

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

In re Application of

[REDACTED]

Appellants

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Appeal No. [REDACTED]

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] (Appellants) filed their appeal under review. Appellants are appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellants' application for a Charter Halibut Permit (permit or CHP).

On March 31, 2010, Appellants 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 Appellants' application, on August 3, 2010, RAM sent Appellants a Notice of Opportunity to Submit Evidence (Notice).³ In the Notice, RAM explained that for the recent participation year of 2008, Appellants were the owners of the business to which the Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner License authorizing logbook fishing trips (Discover Alaskan Adventures) and that this business met the criterion of a minimum of five halibut logbook fishing trips that year. RAM also indicated, however, that for Appellants' "applicant selected qualifying

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 29, 2010, received March 31, 2010.

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

[REDACTED]

year” of 2005, [REDACTED] (Prior Owner), and not Appellants, was the owner of [REDACTED] to which ADF&G issued the ADF&G Business Owner License authorizing logbook fishing trips for that year for that business. The Notice also stated Appellants had not made, or adequately supported, a successor-in-interest claim. RAM set a September 2, 2010, deadline for Appellants to submit additional evidence in support of their claim. On September 1, 2010, Appellants responded to the Notice.⁴ Appellants stated that in March 2007 they purchased [REDACTED] from Prior Owner, that they will submit a copy of the Partnership Dissolution Agreement signed by Prior Owner dissolving the partnership that [REDACTED] was operated under, and that [REDACTED] qualifies as a successor-in-interest to [REDACTED]

On January 18, 2011, RAM sent Appellants the IAD at issue in this case.⁵ In its IAD, RAM denied Appellants a permit because they lacked the requisite logbook trips as explained in the Notice. RAM stated Appellants did not qualify for a permit as a successor-in-interest. RAM noted Appellants had the right to appeal the IAD to OAA and that any appeal must be received by March 21, 2011.

On March 15, 2011, Appellants appealed the IAD.⁶ On April 21, 2011, NAO sent Appellants a letter notifying them that the office had received their appeal and requesting that any additional documentation or information in support of their appeal be submitted to NAO by May 23, 2011.⁷ Applicants did not submit any additional evidence to NAO in support of their appeal.

I have reviewed Appellants’ 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

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

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

If the answer to the above question is “no,” did Appellants establish by a preponderance of the evidence that Prior Owner properly recorded and reported the minimum amount of logbook fishing trips in 2004 or 2005 and

⁴ Original File Tab, type-written letter, dated August 20, 2010, received September 1, 2010.

⁵ Original File Tab, IAD dated January 18, 2011.

⁶ Pleadings Tab, type-written letter of appeal, dated March 15, 2010, received March 22, 2011.

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

⁸ 50 C.F.R. § 679.43 (g)(2), (k).

[REDACTED]

in 2008 thereby making Appellants eligible as a successor-in-interest to receive a CHP?

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

FINDINGS OF FACT

1. In 2004, Prior Owner timely and properly reported sixty-five bottomfish logbook fishing trips to ADF&G.⁹
2. In 2005, Prior Owner timely and properly reported forty-nine bottomfish logbook fishing trips to ADF&G.¹⁰
3. In 2004, Appellants reported no bottomfish logbook fishing trips to ADF&G.¹¹
4. In 2005, Appellants reported no bottomfish logbook fishing trips to ADF&G.¹²
5. In 2008, Appellants timely and properly reported one-hundred and twelve halibut logbook fishing trips to ADF&G.¹³
6. In March 2007, Appellants purchased [REDACTED] from Prior Owner.¹⁴

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 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, 2008.¹⁵

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 2008.¹⁶

⁹ Original File Tab, printed summary.

¹⁰ Original File Tab, printed summary.

¹¹ Original File Tab, printed summary.

¹² Original File Tab, printed summary.

¹³ Original File Tab, printed summary.

¹⁴ Original File Tab, type-written letter, dated August 20, 2010, received September 1, 2010

¹⁵ 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).

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

[REDACTED]

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.¹⁷

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.¹⁸

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.¹⁹

“Applicant selected year” means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and non transferable permits.²⁰

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued the ADF&G Business Owner License.²¹ This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.²²

ANALYSIS

The first issue I must resolve in this appeal is whether Appellants meet the minimum participation requirements to be eligible for a CHP. Under 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 2008.²³

Appellants properly reported one-hundred and twelve logbook fishing trips to ADF&G for 2008. Thus, Appellants meet minimum participation requirements for 2008. However, Appellants reported no qualifying trips for 2004 or 2005 to ADF&G. Since the CHLAP

¹⁷ 50 C.F.R. § 300.67(f)(4).

¹⁸ 50 C.F.R. § 300.67(f)(2).

¹⁹ 50 C.F.R. § 300.67(f)(3).

²⁰ 50 C.F.R. § 300.67(f)(1).

²¹ 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. 50 C.F.R. § 300.67(b)(3).

²² 50 C.F.R. § 300.67(b)(1)(ii).

²³ 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).

regulations require minimum participation in both 2004 or 2005, and 2008, Appellants do not meet the minimum participation requirements for a CHP.

The next issue I must resolve in this appeal is whether Appellants can obtain a CHP as a successor-in-interest.²⁴ Under the CHLAP regulations, a putative successor-in-interest must prove that its predecessor 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, 2008.²⁵ As NMFS states in pertinent part in the CHLAP regulations: “If [a] person is applying [for a permit] as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook trips *that meet the participation requirements described in paragraphs (b)(1)(ii) of this section,*” NMFS will require certain proof of the applicant’s status as successor-in-interest.²⁶ The participation requirements found in paragraph (b)(1)(ii) are “five (5) bottomfish logbook fishing trips or more during one year of the qualifying period [2004 or 2005]; and...five (5) halibut logbook fishing trips or more during the recent participation period [2008].”²⁷

Appellants purchased their business from Prior Owner in March of 2007. At the point of sale, Prior Owner was not eligible for a CHP since it had not satisfied the recent participation requirement of reporting at least five halibut logbook fishing trips in 2008. As a result, Appellants cannot establish eligibility based on the successor-in-interest provisions of the CHLAP regulations.

On appeal, Appellants argue they were given incorrect CHP eligibility information from ADF&G, and the Northwest Pacific Halibut Commission, that the qualifying period is an unfair requirement as it relates to their business, and that they invested a significant amount of money in their charter halibut business and that not receiving a CHP will cause them sever economic harm.

Although Appellants allege they received incorrect CHP eligibility information, this does not affect whether Appellants are eligible for a CHP under the CHLAP regulations. It is Appellants’ burden to show they qualify for a CHP under these regulations, and they have failed do to so.

Appellants state the qualifying period is an unfair requirement as it relates to their business. When it published the Final Rule implementing the CHLAP, NMFS considered the issue of CHP eligibility requiring demonstration of historical participation in halibut charter fisheries. After due consideration of comments received on the Proposed Rule, NMFS stated:

The Council selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on

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

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

²⁶ 50 C.F.R. § 300.67(b)(1)(iii)(emphasis added).

²⁷ 50 C.F.R. § 300.67(b)(1)(ii).

participation in the charter halibut fishery when it acted in early 2007. The Council did not select a larger number of qualifying years because the normal entry and exit from the charter halibut fishery from year to year could result in more charter halibut permits than vessels participating in any one year with a qualifying period of too many years. The choice of combining minimum participation during a qualifying year and the recent participation year further serves the purpose of limiting charter halibut permits to those businesses that have demonstrated a long-term commitment to the charter halibut fishery and gives consideration to present participation and historical dependence, factors that must be considered pursuant to the Halibut Act.²⁸

[2008] was selected as the recent participation period because it is the most recent year for which NMFS has a complete record of saltwater charter vessel logbook data from the State of Alaska Department of Fish and Game (ADF&G).²⁹

There are no provisions in the CHLAP regulations for alternate qualifying periods in determining CHP eligibility.³⁰

Although Appellants achieved the minimum participation requirements for the recent participation period of 2008, the CHLAP regulations do not allow successor-in-interest claims in which the applicant is not a successor-in-interest for both the qualifying and recent participation periods. CHLAP regulations provide 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 qualifying period and the recent period. 50 C.F.R. § 300.67(b)(1)(ii)(A) (qualifying period) & (B) (recent period).

In reaching my decision, I have carefully reviewed the entire record. I recognize Appellants’ financial hardship and interest in their business. However, I am bound to follow the CHLAP regulations, and as such, Appellants do not qualify for a permit.

CONCLUSIONS OF LAW

Appellants are not eligible for a permit under the CHLAP rules as they did not prove by a preponderance of the evidence that they reported at least five bottomfish logbook fishing trips during either 2004 or 2005. Appellants have not established by a preponderance of the evidence that Prior Owner met the requirements of 50 C.F.R. §

²⁸ Final Rule, 75 Fed. Reg. 554, 563 (January 5, 2010).

²⁹ Final Rule, 75 Fed. Reg. 554, 555 (January 5, 2010).

³⁰ 50 C.F.R. § 300.67.

[REDACTED]

300.67(b)(1)(ii)-(iii). Appellants are 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 18, 2011, is upheld. This decision takes effect thirty days from the date issued, November 30, 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).

Appellants 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 November 10, 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.

[REDACTED]

Steven Goodman
Administrative Judge

Date Issued: October 31, 2011