

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0062

DECISION

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STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD 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 were filed with OAA. The undersigned is the administrative judge assigned to review and decide this matter.<sup>1</sup>

This appeal comes before NAO based on a timely appeal filed by [REDACTED] on behalf of [REDACTED] (Appellant). On March 14, 2011, Appellant appealed the Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM) dated January 19, 2011. In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (CHP or permit) pursuant to the regulations governing the Charter Halibut Limited Access Program (CHLAP).

The application referred to in the IAD was filed by Appellant on March 1, 2010.<sup>2</sup> In the application, Appellant indicated he took twenty-one logbook fishing trips in 2005, and thirty-one logbook fishing trips in 2008 on one unknown vessel and the vessel [REDACTED] (Vessel).<sup>3</sup> Appellant listed two businesses on its application, [REDACTED] in 2005 (Business) and [REDACTED] in 2008 (LLC).

After reviewing Appellant's file, RAM determined Appellant took no logbook fishing trips in 2008 for Business and took no logbook fishing trips in 2005 for LLC.<sup>4</sup> Without at least five logbook fishing trips reported in 2005 or 2008, Appellant did not meet the minimum

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<sup>1</sup> See 50 C.F.R. § 679.43.

<sup>2</sup> File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application), signed February 24, 2010, received March 1, 2010.

<sup>3</sup> Original File Tab, Application page 3.

<sup>4</sup> Original File, Print Summary, created on January 26, 2010.

participation requirement for a CHP. On August 26, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice). RAM indicated that Appellant must show that LLC is a successor-in-interest to Business and that Appellant was the sole owner in 2008 of the entity licensed in 2008 by the Alaska Department of Fish and Game (ADF&G) as LLC. In the Notice, RAM informed Appellant that he had thirty days to provide additional information that could establish his eligibility for a CHP.

On September 14, 2010, Appellant's accountant submitted a letter on Appellant's behalf explaining that LLC inadvertently listed additional owners.<sup>5</sup> The accountant indicated that prior to submitting his application, Appellant attempted to remove the additional names but was unsuccessful. Appellant also submitted a letter from ██████████ (Partners) indicating they never participated in the operation of LLC with Appellant.

On January 19, 2011, RAM issued the IAD at issue in this Appeal.<sup>6</sup> In the IAD, RAM denied Appellant's application for a CHP. RAM reasoned that the Official Record, which RAM uses to determine an applicant's eligibility, showed Appellant was not the individual or entity that the State of Alaska Department of Fish and Game (ADF&G) had issued the ADF&G Business Owner License to which authorized the logbook fishing trips in 2004 or 2005 that met the minimum participation requirements.<sup>7</sup> The IAD stated Business met only the participation requirements for the qualifying period 2005, and not the recent participation period, and that LLC met only the recent participation period 2008, and not the qualifying period. RAM stated Appellant did not qualify as a successor-in-interest.

On March 14, 2011, Appellant timely appealed the IAD to OAA.<sup>8</sup> In his appeal, Appellant renewed his claim that he participated in the 2005 and 2008 seasons, but did so under different business names. Appellant explained he ran a sole proprietorship in 2005, but decided to change his business name after a purchase of property in 2008.<sup>9</sup> After deciding to change the name of the business, Appellant filed for an ADF&G Business Owner License listing himself as well as three others on the license as the owners.<sup>10</sup>

On April 21, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until May 23, 2011 to supplement the record.<sup>11</sup> NAO did not receive any additional information from Appellant.

Upon review of Appellant's appeal and case record, I have determined that the record contains sufficient information on which to reach a final judgment. There is no disputed material issue of fact, and no need for a hearing for testimony on disputed factual

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<sup>5</sup> Original File Tab, Appellant's accountant's type-written response to RAM's Notice dated September 14, 2010.

<sup>6</sup> Original File Tab, IAD.

<sup>7</sup> Original File Tab, IAD.

<sup>8</sup> Pleadings File Tab, Appellant's appeal letter received on March 14, 2011.

<sup>9</sup> Pleadings File Tab, Appellant's appeal letter received on March 14, 2011.

<sup>10</sup> Pleadings File Tab, Appellant's appeal letter received on March 14, 2011.

<sup>11</sup> Appeals Correspondence Tab, NAO letter dated April 21, 2011.

issues. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.<sup>12</sup>

## ISSUES

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

Did Appellant establish by a preponderance of the evidence that he reported the minimum participation requirement of five halibut logbook fishing trips or more during the recent participation period of 2008 to ADF&G?

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

## FINDINGS OF FACT

1. In 2004, Appellant began Business.<sup>13</sup>
2. In 2005, Appellant was issued an ADF&G Business Owner License for Business.
3. In 2005, Appellant timely and properly reported twenty-one bottomfish logbook fishing trips to ADF&G for Business.<sup>14</sup>
4. In August 2006, Appellant formed LLC with Partners and his wife. Appellant relocated from the Kodiak area and built a new lodge.<sup>15</sup>
5. In December 2006, Appellant’s wife applied for and was issued an ADF&G Business Owner License. Appellant, Appellant’s wife, and Partners were all listed as owners on this license.<sup>16</sup>
6. For the years 2007, 2008, and 2009, Appellant operated LLC without any input from Partners.<sup>17</sup>
7. In 2008, Appellant timely and properly reported no halibut logbook fishing trips to ADF&G for Business.<sup>18</sup>

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<sup>12</sup> See 50 C.F.R. § 679.43 (g) and (k).

<sup>13</sup> Pleadings File Tab, Appellant’s appeal letter received March 14, 2011.

<sup>14</sup> Original File, Print Summary, created on January 26, 2010.

<sup>15</sup> Pleadings File Tab, Appellant’s appeal letter received March 14, 2011.

<sup>16</sup> Pleadings File Tab, Appellant’s appeal letter received March 14, 2011.

<sup>17</sup> Pleadings File Tab, Appellant’s appeal letter received March 14, 2011.

<sup>18</sup> Original File Tab, Application page 3.

8. In 2008, Appellant timely and properly reported thirty-one halibut logbook fishing trips to ADF&G for LLC.<sup>19</sup>

## PRINCIPLES OF LAW

In general, NMFS is only authorized to issue a CHP to an individual or entity that has been issued an ADF&G Business Owner License. These licenses can include business registration, sport fishing business owner license, sport fish business license, or ADF&G business license. With this license, one is then authorized to take qualifying logbook fishing trips.<sup>20</sup>

To establish one's history of bottomfish logbook fishing trips, one must record qualifying trips in a state-issued logbook. ADF&G issues logbooks to those who hold an ADF&G Business Owner License.<sup>21</sup>

To be eligible for a permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips during one year of the qualifying period, either 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the 2008 recent participation period.<sup>22</sup>

A "logbook fishing trip" means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.<sup>23</sup>

A "halibut logbook fishing trip" means a logbook fishing trip in the 2008 recent participation period that was reported to the ADF&G 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.<sup>24</sup>

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits.<sup>25</sup>

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<sup>19</sup> Original File, Print Summary, created on January 26, 2010.

<sup>20</sup> See 50 C.F.R. § 300.67(b)(1)(ii) and (3).

<sup>21</sup> 50 C.F.R. § 300.67(b)(1)(ii)

<sup>22</sup> 50 C.F.R. § 300.67 (b)(1)(i) and (ii)(A) and (B); 50 C.F.R. § 300.67 (f)(6) and (7).

<sup>23</sup> 50 C.F.R. § 300.67(f)(4).

<sup>24</sup> 50 C.F.R. § 300.67(f)(3).

<sup>25</sup> 50 C.F.R. § 300.67(f)(5).

## ANALYSIS

The issue before me is whether Appellant has shown by a preponderance of the evidence he reported to ADF&G a minimum of five halibut logbook fishing trips in 2008. A “halibut logbook fishing trip” means a logbook fishing trip in the 2008 recent participation period that was reported to the ADF&G 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.<sup>26</sup> Minimum participation requirements to qualify for a CHP require that an applicant reported five or more “halibut logbook fishing trips” taken in 2008.<sup>27</sup>

In his appeal, Appellant concedes he did not report any halibut logbook fishing trips to the ADF&G under his own business’s 2008 logbook, which the Official Record confirms. Since the minimum participation requirements include five or more “halibut logbook fishing trips” in 2008, RAM did not err in the IAD when it denied Appellant’s CHP application.

On appeal, Appellant argues NMFS should credit the trips he took under LLC’s Business Owner License. In support of that argument, Appellant submitted Partners’ statement dated September 7, 2010, which indicated they did not help Appellant operate LLC after its creation. Appellant contends that since Partners did not help operate the business, LLC was still technically a sole proprietorship and the logbook trips could be combined. However, since the trips Appellant references in his appeal were reported in a logbook issued to a new company which he created with three other persons as the ADF&G Business Owner License holders, the CHLAP regulations do not support issuance of a permit to Appellant.<sup>28</sup> Appellant by creating LLC with his wife and Partners, created a new entity wholly separated from Business. This is dispositive.

In reaching my decision about this case, I have carefully reviewed the entire file, including Appellant’s appeal documentation. I have considered Appellant’s argument that his business will experience hardships if a CHP is not awarded. However, I am bound to follow the CHLAP regulations, and as such, I am not authorized to provide Appellant relief under those regulations and facts of this case.

## CONCLUSIONS OF LAW

Pursuant to the CHLAP regulations, Appellant has not shown he properly reported a minimum of five halibut logbook fishing trips in 2008 to ADF&G.

<sup>26</sup> 50 C.F.R. § 300.67(f)(3).

<sup>27</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); 50 C.F.R. § 300.67(d)(1).

<sup>28</sup> 50 C.F.R. § 300.67(b)(2)(i)-(iii).

The IAD is consistent with the CHLAP regulations and Appellant is not eligible for a permit under the CHLAP rules.

### ORDER

The IAD dated January 19, 2011 is upheld. This decision takes effect thirty days from the date issued, December 23, 2011,<sup>29</sup> 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 elects to remand, reverse, or modify this decision pursuant to 50 C.F.R. § 679.43(k) and (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 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 in support of the motion.



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Steven Goodman  
Administrative Judge

Date Issued: November 23, 2011

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<sup>29</sup> 50 C.F.R. § 679.43(k) and (o).