NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
OFFICE OF THE REGIONAL ADMINISTRATOR

In Re Application of	)	
	)	
[redacted]	)	**Appeal No. 11-0035**
	)	
	)	**ORDER MODIFYING**
Appellant.	)	**DECISION ON REMAND**
	)	

REGIONAL ADMINSTRATOR'S REVIEW AND MODIFICATION OF THE NATIONAL APPEALS OFFICE DECISION ON REMAND DATED APRIL 11, 2012

The National Appeals Office ("NAO") issued a Decision dated November 18, 2011, *In Re Application of* [redacted] Appeal No. 11-0035 ("Decision"). The Decision upholds the Initial Administrative Determination dated December 16, 2010, and denies the Appellant's application for a charter halibut permit under the general eligibility provisions, the successor in interest provision, and the unavoidable circumstances provision of the Charter Halibut Limited Access Program ("Program") regulations. On January 26, 2012, I issued an Order that affirmed the Decision's findings and conclusions with regard to Appellant's general eligibility and unavoidable circumstances claims, but that remanded to NAO that portion of the Decision concerning Appellant's successor in interest claim. Specifically, I directed NAO to address the issues of whether [redacted] is dissolved for purposes of the Program and whether Appellant is a successor in interest to [redacted]. After providing Appellant an opportunity to submit additional information on these issues and considering the information Appellant submitted, NAO issued a Decision on Remand dated April 11, 2012. The Decision on Remand supplements the November 18, 2011 Decision[1] and concludes that [redacted] does not meet the Program's participation requirements and that it is not dissolved, both of which are required elements for Appellant's successor-in-interest claim.[2] NAO established an effective date of June 28, 2012, for the Decision on Remand.[3] On June 27, 2012, I stayed the effective date of the Decision on Remand until July 6, 2012. I issued this stay to provide additional time for my review of the Decision on Remand pursuant to my authority under 50 C.F.R. § 679.43(o).

I have considered the entire record on this matter and completed my review of the Decision on Remand. While I concur with the hearing officer's determination that Appellant

[1] Decision on Remand at 2. The Decision on Remand incorrectly refers to the Decision as dated October 19, 2011. The Decision in this appeal is dated November 18, 2011.
[2] Decision on Remand at 4.
[3] Order Establishing New Effective Date of Decision on Remand.

does not meet the requirements for a successor in interest claim and therefore is ineligible to receive a charter halibut permit under the Program, I do not agree with all of the arguments set forth in the Decision on Remand as support for this conclusion. I write to supplement the basis for denying Appellant a charter halibut permit under the successor in interest provision. Pursuant to my authority under 50 C.F.R. 679.43(o)(1), I modify the Decision on Remand to support the agency's conclusion.

An applicant claiming to be a successor in interest must satisfy three requirements at 50 C.F.R. § 300.67(b)(1)(iii). First, as stated in the Decision on Remand, the applicant must "demonstrate the person he or she is claiming to be the successor to was issued an ADF&G Business Owner License authorizing logbook fishing trips, and that this person met the participation requirements for a permit."[4] If the applicant is applying as a successor in interest to an entity that is not an individual, as is the case here, the applicant must then document that the entity has been dissolved and that the applicant is the successor in interest to the dissolved entity.[5]

The person, or business entity, which Appellant is claiming to be the successor to is . Therefore, in order to satisfy the first requirement, must be a person to which ADF&G issued Business Owner Licenses that authorized logbook fishing trips that meet the qualifying period and the recent participation period requirements at 50 C.F.R. § 300.67(b)(1)(ii). According to the record, , is a limited liability company in which was a 98.5% shareholder.[6] was issued an ADF&G Business Owner License and reported more than the minimum number of trips required for the recent participation period.[7] However, reported no trips to ADF&G during the qualifying period.[8] , a sole proprietorship owned by , was issued an ADF&G Business Owner License for 2004 and reported more than the minimum number of trips required for the qualifying period.[9] reported no trips to ADF&G during the recent participation period.[10] Given these facts, the question to be answered is whether are the same person, thus satisfying the participation requirements for a charter halibut permit.

The Decision on Remand examines this question and concludes that are "two distinct 'persons' under the [Program] regulation."[11] The Decision on Remand notes that the businesses have different names, different organizational forms, and different ownership structures.[12] The Decision also refers to

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[4] Decision on Remand at 2; 50 C.F.R. § 300.67(b)(1)(iii).
[5] 50 C.F.R. § 300.67(b)(1)(iii)(B).
[6] Original File Tab, Alaska Division of Corporations, Business and Professional Licensing, Limited Liability Company Online 2007 Biennial Report. died in August 2009 (see Original File Tab, U.S. Department of State, Report of Death of an American Citizen Abroad).
[7] Decision at 3, Finding of Fact #2.
[8] Decision on Remand at 2, Additional Finding of Fact #1.
[9] Decision at 3, Finding of Fact #1.
[10] Original File Tab, printed summary .
[11] Decision on Remand at 3.
[12] Decision on Remand at 3.

statements in the final rule implementing the Program that the logbook histories of two different businesses cannot be combined to satisfy the minimum participation requirements for a permit.[13] However, in *In Re Application of* [redacted],[14] I found that the agency has considered certain businesses with different organizational forms and ownership structures across the participation periods to be the same business for purposes of Program eligibility. Particularly relevant to this case, the agency has considered a business to be the same business when the business was a sole proprietorship during the qualifying period and an LLC during the recent participation period, including instances when the ownership of the LLC was shared by the individual who had been the sole proprietor with other individuals.[15] There is nothing in the record or the Decision on Remand that indicates a conclusion different from the one in [redacted] should be reached in this case. Therefore, I find that [redacted] are the same business and that [redacted] met the participation requirements for a charter halibut permit.

The next requirement is that the entity to which Appellant claims to be the successor has dissolved. The Decision on Remand concludes that [redacted] is not dissolved, relying on Appellant's own statements that the LLC is not dissolved and the State of Alaska's ("State's") Corporations Division website listing the LLC as non-compliant rather than dissolved as the basis for this conclusion.[16] Also supportive of this conclusion is the State's recent institution of involuntary dissolution proceedings against [redacted]. On March 22, 2012, the State sent [redacted] a Sixty Day Notice of Pending Involuntary Dissolution or Revocation, ("Notice"), directing the LLC to come into compliance within sixty days from the date of the Notice, or by May 21, 2012.[17] The Notice stated that failure to bring the LLC into compliance by that date "may result in Involuntary Dissolution or Revocation of the entity's authority to transact business in the State of Alaska."[18] A recent examination of the State's Corporations Division's website shows that [redacted] is still listed as non-compliant.[19] All of this information support the conclusion that [redacted] is not a dissolved entity.

Because Appellant cannot demonstrate that [redacted] is dissolved, I could end my examination of this appeal at this point, as NAO did in the Decision on Remand. While agency determinations on charter halibut appeals cannot be stayed indefinitely while the State makes its decisions on corporate status, I am concerned that if left here, the resolution of Appellant's appeal could be viewed as being based on the lack of action by the State rather than the merits of Appellant's claim. Although [redacted] is not yet dissolved, dissolution appears imminent -- according to the State's website, the most recent Biennial Report for [redacted] was filed January 2, 2007, seeming to indicate that the LLC

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[13] Decision on Remand at 3.
[14] Charter Halibut Appeal No. 11-0026, Regional Administrator's Order Reversing Decision issued April 20, 2012.
[15] *In Re Application of* [redacted], Appeal No. 11-0026, Order Reversing Decision at 2-3.
[16] Decision on Remand at 3.
[17] Evidence Tab, Letter from The Corporations Section of the Alaska Division of Corporations, Business and Professional Licensing, to [redacted], dated March 22, 2012. According to the Notice, [redacted] is "Non-Compliant for failure to file one or more Biennial Reports and/or lack of required Registered Agent information."
[18] Id.
[19] *See* http://commerce.alaska.gov/CBP/Main/CorporationDetail.aspx?id=92977 visited on July 5, 2012.

remains out of compliance.[20] Therefore, the following considers whether Appellant would be considered a successor in interest under the Program if [redacted] was a dissolved entity.

Neither the regulations nor the preambles to the proposed and final rules define the term "successor in interest." However, the preamble to the proposed rule provides examples for a successor in interest to a dissolved non-individual entity:

> For example, a partnership has dissolved and two former partners submit separate and timely applications. If each applicant proves that they are a successor-in-interest to the partnership, NMFS would award the permits in the names of the two successors-in-interest that applied. Similarly, if a corporation qualifies for permits but has dissolved and three former shareholders of the corporation submit timely applications, each proving that they are a successor-in-interest to the corporation; NMFS would award the permits in the names of the three former shareholders. If only two of the three former shareholders submit timely applications, however, NMFS would award the permits in the names of the two former shareholders that submitted timely applications.[21]

These examples indicate that, for purposes of the Charter Halibut Program, successors in interest to a dissolved non-individual entity are those individuals who were partners in or shareholders of an entity that met the requirements for a permit. But for the dissolution, these partners or shareholders would have applied for a permit on behalf of the entity. [redacted] is a limited liability company with shareholders.[22] While I am unable to determine from the record who are the current shareholders of [redacted], the record contains no documentation demonstrating that Appellant is a shareholder. Appellant is not listed as a shareholder in the last biennial report filed by the LLC[23] and Appellant stated that he does not know who owns the 1.5% of the LLC not owned by [redacted].[24] Because Appellant cannot document that he is a shareholder in [redacted], he would not be a successor in interest to [redacted] under the Program even if the LLC was currently dissolved.

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[20] *See* http://commerce.alaska.gov/CBP/Main/[redacted] visited on July 5, 2012.
[21] 75 Fed. Reg. 18178, 18187 (April 21, 2009).
[22] Original File Tab, Alaska Division of Corporations, Business and Professional Licensing, Limited Liability Company Online 2007 Biennial Report.
[23] Id.
[24] Decision on Remand at 1.

As supplemented and modified by this Order, I affirm the April 11, 2012 Decision on Remand of the National Appeals Office as the decision of the agency in this matter. I conclude that NMFS must deny Appellant's application for a charter halibut fishing permit.

IT IS SO ORDERED.

Date: July 5, 2012

[redacted]

James W. Balsiger, Ph.D.
NOAA Fisheries, Alaska Region
Regional Administrator