

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0033

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] (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 23, 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 July 7, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).³ In the Notice, RAM advised Appellant that the Official Record showed that Appellant had not met the minimum participation requirements necessary to qualify for a permit. The Notice also explained that vessel ownership is not part of the CHLAP's criteria for a permit. RAM set an August 6, 2010, deadline for Appellant to submit evidence to show he met participation requirements in 2004 or 2005 and in 2008. On August 13, 2010, Appellant responded to the Notice by waiving his opportunity to submit additional evidence supporting his application.⁴

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 18, 2010, and received March 23, 2010.

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

⁴ Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence, signed August 5, received August 13, 2010.

On December 15, 2010, RAM sent Appellant the IAD at issue in this case.⁵ In its IAD, RAM denied Appellant a permit because he lacked the requisite logbook trips as explained in the Notice. RAM explained that there was no information in the Official Record beyond his application for a CHP and that the purchase of vessels that had been used in the charter fishing industry did not meet the CHLAP's eligibility standards. RAM stated that Appellant did not qualify for a permit as a successor-in-interest or under an unavoidable circumstance claim. RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by February 14, 2011.

On February 11, 2011, Appellant appealed the IAD.⁶ In his appeal, Appellant argues that he is the successor-in-interest to the charter fishing business and vessels he purchased in 2009 and 2010. He argues that he is eligible for a permit under the unavoidable circumstance provision of the CHLAP regulations. Appellant also claims that the regulations violate his due process rights because he entered the charter fishing business in 2009 in good faith and without actual notice that the CHLAP was in development.

On April 21, 2011, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by May 23, 2011.⁷ NAO did not receive any additional material from Appellant supporting his 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.⁸

ISSUES

The broad issue in this case is whether Appellant is eligible for a permit or permits under the CHLAP regulations. To resolve that issue, I must answer the following:

1. Is Appellant eligible to apply for a permit as a successor-in-interest?
2. Has Appellant established that he meets the threshold requirement for an unavoidable circumstance claim?

If the answer to these questions is "no," Appellant is not eligible for a permit, and I must uphold the IAD.

⁵ Original File Tab, IAD dated December 15, 2010.

⁶ Pleadings Tab, Appellant's letter of appeal received February 11, 2011.

⁷ Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

⁸ 50 C.F.R. § 679.43 (g)(2), (k).

FINDINGS OF FACT

1. In 2004, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.⁹
2. In 2005, Appellant timely and properly reported no bottomfish logbook fishing trips to ADF&G.¹⁰
3. In 2008, Appellant timely and properly reported no logbook fishing trips to ADF&G.¹¹
4. In 2009, Appellant entered the charter halibut fishing business by purchasing one vessel and a lodge. The lodge and vessel had been used in the charter fishing business since at least 2004.¹²
5. In 2010, Appellant purchased two more vessels for his charter fishing business. These vessels had been used in the charter fishing business since at least 2004.¹³

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS may only issue a charter halibut permit to the individual or entity to which ADF&G issued the ADF&G Business Owner License that authorized the logbook fishing trips that met the minimum participation requirements for a charter halibut permit.¹⁴ An ADF&G Business Owner License includes a business registration, a sport fish business owner license, a sport fish business license, and an ADF&G business license.¹⁵

As an exception to this general rule, NMFS may issue a charter halibut permit to an applicant under the successor-in-interest provision of the CHLAP regulations.¹⁶ An applicant may receive a permit as a successor-in-interest to the individual or entity to which ADF&G issued the Business Owner Licenses that authorized the qualifying logbook fishing trips in both the qualifying period and the recent participation period.¹⁷ If

⁹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 18, 2010, and received March 23, 2010.

¹⁰ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 18, 2010, and received March 23, 2010.

¹¹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 18, 2010, and received March 23, 2010.

¹² Pleadings Tab, Appellant's letter of appeal received February 11, 2011.

¹³ Pleadings Tab, Appellant's letter of appeal received February 11, 2011.

¹⁴ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁵ 50 C.F.R. § 300.67(b)(3).

¹⁶ 50 C.F.R. § 300.67(b)(1)(iii).

¹⁷ Fifty C.F.R. § 300.67(b)(1)(iii) provides that the person must be applying as a successor-in-interest "to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet *the participation requirements described in paragraphs (b)(1)(ii) of this section.*" (Emphasis added.) The participation requirements in paragraphs (b)(1)(ii) are the participation requirements in the

an individual met the minimum participation requirements, the applicant claiming to be a successor-in-interest to the individual must show that the individual died.¹⁸ If an entity, such as a corporation, met the minimum participation requirements, the applicant claiming to be a successor-in-interest must show that the entity has been dissolved.¹⁹

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 publication period, namely 2008.²⁰

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.²¹ The time limit to submit logbook fishing trips reports in 2008 was eight to fourteen days, as delineated in the 2008 Saltwater Charter Logbook.²²

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.²³

A “halibut logbook fishing tip” 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.²⁴

If an applicant does not qualify for a CHP based on the criteria outlined above, he may still be eligible for a permit if he meets the requirements of the unavoidable circumstance provision of the CHLAP regulations. Under the unavoidable circumstance provision as it applies to this case, an applicant for a CHP that meets the participation requirement for one of the participation periods, but not both periods, may receive one or more CHPs if the applicant proves the following:

- he had a specific intent to operate a charter halibut fishing business in the period in which he did not meet the minimum participation requirements;

qualifying period and the recent period. 50 C.F.R. § 300.67(b)(1)(ii)(A) (qualifying period) & (B) (recent period).

¹⁸ 50 C.F.R. § 300.67(b)(1)(iii)(A).

¹⁹ 50 C.F.R. § 300.67(b)(1)(iii)(B).

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

²¹ 50 C.F.R. § 300.67(f)(4).

²² Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

²³ 50 C.F.R. § 300.67(f)(2).

²⁴ 50 C.F.R. § 300.67(f)(3).

- his specific intent was thwarted by an actual circumstance that was unavoidable, unique to him as the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable, and;
- he took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in that participation period.²⁵

ANALYSIS

1. Is Appellant eligible to apply for a permit as a successor-in-interest?

In general, an applicant must meet 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 2008.²⁶ NMFS carved out an exception to this general rule for successors-in-interest. Under the successor-in-interest provision of the regulations as they relate to this case, an applicant must, as a preliminary matter, demonstrate that the entity met the minimum participation requirements for a permit before the entity dissolved.²⁷ An applicant must then provide written documentation that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.²⁸

Appellant explains that he purchased a lodge and three vessels that were used during both the qualifying period, 2004 or 2005, and the recent participation period, 2008. Appellant argues that because he paid market value for the vessels “on the assumption that they could be used in the charter halibut fishery,” he should be eligible for a permit under the successor-in-interest provision.²⁹

In the context of the CHLAP, Appellant’s argument lacks merit. NMFS may only award a permit to an applicant making a successor-in-interest claim if the dissolved entity met the participation requirements for a permit. I note that Appellant has not specified which, if any, entity he is applying on behalf of in his appeal; however, I am able to conclude that the evidence presented does not demonstrate that Appellant has met the preliminary requirement to establish that he may apply for a permit as a successor-in-interest. Appellant submitted no evidence that any of the vessels were used to complete five or more bottomfish logbook fishing trips during the qualifying period or five or more halibut logbook fishing trips during the recent participation period. Appellant has not demonstrated that his lodge was the holder of a Business Owner License that authorized a sufficient number of logbook fishing trips during both of the participation periods. Appellant merely stated that the vessels and the lodge “had been used in the

²⁵ 50 C.F.R. § 300.67(g)(1)(i)-(iv).

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

²⁷ See 50 C.F.R. § 300.67(b)(1)(iii).

²⁸ 50 C.F.R. § 300.67(b)(1)(iii)(B).

²⁹ Pleadings Tab, Appellant’s letter of appeal received February 11, 2011.

charter fishing business for many years, since at least 2004.”³⁰ I have reviewed the entire record, and I conclude that Appellant has not demonstrated by a preponderance of the evidence that his vessels or his lodge met the participation requirements of the CHLAP.

Since I conclude that, based on the evidence presented, Appellant’s vessels and lodge did not meet the minimum participation requirements for a permit, I do not address whether Appellant is a successor-in-interest under the CHLAP regulations.

2. Has Appellant established that he meets the threshold requirement for an unavoidable circumstance claim?

Since Appellant is not eligible for a CHP under the successor-in-interest provision, I must determine whether the unavoidable circumstance provision of the CHLAP regulations may provide a basis for Appellant to receive a CHP.³¹ Specifically, the question to resolve is whether the CHLAP regulations permit a claim of unavoidable circumstance for both periods of participation, 2004 or 2005, and 2008.

To qualify for a permit under this provision, an applicant must demonstrate, as a threshold matter, that he met the requirements in one of the relevant participation periods. An applicant must show he either: had five or more logbook fishing trips in 2004 or 2005, but an unavoidable circumstance thwarted his specific intent to operate a charter fishing business in 2008; or had five or more halibut logbook fishing trips in 2008, but an unavoidable circumstance thwarted his specific intent to operate a charter fishing business in 2004 or 2005.³²

Since Appellant has not established that he met the participation requirements for either the qualifying period or the recent participation period, he does not meet the threshold requirements for eligibility for a permit pursuant to the “unavoidable circumstance” exception under 50 C.F.R. § 300.67(g).

Appellant argues that he should not be required to meet the criteria of the unavoidable circumstance provision, that there should be an “exception.”³³ Appellant explains that he has invested thousands of dollars with the intent of operating a charter fishing business. While I recognize Appellant’s significant investments and his interest in continuing to fish for halibut, I am bound to follow the CHLAP regulations. I am not authorized to grant Appellant an “exception,” and as such, Appellant does not qualify for a CHP under the unavoidable circumstance provision.

³⁰ Pleadings Tab, Appellant’s letter of appeal received February 11, 2011.

³¹ See 50 C.F.R. § 300.67(g)(2).

³² See 50 C.F.R. § 300.67 (g)(1)&(2)(“An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period” or “[a]n application for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period,” may nevertheless receive a permit if he or she meets the unavoidable circumstance exception requirements.).

³³ Pleadings Tab, Appellant’s letter of appeal received February 11, 2011.

Appellant explains he did not receive actual notice that the CHLAP was in development before he made significant financial investments in the charter fishing industry. He also states that he relied on the representations of a NOAA employee who claimed Appellant would receive a permit.³⁴ I do not have authority to order that an applicant receive a permit because of an alleged discussion he or she had with a NOAA employee or because of a claim that the applicant had no notice of the development of the regulations. I am bound to decide CHLAP appeals based on the CHLAP regulations. I also note that in December 2005, the North Pacific Fishery Management Council (Council) adopted a control date of December 9, 2005, and NMFS published notice of the control date in the Federal Register in February 2006.³⁵ In the control date notice, NMFS explained that

anyone entering the charter sport fishery for Pacific halibut in and off Alaska after December 9, 2005 (control date) will not be assured of future access to that fishery. . . . This notice is intended to promote public awareness. . . and to discourage new entrants into the charter halibut fishery while the Council discusses whether and how access to the halibut resource by the charter sport fishery should be controlled.³⁶

Appellant entered the charter fishing industry in 2009, well after the publicized control date. I also note that the charter halibut fishing industry has been highly regulated for many years and that Appellant was on constructive notice of further developments. NMFS further explained this in response to a comment on the CHLAP's final rule:

[T]he Council has a long history of developing management measures for the charter halibut fishery, as described in the preamble to the proposed rule (74 FR 18178, April 21, 2009), and the control date notice published February 8, 2005 (71 FR 6442). Persons entering the charter halibut fishery for the first time after 2005 were on notice that their future access to that fishery was not assured.³⁷

Though Appellant's financial investment is noteworthy, it does not make him eligible to receive a permit under the regulations. In reaching my decision in this case, I carefully reviewed the entire record. However, based on the evidence provided and applicable regulatory provisions, Appellant does not qualify for a CHP.

³⁴ Pleadings Tab, Appellant's letter of appeal received February 11, 2011.

³⁵ Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 61 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>.

³⁶ Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 71 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>. See *also* Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 563-64 (Jan. 5, 2010).

³⁷ Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 563-64 (Jan. 5, 2010).

CONCLUSIONS OF LAW

Appellant is not eligible for a permit as a successor-in-interest because he did not prove by a preponderance of the evidence that his vessels or his lodge met the CHLAP participation requirements.

Appellant is not eligible to receive a permit under the unavoidable circumstance provision of the regulations because Appellant did not prove by a preponderance of the evidence that he participated in the charter halibut fishing business in at least one of the participation periods.

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated December 15, 2010, is upheld. This decision takes effect thirty days from the date issued, November 18, 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 the tenth day after the date of this Decision, October 31, 2011. 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.

[REDACTED]
Steven Goodman
Administrative Judge

Date Issued: October 19, 2011