

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0111

ORDER DENYING MOTION for
RECONSIDERATION

On October 19, 2011, the National Appeals Office (NAO), a division within the National Marine Fisheries Service (NMFS), closed the evidentiary record and issued a Decision in this appeal. On October 28, 2011, [REDACTED] doing business as (dba) [REDACTED] [REDACTED] (collectively referred to herein as Appellant) submitted a timely motion for reconsideration of the Decision. In his motion, Appellant also requested an extension of time, until November 17, 2011, to supplement his motion. On October 31, 2011, NAO granted Appellant's request. On November 15, 2011, Appellant filed an eleven page supplement to his motion; the supplement includes a copy of Appellant's March 17, 2011 appeal paperwork.

A motion for reconsideration is not a new layer of appeal or an opportunity to present arguments or evidence that were available prior to the date the record closed. A motion for reconsideration must state material issues of law or fact the appellant believes were misunderstood or overlooked in the decision. In support of a motion for reconsideration, an appellant must include argument, or points and authorities in support thereof.¹

In his November 15, 2011 supplement, Appellant states: "I have never claimed that I met the criterion of the Final Rule CHLAP."² Since Appellant concedes he does not meet the requirements for a permit outlined in the Charter Halibut Limited Access Program (CHLAP) regulations, he cannot prevail in this appeal. Nevertheless, I will respond to the seven points of error Appellant asserts in his reconsideration paperwork.

First, Appellant requests an impartial third party to arbitrate his appeal. Appellant does not believe NAO, a division within NMFS, can fairly adjudicate his appeal.

As to Appellant's request for arbitration, the applicable regulations, both the Charter Halibut Limited Access Program's (CHLAP's)³ and NMFS's Alaska Region's Procedural

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

² Appellant's supplement received by NAO on November 15, 2011, Page 3.

³ 50 C.F.R. § 300.67 et seq.

Rules,⁴ do not provide a provision allowing arbitration. Therefore, Appellant's argument on this point is not a basis to overturn the Decision.

With respect to Appellant's concern about bias by NAO adjudicators, NAO is the division NMFS has charged with adjudicating appeals. NAO makes decisions, without improper interference, in a neutral, unbiased manner.

Second, Appellant asks NAO to re-visit its decision concerning one of the arguments Appellant raised originally; he identifies that argument as Item #2 in his March 17, 2011 paperwork. In essence, Appellant argues notice of the CHLAP was not sufficient for him as the Alaska Department of Fish and Game (ADF&G) did not properly notify him of NMFS's decision to regulate charter fishing.

ADF&G was not responsible for implementing the CHLAP. As the Federal agency responsible for administering the CHLAP, NMFS and the North Pacific Fishery Management Council (Council) were aware of the need to manage certain charter fisheries since 1993.⁵ In the Preamble to the Proposed Regulations, NMFS explained in some detail the history of management and regulatory development over charter fishing.⁶ Of particular import was the Council and NMFS's decision to establish a control date of December 9, 2005.

The Council determined that anyone entering the charter halibut fishery in and off Alaska after this date would not be assured of future access to that fishery if a limited access system of management was developed and implemented...In addition to public announcement of this action at its meeting in December 2005, the Council also published this date in its December 2005 and February 2006 newsletters...The Secretary also published a notice in the Federal Register on February 8, 2006.⁷

Third, Appellant takes issue with the lack of discussion about Appellant's interim permit in the Decision. Appellant explains that based on the interim permit, he has booked clients through 2012 and wishes to keep his interim permit to accommodate those clients.

The fact that Appellant was issued an interim permit has no effect on whether he is eligible for a "regular" permit. Appellant's interim permit advises Appellant that it is only good "until amended, revoked, suspended, or superseded."⁸

Further, the applicable regulations provide:

If the applicant applies for a permit within the specified application period and OAA accepts the applicant's appeal, but according to the information in the official charter halibut record, the applicant would not be issued any

⁴ 50 C.F.R. § 679.43 et seq.

⁵ CHLAP Proposed Rules, 74 Fed. Reg. 18178, 18179 (April 21, 2009).

⁶ CHLAP Proposed Rules, 74 Fed. Reg. 18178, 18179-18182 (April 21, 2009).

⁷ 75 Fed. Reg. 554, 560 (Jan. 5, 2010).

⁸ E-mail correspondence between NAO and RAM dated January 6, 2012. The correspondence and a copy of Appellant's permit were added to the appeals file under the Evidence Tab.

permits, the applicant will receive one interim permit with an angler endorsement of four (4).

...All interim permits will be non-transferable and will expire when NMFS takes final agency action on the application.⁹

As indicated in the applicable regulations, interim permits are revoked upon final agency action. Final agency action occurs after the administrative appeals process is exhausted, including review by the Regional Administrator following NAO's decision-making.¹⁰

Fourth, Appellant argues the Decision is in error because in the Principles of Law section, it does not mention the Halibut Act or the Magnuson-Stevens Act. Appellant suggests the CHLAP regulations cited in the Decision do not conform to the two statutes. At the core of Appellant's argument is his claim the CHLAP regulations did not follow statutory law because the regulations did not focus on stability in the fishery. Appellant explains that neither the Council nor NMFS had adequate evidence the CHLAP regulations were necessary to conserve a species.

Appellant's third argument extends beyond the scope of NAO's purview. NAO reviews Initial Administrative Determinations (IADs) to determine whether they were consistent, or not, with applicable program regulations,¹¹ in this case, the CHLAP rules.

Fifth, Appellant states the Council and NMFS violated the Halibut Act by not analyzing the issue of "optimal yield." Again, NAO's mission is not to evaluate the validity of NMFS's regulations, or whether NMFS's action in issuing regulations is consistent with statutory law.

Sixth, Appellant does not believe his claim of discrimination was adequately addressed in the Decision. Appellant explains he feels it is unfair that many villages without extensive historical participation in the halibut charter industry will receive permits, while he, an active participant, will not.

As indicated in the Decision, this appeal involves the Appellant and whether the IAD issued to him is consistent with applicable regulations. The applicable regulations require historical participation in two different time periods, 2004 or 2005 and 2008. By his own admission, Appellant does not have records proving sufficient participation (at least five reported bottomfish logbook trips in 2004 or 2005). Appellant also has not met his burden of proving he properly reported at least five halibut logbook trips for 2008. The fact that other applicants may qualify for a permit, does not show that Appellant does. Further, to the extent Appellant argues the community permit provisions¹² are unfair, that argument is beyond the scope of an administrative appeal.

⁹ 50 C.F.R. § 300.67(h)(6).

¹⁰ See 50 C.F.R. § 679.43(o).

¹¹ See 50 C.F.R. § 679.43(a).

¹² See 50 C.F.R. § 300.67(k).

Seventh, Appellant opposes use of 2004/2005 and 2008 as participation years. This argument was addressed in the Decision:

NMFS chose the years 2004/2005 and 2008 based on the best objective data that was available at the time the program and regulations were being developed.¹³ As explained by NMFS:

The [North Pacific Fishery Management] Council determined the level of minimum participation in both years—the historical, 2004 or 2005, and present participation, 2008—indicated a reasonable dependence on the charter fishing industry...[C]harter halibut businesses that participated only in the recent period but not in the historical period likely entered the fishery after the control date [December 9, 2005].¹⁴

NMFS also explained that the North Pacific Fishery Management Council ‘selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on participation in the charter halibut fishery when it acted in early 2007.’¹⁵ The year 2008 ‘was selected as the recent participation period because it is the most recent year for which NMFS has a complete record of saltwater charter vessel logbook data from’ ADF&G.¹⁶ Further, in several places in the preamble to the Final Rule, NMFS explained why it used 2004/2005 and 2008 for the participation periods. For example:

The [North Pacific Fishery Management] Council did not select a larger number of qualifying years because the normal entry and exit from the charter halibut fishery from year to year could result in more charter halibut permits than vessels participating in any one year with a qualifying period of too many years. The choice of combining minimum participation during a qualifying year and the recent participation year further serves the purpose of limiting the charter halibut permits to those businesses that have demonstrated a long-term commitment to the charter halibut fishery and gives consideration to present participation and historical dependence.¹⁷

¹³ 75 Fed. Reg. 554, 591-593 (January 5, 2010).

¹⁴ 75 Fed. Reg. 554, 560, 564 (January 5, 2010). NMFS explained in the preamble to the Final Rule that businesses that entered into the fishery after the control date were “discouraged from entry by announcing that their participation would not necessarily be recognized (71 FR 6442, February 8, 2006).”. 75 Fed. Reg. 554, 560 (January 5, 2010).

¹⁵ 75 Fed. Reg. 554, 564 (January 5, 2010).

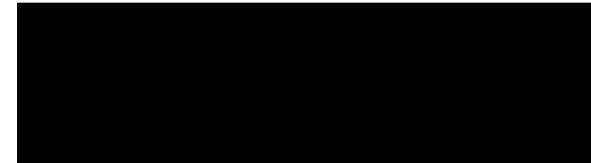
¹⁶ 75 Fed. Reg. 554, 555 (January 5, 2010).

¹⁷ 75 Fed. Reg. 554, 564 (January 5, 2010).

I understand Appellant thinks NMFS used “flawed reasoning” in adopting the years it did; however, NAO’s review is to determine whether the IAD is consistent with applicable regulations, not to decide whether NMFS’s policies are appropriate.

I have carefully reviewed the file, including the Decision and Appellant’s Motion for Reconsideration. I conclude the Decision does not contain material errors of law or fact. Accordingly, I deny Appellant’s Motion for Reconsideration.

The new effective date of the Decision is February 24, 2012, subject to the Regional Administrator’s review.¹⁸



Eileen G. Jones
Chief Administrative Judge

Date Issued: January 25, 2012

¹⁸ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>; 50 C.F.R. § 679.43(o).