

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0100

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 Headquarters in Silver Spring, Maryland, and maintains an office in the NMFS Alaska Region. NAO is the successor to the Office of Administrative Appeals, Alaska Region (OAA), and is charged with deciding appeals that were filed with OAA. NAO decides these appeals pursuant to the procedure established in federal regulation 50 C.F.R. § 679.43.

On November 15, 2010, [REDACTED] doing business as (dba) [REDACTED] (Appellants), filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on September 17, 2010. Appellants can file this appeal because Appellants are directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b).

In the IAD, RAM determined that Appellants qualified for one transferable and one non-transferable charter halibut permit, endorsed for International Pacific Halibut Commission (IPHC) Regulatory Area 3A. IPHC Regulatory Area 3A is roughly Southcentral Alaska.¹ The transferable permit will have an angler endorsement of seventeen. The non-transferable permit will have an angler endorsement of eight.²

¹ For the precise coordinates of IPHC Area 3A, see 50 C.F.R. § 300.61.

² See 50 C.F.R. § 300.67(e) (1) – (5) (subject to a minimum angler endorsement of four, the angler endorsement on an applicant's first permit is the highest number of anglers the applicant took on a bottomfish logbook fishing trip with a vessel in 2004 or 2005; the angler endorsement on an applicant's second permit is the highest number of anglers the applicant took on a trip in 2004 or 2005 with a different vessel).

The IAD made three additional determinations. First, Appellants did not qualify for three transferable charter halibut permits because in 2008, Appellants used only one vessel that met the fifteen-trip requirement for a transferable charter halibut permit.³

Second, RAM determined that Appellants did not qualify as successors-in-interest within the meaning of the Charter Halibut Limited Access Program (CHLAP).⁴ Appellants claimed they were eligible for a second transferable charter halibut permit because they purchased a vessel from [REDACTED] (Seller) in September 2008 and the vessel had made fifteen or more charter halibut trips in 2008. However, according to information in the Official Record,⁵ Seller reported no halibut logbook fishing trips for Seller's business, [REDACTED] (Business) to ADF&G in 2008. The IAD also stated that Appellants had not shown they were the successors-in-interest to Business.

Third, Appellants could not upgrade the number of permits issued or change a non-transferable permit to a transferable permit under the unavoidable circumstance regulation in the CHLAP.⁶

In their appeal, Appellants argue that although Seller did not report Business's halibut fishing trips to ADF&G in 2008, Business did in fact complete at least fifteen halibut charters in 2008.⁷ Appellants also argue they are successors-in-interest to Business.

I conclude that the record contains sufficient information upon which to decide this appeal.⁸ I did not order a hearing because the alleged facts, if true, would not authorize NMFS to issue a charter halibut permit.⁹ I therefore close the record and issue a decision.

For reasons which I explain below, I conclude that RAM correctly determined that Appellants meet the requirements to receive one transferable and one non-transferable charter halibut permit and do not meet the requirements to receive a second transferable charter halibut permit.

³ See 50 C.F.R. § 300.67(d)(2) (an applicant will be issued a number of transferable licenses "equal to the lesser of the number of vessels that met the minimum transferable permit qualifications described in (d)(1)(i) or (d)(1)(ii) of this section").

⁴ See 50 C.F.R. § 300.67(b)(iii).

⁵ 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. See 50 C.F.R. § 300.67(f)(5).

⁶ See 50 C.F.R. § 300.67(g) ("Unavoidable circumstance claims will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. This unavoidable circumstance provision cannot be used to upgrade the number of permits issued or to change a non-transferable permit to a transferable permit . . .").

⁷ Letter from Appellants to OAA (Nov. 15, 2010). In documents submitted after their initial letter of appeal, Appellants demonstrated that Business completed twenty-one unreported halibut fishing trips in 2008. Chart "2008 Supporting Data for the f/v [REDACTED] Halibut Charters for Area 3-A" accompanying Letter from Appellant to NAO (Jan. 16, 2011).

⁸ 50 C.F.R. § 679.43(g)(2).

⁹ 50 C.F.R. § 679.43(g)(3).

ISSUE

Did Business meet the minimum participation requirements to receive a charter halibut permit?

FINDINGS OF FACT

1. In 2005, Seller reported Business's seventy-nine bottomfish logbook fishing trips to ADF&G.¹⁰
2. In 2008, Seller took twenty-one halibut fishing trips.¹¹
3. In 2008, Seller did not report any halibut fishing trips to ADF&G.¹²
4. On September 5, 2008, Seller sold his vessel to Appellants, along with any fishing rights Business had at the time.¹³
5. Appellants submitted a timely application for a permit on March 23, 2010.¹⁴

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.¹⁵ 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.¹⁶

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 regulation.¹⁷ 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.¹⁸

¹⁰ Official Charter Halibut Record (Jan. 27, 2010).

¹¹ Chart "2008 Supporting Data for the f/v [REDACTED] Halibut Charters for Area 3-A" accompanying Letter from Appellant to NAO (Jan. 16, 2011).

¹² IAD at 4.

¹³ Bill of Sale (received Mar. 25, 2010).

¹⁴ Application (Mar. 23, 2010).

¹⁵ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁶ 50 C.F.R. § 300.67(b)(3).

¹⁷ 50 C.F.R. § 300.67(b)(1)(iii).

¹⁸ 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

If 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.¹⁹ 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.²⁰

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 2008.²¹

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.²² The time limit to submit logbook fishing trips reports in 2008 was eight to fourteen days, as delineated in the 2008 Saltwater Charter Logbook.²³

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.²⁴

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.²⁵

ANALYSIS

Did Business meet the CHLAP’s minimum participation requirements to receive a permit?

Appellants argued that Business dissolved and they are a successor-in-interest to Business.²⁶ Appellants also informed NAO that Seller, the owner of Business, died.²⁷ I

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

¹⁹ 50 C.F.R. § 300.67(b)(1)(iii)(A).

²⁰ 50 C.F.R. § 300.67(b)(1)(iii)(B).

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

²² 50 C.F.R. § 300.67(f)(4).

²³ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

²⁴ 50 C.F.R. § 300.67(f)(2).

²⁵ 50 C.F.R. § 300.67(f)(3).

²⁶ Letter from Appellants to OAA (Nov. 15, 2010).

do not determine whether Appellants are successors-in-interest to Business because Appellants may only receive a permit as successors-in-interest to a Business (a corporation or other business entity) if the Business met the minimum participation requirements for a permit before Business dissolved.²⁸ Since I conclude that Business did not ever meet the minimum participation requirements for a permit, I do not address whether Appellants are successors-in-interest to Business.

To receive a non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005),²⁹ and a minimum of five halibut logbook fishing trips in the recent participation period (2008).³⁰ To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in the qualifying period (2004, 2005),³¹ and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).³²

Seller properly reported Business's seventy-nine bottomfish logbook fishing trips to ADF&G in 2005. Thus, Business met the minimum participation requirement for a transferable permit in the qualifying period based on its participation in 2005. However, Seller reported no halibut logbook fishing trips for Business in the recent period.³³ Since the CHLAP regulation requires minimum participation in both 2004 or 2005 and 2008, Business does not meet the minimum participation requirement for a CHP.

On appeal, Appellants explain that Business completed at least twenty-one halibut fishing trips in 2008. Appellants submitted evidence supporting this claim, summarized in a chart that includes the date fished, the number of clients, the number of halibut retained, the number of bottomfish retained, the booking company arranging the trip, and a contact person for each trip.³⁴ Appellants also provided emails from individuals who were involved in these trips. Appellants submitted detailed and organized records supporting the fact that Business completed halibut fishing trips in 2008. I have found that Business took these trips.³⁵

Appellants also submitted copies of letters sent to Seller requesting Seller's 2008 logbook for Business. Seller did not reply to Appellants' requests.³⁶ Even if Appellants could provide Seller's logbook, Seller did not submit any trip reports from that logbook to ADF&G in 2008. Appellants do not claim that Seller ever submitted his 2008 logbook trip reports for Business to ADF&G. Rather, Appellants are stating that the Official

²⁷ Email from Appellants to NAO (June 21, 2011).

²⁸ See 50 C.F.R. § 300.67(b)(1)(iii).

²⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A).

³⁰ 50 C.F.R. § 300.67(b)(1)(ii)(B).

³¹ 50 C.F.R. § 300.67(d)(1)(i).

³² 50 C.F.R. § 300.67(d)(1)(ii).

³³ IAD at 4.

³⁴ Chart "2008 Supporting Data for the f/v [REDACTED] Halibut Charters for Area 3-A" accompanying Letter from Appellant to NAO (Jan. 16, 2011).

³⁵ Finding of Fact 2.

³⁶ Email from Appellants to NAO (Apr. 13, 2011).

Record is incomplete because Business took these trips and, even though Seller did not submit trip reports to ADF&G, Appellants wish to report them now. If these trips were added to the Official Record, Business would have twenty-one halibut logbook fishing trips in 2008 and would meet the minimum participation requirements for a transferable permit.

In the context of the CHLAP, Appellants' argument lacks merit. Seller did not report Business's trips to ADF&G within the time limits for reporting the trips. A "halibut logbook fishing trip" is a regulatory term that means "a logbook fishing trip in the recent participation period [2008] 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."³⁷ The requirement that a trip was "reported" is restated in the regulation that establishes the minimum participation criteria for a transferable permit:

- (i) *Reported* fifteen (15) bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period; and
- (ii) *Reported* fifteen (15) halibut logbook fishing trips or more from the same vessel during the recent participation period.³⁸

In the proposed rule, NMFS addressed whether an applicant could add trips to the Official Record if the applicant had not reported them to ADF&G when the trips occurred:

A logbook fishing trip would be an event that was reported to ADF&G in a logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. . . . If a trip was not reported within those time limits, NMFS would not consider it a logbook fishing trip for purposes of this proposed rule, and it would not serve as the basis for NMFS to issue a charter halibut permit. *Hence, a permit applicant could not add a trip to the official record years after the trip should have been reported to the State.*³⁹

In the commentary to the final rule, NMFS restated that proposition:

As stated above, the basic unit of participation for receiving a charter halibut permit will be a logbook fishing trip, which is a trip that was reported to ADF&G in a saltwater charter logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. *If a trip was not reported within those time limits, NMFS will not consider it a logbook fishing trip for purposes of a charter halibut permit application.*⁴⁰

³⁷ 50 C.F.R. § 300.67(f)(3)(definition of halibut logbook fishing trip); 50 C.F.R. § 300.67(f)(4) (definition of logbook fishing trip).

³⁸ 50 C.F.R. § 300.67(d)(1)(i)-(ii) (emphasis added).

³⁹ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009) (emphasis added).

⁴⁰ Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010) (emphasis added).

Thus, the participation requirement is not simply that an applicant took a charter halibut trip but that the trip was reported in a logbook to ADF&G in accord with ADF&G time limits. These trips occurred between May and August 2008. Appellants sought to report them to NMFS first in November 2010 and then in more detail in January 2011.

The instructions contained in the 2008 ADF&G Saltwater Charter Logbook state that trips had to be reported weekly:

RETURN THE LOGBOOK REPORTS WEEKLY

All charter fishing activity that occurs between April 7, 2008 through December 31, 2008 must be received by ADF&G offices or postmarked per the **WEEKLY** schedule provided on the inside cover of this logbook.
Fishing activity that occurs prior to April 7, 2008, is due to ADF&G by April 14, 2008.⁴¹

I conclude that the twenty-one trips that Business took in 2008 are not “halibut logbook fishing trips,” as defined by federal regulation, because Seller did not report them to ADF&G. I therefore conclude that Business does not meet the participation requirement in the recent period for a transferable permit.

Thus, 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. As explained above, Business did not meet the minimum participation requirements for a permit because Seller did not report any of Business’s halibut fishing trips to ADF&G in 2008. Because this issue is determinative, I do not address whether Appellants are successors-in-interest to Business.

CONCLUSIONS OF LAW

1. Business did not meet the participation requirement in the recent period for a transferable or non-transferable charter halibut permit.
2. NMFS can only issue a charter halibut permit to an applicant applying as a successor-in-interest if the individual or entity to which the ADF&G Business Owner License that authorized logbook fishing trips met the participation requirements for a charter halibut permit.
3. NMFS does not have authority to issue a third charter halibut permit to Appellants under the successor-in-interest provision.
4. Appellants qualify for one transferable and one non-transferable charter halibut permit. Appellants do not qualify for any additional permits.

⁴¹ 2008 Logbook Instructions at iii (*italics added*). The weekly schedule was on the inside cover of the book.

ORDER

The IAD dated September 17, 2010 is upheld. This decision takes effect on March 5, 2012, unless by that date the Regional Administrator reverses, remands, or modifies 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 February 13, 2012, 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.


Mary Alice McKeen
Administrative Judge

Date Issued: February 2, 2012