

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

In re Application of



Appellant

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Appeal No. 10-0088

ORDER DENYING MOTION
FOR RECONSIDERATION

On October 28, 2011, I issued a Decision in this appeal.¹ 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, the Decision would become final agency action on November 28, 2011, subject to the right of Appellant or Restricted Access Management Program (RAM) to seek reconsideration by November 7, 2011, and subject to the right of the Regional Administrator for the Alaska Region to reverse, remand or modify the decision.²

Appellant requested an extension of time to file a motion for reconsideration.³ I granted Appellant's request and extended the deadline for him to file a motion for reconsideration to November 17, 2011.⁴ On November 16, 2011, Appellant timely filed a Motion for Reconsideration.⁵

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.⁶ 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 Decision contains a material mistake of law or fact.

¹ Decision (Oct. 28, 2011). All references to Decision in this Order will be to this Decision.

² Decision at 12 – 13. The Regional Administrator has that right pursuant to 50 C.F.R. § 679.73(k) and 50 C.F.R. § 679.73(o).

³ Email from Appellant to Mary Alice McKeen (Nov. 4, 2011).

⁴ Order Granting Request for Extension of Time to File Motion for Reconsideration and Staying Effective Date of Decision (Nov. 7, 2011).

⁵ Motion for Reconsideration (dated Nov. 11, 2011, rec'd Nov. 16, 2011).

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

ANALYSIS

The key fact in this appeal is that Appellant did not report five or more bottomfish logbook fishing trips under an Alaska Department of Fish and Game (ADF&G) Business Owners License issued to him in either year of the qualifying period, 2004 or 2005. Appellant did not report any bottomfish logbook fishing trips under an ADF&G Business Owners License issued to him in either of those years. Appellant does not dispute this.

In his appeal, and in his motion for reconsideration, Appellant seeks to meet the participation requirement in the qualifying period (2004, 2005) through his purchase of the assets of [REDACTED] (Seller 1), which was finalized on January 3, 2007,⁷ and through his purchase of [REDACTED] from [REDACTED] (Seller 2), which Appellant states occurred on December 24, 2006.⁸

Appellant met the minimum participation requirement in the recent period (2008) for a transferable permit: fifteen halibut logbook fishing trips with one vessel.⁹ Appellant took fifty-two logbook fishing trips with one vessel in 2008.¹⁰

Appellant argues that he met the minimum participation requirement in the qualifying period (2004 or 2005) for a permit because Seller 1 and Seller 2 met that participation requirement.¹¹ Appellant argues, alternatively, that he should receive a permit as a successor-in-interest to Seller 1 or Seller 2.¹²

The Decision did not overlook either argument by Appellant. The Decision concluded that an applicant cannot meet the participation requirement in the qualifying period by purchasing the assets of a business that met the participation requirement in the qualifying period.¹³

The Decision states that the charter halibut regulation is clear. An applicant must be ***“the individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements [for a permit.]”***¹⁴ Appellant was not that individual or non-individual entity in the qualifying period. The Decision noted that the regulatory history is equally explicit. NMFS does not have authority to grant a permit based on a private agreement

⁷ Decision at 3, Finding of Fact 2.

⁸ Appellant’s Motion for Reconsideration (Nov. 11, 2011). Appellant submitted fourteen pages of attachments with his motion. I have labeled Appellant’s attachments as Exhibit 1 to the motion and numbered them pages 1 through 14. The December 24, 2006 date is contained in an unsigned copy of a letter from Seller 2 to ADF&G dated September 9, 2008. Page 6, Exhibit 1 to Motion for Reconsideration.

⁹ 50 C.F.R. § 300.67(d)(1)(ii).

¹⁰ Decision at 3, Finding of Fact 6.

¹¹ Appellant’s Motion for Reconsideration (Nov. 11, 2011). The minimum participation requirement for a non-transferable permit is five bottomfish logbook fishing trips in 2004 or 2005. 50 C.F.R. § 300.67(b)(ii)(A). The minimum participation requirement for a transferable permit is fifteen halibut logbook fishing trips in 2008. 50 C.F.R. § 300.67(d)(1)(ii).

¹² Appellant’s Motion for Reconsideration (Nov. 11, 2011).

¹³ Decision at 6 – 8.

¹⁴ 50 C.F.R. § 300.67(b)(1)(ii) quoted in Decision at 7 (emphasis in Decision).

by a business owner that met the participation requirement in the qualifying period to sell that trip history to a business owner that met the participation requirement in the recent period.¹⁵

The Decision also addressed Appellant's successor-in-interest claim.¹⁶ The Decision concluded that an applicant can only receive a permit as a successor-in-interest if the applicant is a successor-in-interest to a person that met the minimum participation requirement for a permit in the qualifying period (2004, 2005) *and* recent period (2008).¹⁷ The "interest" must have been an interest that would have been sufficient to allow the prior person to receive a permit, if the prior person had been able to apply.¹⁸ Since Appellant states that he purchased both businesses in December 2006, it is not possible that Appellant can receive a permit as a successor-in-interest because neither Seller 1 nor Seller 2 could have met the minimum participation requirement in the recent period, 2008.

In his motion for reconsideration, Appellant appears to have misinterpreted the Decision. Appellant stated: "After receiving your conclusions of law I now clearly see what I needed to move forward in obtaining my permits. I have complied with all the necessary requirements that you kindly laid out in your judgment."¹⁹

Unfortunately for Appellant, the Decision did not lay out a path for Appellant to receive a permit. It stated that, assuming that the facts as stated by Appellant are true, namely that he purchased the assets of a business from Seller 1 and Seller 2, Appellant could still not receive a permit because Appellant only met the participation requirement in the recent period.²⁰

Appellant attached documents to his motion. Appellant had submitted all but four of those documents to RAM or with his appeal and therefore I had already reviewed them.²¹ The four new documents were as follows: a release from Seller 1 to Appellant for ADF&G logbook records; a release by Appellant to ADF&G for the same information; an unsigned copy of a letter from Seller 2 to ADF&G that Seller 2 sold a vessel to Appellant and that authorized Appellant access to the logbooks of that vessel; a printout from ADF&G of logbook trips by the vessel owned by Seller 1, which shows well over fifteen bottomfish logbook fishing trips in 2004 by that vessel.²²

¹⁵ Decision at 7 – 8.

¹⁶ Decision at 8 – 10.

¹⁷ Decision at 9 *quoting* 50 C.F.R. § 300.61(b)(1)(iii).

¹⁸ Decision at 9 – 10.

¹⁹ Motion for Reconsideration at 1 (Nov. 11, 2011).

²⁰ Decision at 7 ("However, even if both parties [to the sale] intended to transfer the seller's logbook fishing history to Appellant, NMFS does not have authority to do that."); Decision at 7 ("But assuming that Appellant and Seller 2 both intended to transfer the logbook fishing history of Seller 2 to Appellant, again, NMFS does not have authority to do that.").

²¹ The documents already submitted were pages 1, 4-5, 7 – 12 of Exhibit 1 to Appellant's Motion for Reconsideration.

²² These documents were pages 2, 3, 6, 13 - 14 of Exhibit 1 to Appellant's Motion for Reconsideration.

All the documents attached to Appellant's motion – either the new documents or the ones that I had reviewed before issuing the Decision – tend to prove one or four points: that Appellant purchased the assets of the business from Seller 1 or Seller 2; that the parties intended the purchase to include the logbook history of a vessel; that the vessels owned by Seller 1 met the participation requirement in the qualifying period for a permit; and, that Seller 2 should be treated as a dissolved corporation.

For purposes of the Decision, I assumed that all of those facts were true.²³ Appellant still cannot receive a permit because the charter halibut regulation only authorizes NMFS to issue a permit to [1] an applicant that met the participation requirements in **both** the qualifying period and the recent period or [2] an applicant that is applying as a successor-in-interest to a person that met the participation requirements in **both** periods. The Decision did not err in concluding that Appellant neither met the participation requirements in both periods himself nor is a successor-in-interest to a person that met the participation requirements in both periods.

ORDER

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. The new effective date of the Decision is February 27, 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 27, 2012

²³ With respect to the two vessels owned by Seller 1, I found that Seller 1 made eighty-nine bottomfish logbook fishing trips with these vessels in 2004. Decision at 3, Finding of Fact 1.