

NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION

NATIONAL MARINE FISHERIES SERVICE

ALASKA REGIONAL OFFICE

In re Application of)
[REDACTED]) Appeal No. 11-0039
Appellant) ORDER MODIFYING DECISION
_____)

**REGIONAL ADMINISTRATOR'S REVIEW AND MODIFICATION OF THE
DECISION ISSUED BY THE NATIONAL APPEALS OFFICE ON OCTOBER 12, 2011**

I have reviewed the Decision issued by the National Appeals Office on October 12, 2011 ("the decision"), in the appeal of [REDACTED] to the IAD denying a transferable charter halibut permit (Appeal No. 11-0039).

I concur with the hearing officer's disposition of this matter in the decision. I write, however, to modify the decision pursuant to my authority under 50 C.F.R. § 679.43(o)(1). I am modifying the decision in order to clarify the decision's potentially confusing characterization of the Council's motion. This characterization appears in the decision's discussion about the agency's specification of the recent participation period, on page 8 of the decision.

Appellants suggested that the National Marine Fisheries Service (NMFS) erred in its specification of 2008 as the recent participation period in the final rule to implement the Charter Halibut limited access system (letter from Appellant to NMFS, Feb. 14, 2010). Appellants asserted that they would have qualified for a transferrable permit if NMFS had specified 2009 or 2010 as the recent participation period.

NMFS's specification of a recent participation period was based on the Council's motion, which required applicants for a charter halibut permit to demonstrate the requisite number of logbook fishing trips "during 2004 or 2005 and year prior to implementation . . ." North Pacific Fishery Management Council Motion on Charter Halibut Moratorium in Area 2C and 3A (March 31, 2007), available at:
<http://fakr.noaa.gov/npfmc/PDFdocuments/halibut/CharterHalibutMotion307.pdf>.

The Council's motion contemplated that the "year prior to implementation" could be two years. As an example, the Council's motion cited 2007 and 2008 as possible years that could constitute the "year prior to implementation." Contrary to its characterization in the decision, the Council's

motion did not state that either 2007 or 2008 would necessarily constitute the “year prior to implementation.”

Accordingly, I make the following modifications to the decision:

1) Strike the following text from the third complete paragraph on page 8 and strike the accompanying text in footnote 52:

The Council motion stated that the year prior to implementation would be either 2007 or 2008.⁵²

2) Insert the following text between the third and fourth complete paragraphs on page 8:

The final rule explains the basis on which NMFS determined that the “year prior to implementation” is 2008. As explained in the final rule, NMFS interpreted the “year prior to implementation” to mean the most recent year for which a full year of logbook fishing trip data were available. See 75 Fed. Reg. 554 at 560 (“In the proposed rule (April 21, 2009, 74 FR 18178), NMFS interpreted the “year prior to implementation” for practical purposes to mean the most recent year for which participation data are available. The most recent year for which ADF&G saltwater log book data are available now is 2008. “); see also 75 Fed. Reg. at 555, 578, 596-97. When NMFS promulgated the final rule in early 2010, 2008 was the most recent year for which a full year of logbook fishing trip data were available. Because 2008 represented the “year prior to implementation,” as the agency interprets that clause in the Council’s motion, the final rule specified 2008 as the recent participation period. This specification of the recent participation period was consistent with the agency’s express interpretation of the Council’s motion.

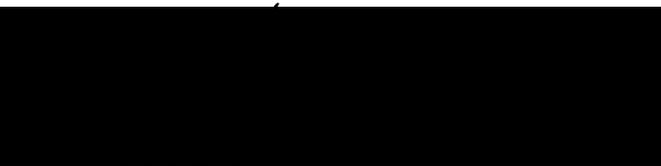
3) Strike the following text from the fourth complete paragraph on page 8:

Whatever the origin of this regulatory provision, the final regulation, as adopted specifies 2008 as the recent participation period.

4) Insert the following text at the beginning of the fourth complete paragraph on page 8:

The final regulation, as adopted, specifies 2008 as the recent participation period.

The modifications provided above do not affect the conclusions of law or disposition reached in the decision. With the modifications specified above, I affirm the October 21, 2011 Decision of the National Appeals Office in this matter, as the decision of the agency in this matter. I conclude that NMFS must deny Appellant’s application for a transferrable charter halibut fishing permit.



Dr. James W. Balsiger, Regional Administrator

11.10.11

Date

Cc: NAO, Records FAKR, GCAK