material point of law or fact in concluding that NMFS may not issue a permit to Appellant because **Appellant** is not a person that met **both** participation requirements.<sup>22</sup> The Decision did not overlook any material point of law or fact in concluding that NMFS may not recognize private agreements as a basis to issue a permit to a person who did not meet the participation requirements in both periods.<sup>23</sup>

Appellant has not shown that he has a due process right to a hearing when he has not shown that the appeal presents a factual dispute which requires resolution at a hearing. Assuming the facts, as stated by Appellant, he still does not meet the requirements for a permit.

4. Appellant argues that he was denied equal protection of laws as a natural person compared to a corporation.

Appellant states that the charter halibut regulation denies him equal protection because

he, as a natural person who bought a charter fishing business including the vessel, logbooks and catch history of the business, is denied eligibility based on the participation requirements he purchased, while a non-individual entity, such as a corporation or partnership, would be granted eligibility based on the same facts and purchase of the same assets.<sup>24</sup>

I do not have authority to declare a regulation invalid on the grounds that it violates equal protection. My responsibility is to interpret and apply the regulation as it was adopted by the Secretary of Commerce.

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adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.")

<sup>19</sup> Letter from Appellant to NMFS (with application)(Feb. 25, 2010); Letter of Appeal from Appellant's Attorney to OAA (Dec. 28, 2010).

<sup>20</sup> The Decision noted that the IAD stated that VESSEL did not take five or more bottomfish logbook fishing trips in 2004 or 2005. Decision at 8.

<sup>21</sup> Appellant introduced no evidence from the prior owner of vessel and it appears that Appellant and prior owner are at odds. Letter from Appellant's Attorney to OAA (Dec. 28, 2010)(asking for subpoena of application for charter halibut permit by prior owner and asking to depose her). I do not have authority to issue subpoenas. But even if I did, as noted above, assuming the facts most favorable to Appellant, he does not meet the participation requirement in the qualifying period for a permit.

<sup>22</sup> Decision at 5 – 6.

<sup>23</sup> Decision at 6.

<sup>24</sup> Motion for Reconsideration at 12.

I do not interpret the charter halibut regulation to allow an individual *or* a corporation to buy a vessel and a vessel's history and receive credit for the vessel's participation that occurred before the purchase. If a corporation had bought VESSEL and the fishing history of VESSEL, just as Appellant states that he did, I would also conclude that the corporation did not meet the participation requirement for a permit in the qualifying period.

#### CONCLUSION

I conclude that Appellant has not shown that the Decision contains a material error of law or fact. Accordingly, I deny Appellant's Motion for Reconsideration. I am issuing a corrected Decision to change the incorrect reference to IPHC area 2C on page 1 and to provide a complete citation in note 26. I make no other changes from the original decision.

The effective date of the corrected Decision is February 22, 2012, unless the Regional Administrator reverses, modifies or remands the Decision pursuant to federal regulation 50 C.F.R. 679.43(k) and (o).



Mary Alice McKeen  
Administrative Judge

Date issued: January 23, 2012