

NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION

NATIONAL MARINE FISHERIES SERVICE

ALASKA REGIONAL OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal No. 11-0058

ORDER REMANDING

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**REGIONAL ADMINISTRATOR'S REMAND OF THE DECISION ISSUED BY THE  
NATIONAL APPEALS OFFICE ON OCTOBER 21, 2011**

I have reviewed the National Appeals Office (NAO) Decision dated October 21, 2011, *In Re Application of* [REDACTED] Appeal No. 11-0058 ("the Decision"). I previously issued an order on November 17, 2011 to stay the Decision until January 17, 2012 to allow for my further review. Pursuant to my authority under 50 C.F.R. § 679.43(o), I remand this matter to the National Appeals Office to take appropriate action consistent with this order.

[REDACTED] ("Appellant") applied for two charter halibut permits. The Restricted Access Management division issued its Initial Administrative Determination ("IAD") on January 7, 2011, which concluded that Appellant is entitled to receive one transferable charter halibut permit, but is not entitled to receive a second transferable charter halibut permit. The Decision upholds the IAD and likewise concludes that Appellant is not entitled to receive a second transferable charter halibut permit. The Decision notes that Appellant argued on appeal that it is entitled to a second transferable charter halibut permit under a provision of the charter halibut regulations that allows permits to be issued to a "successor-in-interest" to the entity that properly reported requisite number of logbook fishing trips to the Alaska Department of Fish and Game. The Decision, however, declines to address this argument on the merits because Appellant did not present the argument to the Restricted Access Management division of this agency before the IAD was issued. The Decision states:

I am not in a position to resolve Appellant's successor-in-interest claim raised for the first time on appeal as it was not fully developed below. ... NAO's function is to review IADs and determine if they are consistent with applicable regulations. Very rarely, and unless explicitly stated in applicable regulations, NAO's function

is to make initial determinations about the merits of an application. ... In this case, RAM did not make an initial determination with respect to a successor-in-interest claim because Appellant did not assert such a claim.

Decision at 8. The Decision does not cite any provision of the appeal regulations, the charter halibut regulations, nor any other source of authority that supports its narrow view of NAO's function or its declination to resolve the merits of Appellant's "successor-in-interest" claim.

The regulations that establish the procedures to be followed in this appeal provide that "any person whose interest is directly and adversely affected by an initial administrative determination may file a written appeal."<sup>1</sup> Those regulations specifically address the scope of review by the appellate officer: "The appellate officer will limit his/her review *to the issues stated in the appeal*; all issues not set out *in the appeal* will be waived."<sup>2</sup> The regulations do not, however, provide that an appellate officer may decline to review specific legal theories that were not previously presented to the Restricted Access Management division and addressed in the initial administrative determination. Nor do the regulations inform would-be appellants that specific claims or legal theories offered in support of an appeal will be waived in such circumstances.<sup>3</sup>

Through prior adjudications under these appeal regulations, the Alaska Region of NMFS has established a policy that favors broad construction of an applicant's claim for limited access permits or privileges so that NMFS can decide applications, and by extension appeals, on the merits. For example, the Office of Administrative Appeals decision in *In re Application of* ██████████ explains:

as a matter of policy, NMFS *prefers* deciding whether an applicant actually meets the substantive requirements for a license over denying an application because it is late. This policy lets NMFS get to the merits of as many applications as possible. This policy is consistent with this Office's approach in ██████████ where we broadly construed an applicant's IFQ claim and decided it on the merits rather than deciding it was untimely:

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<sup>1</sup> 50 C.F.R. § 679.43(b).

<sup>2</sup> 50 C.F.R. § 679.43(f) (emphasis added).

<sup>3</sup> Even if the regulations provided for waiver of "issues" not raised in an application to, or other correspondence with, the Restricted Access Management division, it is not clear that this appeal would present such a circumstance. The Appellant applied for a second charter halibut permit based on the halibut logbook fishing trips and bottomfish logbook fishing trips reported for the vessel ██████████. Broadly conceived, the "issue" raised by Appellant's application is whether Appellant may receive a charter halibut permit based on the halibut logbook fishing trips and bottomfish logbook fishing trips taken by that vessel. The specific legal theory presented on appeal—whether Appellant may qualify as a "successor-in-interest" to the vessel's previous owner—is arguably encompassed within this broader issue.

