

motion is that he questions why I issued a corrected Decision and an Order Denying Reconsideration on the same date and did not give him a separate chance to object to the corrected Decision.⁹ Since the changes in the corrected Decision were completely non-substantive, I did not intend to give Appellant the right to seek reconsideration of the corrected Decision. By having one opportunity to seek reconsideration of the original Decision, Appellant had received the right to seek reconsideration afforded him in the National Appeals Office policy on reconsideration.¹⁰ But the corrected Decision did give Appellant the right to file a second motion for reconsideration. He did that and I have considered the arguments in his second motion for reconsideration.

Appellant restates his argument that NMFS improperly issued charter halibut permits based on the number of bottomfish logbook fishing trips that an applicant took in 2004 or 2005 because, in those years, the Alaska Department of Fish and Game (ADF&G) did not require vessel operators to separately report halibut data.¹¹

Appellant does not claim that he ever took any trips in 2004 or 2005 under an ADF&G Business Owner License issued to him in 2004 or 2005.¹² Appellant has consistently argued that this claimed problem with the ADF&G data in 2004 and 2005 affected him because [1] Appellant bought [REDACTED] (VESSEL) from [REDACTED] (Seller) in 2008, [2] Appellant and Seller intended to transfer VESSEL's fishing history to Appellant and [3] VESSEL made, or may have made, five or more bottomfish logbook fishing trips in 2004 or 2005, even though, according to the official charter halibut record, VESSEL did not.¹³ Appellant argues that he has a due process right to a hearing to determine whether Appellant and Seller agreed to transfer VESSEL's fishing history to Appellant and to determine whether the official record is wrong and VESSEL made five or more bottomfish logbook fishing trips in 2004 or 2005.¹⁴

The Decision and the prior Order Denying Reconsideration did not overlook these claims. In the prior Order, I stated:

For purposes of deciding this motion, I assume that VESSEL did take five or more bottomfish logbook fishing trips in 2004 or 2005. I also assume that Appellant and the prior owner of VESSEL intended to sell VESSEL's catch history with the vessel.

Assuming those facts are true, Appellant did not show that the Decision overlooked any material point of law or fact in concluding that NMFS may not issue a permit to Appellant because **Appellant** is not a person that

⁹ Motion for Reconsideration at 1 – 2 (Feb. 1, 2012).

¹⁰ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>.

¹¹ Motion for Reconsideration at 2 – 5 (Feb. 1, 2012).

¹² Appellant's Application for Charter Halibut Permit at 3 – 4 (Feb. 25, 2010); Motion for Reconsideration (Feb. 1, 2012).

¹³ Motion for Reconsideration (Feb. 1, 2012). Decision (Jan. 23, 2012) at note 32 *quoting* the Initial Administrative Determination: "Furthermore, the Official Record does not show that this vessel met the minimum bottomfish logbook participation requirements in 2004 or 2005."

¹⁴ Motion for Reconsideration at 4 – 7 (Feb. 1, 2012).

met **both** participation requirements. The Decision did not overlook any material point of law or fact in concluding that NMFS may not recognize private agreements as a basis to issue a permit to a person who did not meet the participation requirements in both periods.

Appellant has not shown that he has a due process right to a hearing when he has not shown that the appeal presents a factual dispute which requires resolution at a hearing. Assuming the facts, as stated by Appellant, he still does not meet the requirements for a permit.¹⁵

In reaching the conclusion that NMFS may not recognize private agreements as a basis for eligibility, the Decision relied on the language of the charter halibut regulation at 50 C.F.R. § 300.67(b)(1) and NMFS's addressing this point explicitly in the proposed rule and final rule.¹⁶

Appellant restates his argument that he is a successor-in-interest to Seller.¹⁷ Appellant must prove that he meets the successor-in-interest provision in the charter halibut regulation, which is 50 C.F.R. § 300.67(b)(1)(iii). Appellant does not show that I overlooked any material point in the prior Order Denying Motion for Reconsideration when I concluded that Appellant is not a successor-in-interest under 50 C.F.R. § 300.67(b)(1)(iii) for two reasons. First, Seller did not meet the participation requirement in the qualifying period and the recent participation period.¹⁸ Second, Appellant has not shown that Seller is either an individual who has died or a corporation that has dissolved.¹⁹

Appellant restates his argument that he is being denied equal protection because he could have purchased the fishing history of VESSEL if he had been a corporation.²⁰ Appellant does not show that I overlooked any material point in the prior Order Denying Motion for Reconsideration.

First, I do not have authority to declare a regulation invalid based on an equal protection challenge.²¹ My responsibility is to interpret and apply the regulation, as it was adopted by the Secretary of Commerce. Second, I do *not* interpret the charter halibut regulation to allow corporations to receive a charter halibut permit based on a purchase of a vessel's fishing history: "If a corporation had bought VESSEL and the fishing history of VESSEL, just as Appellant states that he did, I would also conclude that the corporation did not meet the participation requirement for a permit in the qualifying period."²² I interpret the regulation the same for individuals and corporations.

¹⁵ Order Denying Motion for Reconsideration at 4 (Jan. 23, 2012)(footnotes omitted)(emphasis in original).

¹⁶ Decision at 5 - 6 *quoting* Proposed rule, 75 Fed. Reg. 18,178, 181,182 – 18,183 (Apr. 21, 2009), Final Rule, 75 Fed. Reg. 554, 585 (NMFS Response to Comment 105)(Jan. 5, 2010).

¹⁷ Motion for Reconsideration at 6 – 11 (Feb. 1, 2012)

¹⁸ Order Denying Motion for Reconsideration at 2 – 3 (Jan. 23, 2012).

¹⁹ Order Denying Motion for Reconsideration at 3 (Jan. 23, 2012).

²⁰ Motion for Reconsideration at 11 – 13 (Feb. 1, 2012).

²¹ Order Denying Motion for Reconsideration at 4 (Jan. 23, 2012).

²² Order Denying Motion for Reconsideration at 5 (Jan. 23, 2012).

CONCLUSION

I conclude that Appellant has not shown that the Decision, dated January 23, 2012, contains a material error of law or fact. Accordingly, I deny Appellant's Motion for Reconsideration. The new effective date of the Decision, dated January 23, 2012, is March 19, 2012, unless the Regional Administrator reverses, modifies or remands the Decision pursuant to federal regulation 50 C.F.R. 679.43(k) and (o).

A black rectangular redaction box covers the signature of the Administrative Judge. A small handwritten mark is visible below the redaction.

Mary Alice McKeen
Administrative Judge

Date issued: February 17, 2012