

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0063

DECISION ON REMAND

On November 15, 2011, NAO issued the initial Decision in this appeal. On December 14, 2011, the Regional Administrator (RA) for the National Marine Fisheries Service (NMFS), Alaska Regional Office, issued a stay of the Decision until January 13, 2012. On January 13, 2012, the RA issued a second stay of the Decision until January 27, 2012. On January 25, 2012, the RA issued an Order Remanding Decision remanding NAO's November 15, 2011, Decision to further develop the existing record. Specifically, the RA asked NAO to develop the record on [REDACTED] eligibility to receive a charter halibut permit (CHP) without the trips made by [REDACTED].

The RA directed NAO to provide Appellant an opportunity to submit additional materials concerning the number of bottomfish logbook fishing trips made by [REDACTED] during the qualifying period and the relationship of [REDACTED], [REDACTED], and [REDACTED]. The RA further directed NAO to consider any additional materials submitted and issue a supplemental decision.

Subsequent to the RA's Remand, NAO issued a Request for Information to Appellant requesting evidence necessary for NAO to comply with the RA's remand. On February 17, 2012, in response to this request, Appellant submitted the following documents:

- (1) A letter from Appellant's attorney.
- (2) A supplemental affidavit from [REDACTED]
- (3) A copy of a 2004 Alaska Department of Fish and Game (ADF&G) Saltwater Charter Vessel Logbook carbon copy, indicating [REDACTED] completed six bottomfish fishing trips in 2004.
- (4) A letter from [REDACTED], a former client of Appellant, stating that on September 28, 2004, she was a client of Appellant on a charter vessel trip.

(5) Appellant's 2004 appointment calendar listing [REDACTED] on September 28, 2004.

(6) A 2004 application for an ADF&G Business Owner License listing [REDACTED] as the owner of business (F/V [REDACTED] [REDACTED] [REDACTED])

(7) 2005, 2006, and 2007 ADF&G Business Owner Licenses listing [REDACTED] as the owner of [REDACTED]

(8) Copies of [REDACTED] initial and subsequent biennial reports.

(9) A 2008 ADF&G Business Owner License listing [REDACTED] as the owner of [REDACTED]

This Decision supplements the NAO Decision dated November 15, 2011.

ADDITIONAL FINDINGS OF FACT

1. [REDACTED] was incorporated on April 20, 2001.¹

ANALYSIS

The CHLAP regulations state that a CHP will only be awarded to the person who: first, applies for a permit and second, is the person (individual or non-individual entity) to which ADF&G issued the license that authorized logbook fishing trips.²

Appellant did not establish that Appellant is the same person (individual or non-individual entity) to which ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements in both the qualifying period, 2004 or 2005, and the recent participation period, 2008.

Appellant argues that [REDACTED] and [REDACTED] are the same person to whom ADF&G issued Business Owner Licenses in both participation periods. Appellant further argues that [REDACTED] was the owner of both these businesses and that she applied for ADF&G Business Owner Licenses for these businesses in 2004 and 2008. Appellant claims the above establish Appellant's eligibility for a CHP under the CHLAP regulations.

¹ Evidence Tab, Articles of Incorporation, [REDACTED] received February 17, 2012.

² 50 C.F.R. § 300.67(b)(1)(i)-(ii).

Under the CHLAP regulations, a person is the individual, corporation, firm, or association to which ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips.³

The Final Rule on the CHLAP states that two different businesses cannot combine their logbook histories to qualify for a permit, notwithstanding similarities in ownership in the qualifying period and the recent participation period.⁴

While [REDACTED] is a formally organized corporation, [REDACTED] is a sole proprietorship. These businesses, with different names, organizational forms and ownership structures, are two distinct “persons” under the CHLAP regulations. Though Appellant was the sole owner of both businesses, their logbook histories may not be combined to satisfy the minimum participation requirements for a permit.

Even if I were to accept Appellant was the same person under the CHLAP regulations during both participation periods, Appellant would still not qualify for a CHP.

Under the Charter Halibut Limited Access Program (CHLAP) regulations, minimum participation requirements for a CHP are five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and five or more halibut logbook fishing trips during the recent participation period, namely 2008.

In order to qualify for a CHP, Appellant must demonstrate by a preponderance of the evidence Appellant properly reported to ADF&G at least five bottomfish fishing trips in a logbook with the requisite information in both the qualifying and recent participation periods. Since Appellant agrees [REDACTED] took no bottomfish logbook fishing trips in 2005, the only relevant qualifying period year for review is 2004. The Official Record indicates [REDACTED] took only four bottomfish logbook fishing trips in 2004. Appellant must prove by a preponderance of the evidence, therefore, that the Official Record is incorrect and that [REDACTED] took a least one additional bottomfish fishing trip in 2004. In an attempt to meet that burden, Appellant submitted a client affidavit regarding a September 28, 2004, bottomfish fishing trip not included in the Official Record, Appellant’s 2004 calendar, and Appellant’s 2004 logbook copies, indicating bottomfish logbook fishing trips on September 28, 2004, and September 29, 2004, both of which do not appear in the Official Record. Appellant states her normal practice was to remove logbook top sheets and promptly mail them to ADF&G. Appellant concludes that because Appellant’s logbook top sheet for the page containing the additional trips is missing, Appellant mailed it to ADF&G.

³ See 50 C.F.R. §§ 300.61, 300.67. ADF&G Business Owner License is a regulatory term that includes a sport fish business registration and a sport fish business owner license. See 50 C.F.R. § 300.67(b)(3).

⁴ 75 Fed. Reg. 578 (January 5, 2010).

Appellant's testimony is not sufficient to find the Official Record is incorrect. Just because Appellant's claimed practice is to mail logbook top sheets to ADF&G it does not necessarily follow Appellant did so in the case of the alleged two additional 2004 bottomfish fishing trips. The Official Record does not indicate these alleged additional 2004 bottomfish trips were properly reported to ADF&G.

Merely taking trips is not sufficient to meet participation requirements. The regulations require that the bottomfish fishing trip was a) timely reported, b) in a logbook assigned to Appellant based on Appellant's business license, and c) with appropriate information. Appellant has not shown Appellant submitted logbook pages to ADF&G reporting at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005). At best, Appellant's evidence shows Appellant took charter trips, but not that Appellant reported them in the manner and by the deadline established by law. It is Appellant's burden to establish by a preponderance of the evidence that Appellant reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005. Given all of the evidence, I conclude Appellant has not carried that burden and that Appellant did not properly report more than four bottomfish logbook fishing trip to ADF&G in 2004.

CONCLUSIONS OF LAW

RAM correctly denied Appellant's application for a CHP. Appellant is not eligible for a CHP because Appellant did not prove by a preponderance of the evidence that Appellant is the same person that was issued the ADF&G Business Owner License that authorized logbook fishing trips that meet the minimum participation requirements in both 2004 or 2005 and 2008. Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004 or 2005.

The IAD is consistent with CHLAP regulations.

ORDER

The NAO Decision dated November 15, 2011, is supplemented by this Decision on Remand. The IAD dated January 11, 2011, is upheld. This decision is effective thirty (30) days from the date issued⁵, August 13, 2012, 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

⁵ 50 C.F.R. § 679.43(k) and (o).

