

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0052

DECISION

STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, Maryland and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.¹

[REDACTED] doing business as [REDACTED] (Appellant) filed the appeal under review. Appellant is appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (permit or CHP).

On March 30, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).² The application was filed with RAM, who is responsible for reviewing and determining whether an applicant will receive a permit or permits.

In response to Appellant's application, on August 3, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).³ In the Notice, RAM advised Appellant the Official Record showed minimum participation requirements necessary to qualify for a permit had not been met. Specifically, the Notice indicated Appellant was not listed as the owner of [REDACTED] for the qualifying years (2004 or 2005) as well as the recent participation year (2008). Moreover, the Notice stated Appellant had not adequately supported a successor-in-interest claim. RAM set a September 2, 2010, deadline for Appellant to submit additional supporting evidence.

¹ 50 C.F.R. § 679.43.

² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 30, 2010, received March 30, 2010.

³ Original File Tab, Notice of Opportunity to Submit Evidence, dated August 3, 2010.

On August 24, 2010, Appellant responded to the Notice.⁴ Appellant indicated [REDACTED] was purchased from [REDACTED] (Prior Owner) on June 30, 2008. Appellant asserted that under the purchase agreement with Prior Owner, [REDACTED], was to be dissolved and that Appellant would become a successor-in-interest to [REDACTED]

On January 6, 2011, RAM sent Appellant the IAD at issue in this case.⁵ In its IAD, RAM denied Appellant a permit because for the lack of requisite logbooks as explained in the Notice. RAM stated Appellant did not qualify for a permit as a successor-in-interest. RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by March 7, 2011.

On March 4, 2011, Appellant appealed the IAD.⁶ Included in Appellant's notice of appeal was Appellant's Attachment to the Earnest Money Receipt and Agreement to Purchase,⁷ the Addendum to Appellant's Attachment to the Earnest Money Receipt and Agreement to Purchase,⁸ and a copy of Alaska's Revised Limited Liability Company Act.⁹ On April 21, 2011, NAO sent Appellant's counsel a letter notifying him that the office had received the appeal and requested that any additional documentation or information in support of the appeal be submitted to NAO by May 23, 2011.¹⁰ NAO did not receive any additional material from Appellant supporting the claim.

I have reviewed Appellant's appeal and the case record, and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing.¹¹

ISSUES

At issue in this appeal is whether Appellant is eligible for a CHP. To resolve this issue, I must evaluate the following:

1. Did Appellant prove by a preponderance of the evidence that he timely and properly reported to ADF&G at least five bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005)?

⁴ Original File Tab, type-written letter, dated August 20, 2010, received August 24, 2010.

⁵ Original File Tab, IAD dated January 6, 2011.

⁶ Pleadings Tab, Appellant's Notice of Appeal, received March 4, 2011.

⁷ Pleadings Tab, Attachment to the Earnest Money Receipt and Agreement, signed May 10, 2008, received March 4, 2011.

⁸ Pleadings Tab, Addendum to Earnest Money Receipt and Agreement to Purchase, fully executed January 31, 2009, received March 4, 2011.

⁹ Pleadings Tab, Revised Limited Liability Company Act

¹⁰ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

¹¹ 50 C.F.R. § 679.43 (g)(2), (k).

2. If the answer to the above question is “no,” did Appellant establish by a preponderance of the evidence that he is a successor-in-interest making him eligible to receive a CHP?

If the answer to that question is “no,” I must uphold the IAD and conclude Appellant does not qualify for a CHP.

FINDINGS OF FACT

1. [REDACTED], is an active entity that has not been dissolved.
2. [REDACTED], filed its biennial report on January 21, 2010.
3. In 2004, Appellant timely and properly recorded no bottomfish logbook fishing trips to ADF&G.¹⁴
4. In 2005, Appellant timely and properly recorded no bottomfish logbook fishing trips to ADF&G.¹⁵
5. In 2008, Appellant timely and properly recorded no halibut logbook fishing trips to ADF&G.¹⁶

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if an applicant meets certain requirements. If an Appellant seeks a permit because he is a successor-in-interest, among the requirements for establishing his claim is proof that the predecessor entity reported five or more bottomfish logbook fishing trips during one year of the qualifying period, either 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, 2008.¹⁷

¹² Original File Tab, Alaska Corporations Business and Professional Licensing, Filed Documents, [REDACTED]

[REDACTED] Original File Tab, Alaska Corporations Business and Professional Licensing, Filed Documents, [REDACTED]

[REDACTED] Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 30, 2010, received March 30, 2010.

¹⁵ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 30, 2010, received March 30, 2010.

¹⁶ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 30, 2010, received March 30, 2010.

¹⁷ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B)(iii); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

If the person is applying as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips for one or more charter halibut permits, NMFS will require the following written documentation: (A) If the applicant is applying on behalf of a deceased individual, the applicant must document that the individual is deceased, that the applicant is the personal representative of the deceased's estate appointed by a court, and that the applicant specifies who, pursuant to the applicant's personal representative duties, should receive the permit(s) for which application is made; or (B) If the applicant is applying as a successor-in-interest to an entity that is not an individual, the applicant must document that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.¹⁸

Minimum participation requirements to qualify for a charter halibut permit are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008.¹⁹

A "logbook fishing trip" means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.²⁰ The time limit to submit logbook fishing trips reports in 2008 was eight to fourteen days, as delineated in the 2008 Saltwater Charter Logbook.²¹

A "bottomfish logbook fishing trip" means a logbook fishing trip in the qualifying period that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: the statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²²

A "halibut logbook fishing trip" means a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: the number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.²³

¹⁸ 50 C.F.R. § 300.67(b)(1)(iii).

¹⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

²⁰ 50 C.F.R. § 300.67(f)(4).

²¹ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

²² 50 C.F.R. § 300.67(f)(2).

²³ 50 C.F.R. § 300.67(f)(3).

ANALYSIS

The first issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to be eligible for a CHP. Under the 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.

Appellant properly reported no logbook fishing trips to ADF&G in 2004, 2005, and 2008. Thus, Appellant does not meet the minimum participation requirements for 2004 or 2005, and also does not meet the minimum participation requirements for 2008. Since the CHLAP regulations require minimum participation in both 2004 or 2005 and 2008, Appellant does not meet the minimum participation requirements for a CHP.

The next issue I must resolve in this appeal is whether Appellant can obtain a CHP as a successor-in-interest. Under the CHLAP regulations, a putative successor-in-interest to an entity that is not an individual must document that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.

Appellant is applying as a successor-in-interest to [REDACTED]. As this company is an entity that is not an individual, Appellant must establish this company was dissolved. Appellant contends that [REDACTED] was dissolved upon Prior Owner's 2008 written submission that [REDACTED] would be dissolved.

The Alaska Division of Corporations Business and Professional Licensing (Division) lists the status of [REDACTED] as "Active." It is logical to conclude, therefore, that this company has not been dissolved. Moreover, according to the Division, [REDACTED] filed its biennial report in 2010. This is almost two years after Prior Owner's written submission that the company would be dissolved. Appellant provides no additional evidence, aside from Prior Owner's written submission, showing that the State of Alaska considers [REDACTED] a dissolved entity. Although Appellant has an agreement with Prior Owner that his company would be dissolved, Appellant has not established that this company was dissolved under the CHLAP regulations. As Appellant has not met his burden in showing that [REDACTED], [REDACTED], is a dissolved entity, Appellant is not a successor-in-interest to that entity.

In reaching my decision, I have carefully reviewed the entire record. I recognize Appellant's interest in his business. However, I am bound to follow the CHLAP regulations, and as such, Appellant does not qualify for a permit.

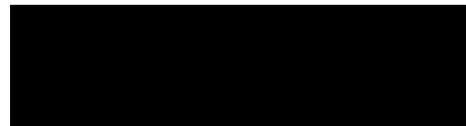
CONCLUSIONS OF LAW

Appellant is not eligible for a CHP under the CHLAP rules as Appellant did not prove by a preponderance of the evidence that he reported at least five bottomfish logbook fishing trips during either 2004 or 2005, and at least five halibut logbook fishing trips in 2008. Appellant has not established by a preponderance of the evidence that he met the requirements of 50 C.F.R. § 300.67(b)(1)(iii)(B). Appellant is not eligible for a CHP as a successor-in-interest to Prior Owner. The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated January 6, 2011, is upheld. This decision takes effect thirty days from the date issued, December 23, 2011, 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 Administrator reverses, modifies, or remands this decision pursuant to 50 C.F.R. § 679.43 (k), (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Standard Time on December 5, 2011, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.



Steven Goodman
Administrative Judge

Date Issued: November 23, 2011