

was less than 12 months old.⁸ Appellant further asserted “[t]here [was] no valid reason” for him to obtain a more recent AOT, because in past years RAM had qualified him for HMPs so long as the AOTs he submitted were less than 12 months old.⁹ Appellant closed his email by stating, “Please process my application with the [AOT] submitted. Otherwise, please inform me of my appeal rights.”¹⁰

On February 25, 2019, at 3:05 p.m., RAM responded to Appellant, again requesting he submit a more recent AOT for Vessel.¹¹ In this email, RAM explained that under the current Federal Regulations at 50 C.F.R. § 679.42, Appellant’s HMP application must be accompanied by an AOT showing Appellant had maintained at least a twenty-percent ownership interest in Vessel for the 12 month period immediately preceding the date he filed his application.¹² RAM further explained that the current AOT requirement has been in place since 2014, and pasted a copy of the current HMP regulations—50 C.F.R. § 679.42(i)(1)(i)-(iii)—in the body of the email.¹³

On February 25, 2019, at 4:11 p.m., Appellant responded to RAM’s email, stating, “It has consistently been the policy of NOAA to accept an [AOT] if it was issued less than 12 months prior to an application for HMP.”¹⁴ Appellant further reasoned it would be “virtually impossible” to comply with RAM’s contemporaneous AOT requirement because he would have to provide an AOT dated on or after the date of his initial HMP application.¹⁵ Appellant closed his email by informing RAM he “would gladly sign an affidavit” stating he has maintained a twenty-percent interest in Vessel over the previous 12 months, or, alternatively, RAM “could simply call the [USCG] for verification.”¹⁶

The next morning, at 7:18 a.m., RAM replied to Appellant’s most recent email by once again informing him the current AOT requirement has been in place since 2014, and pointing out that Appellant had complied with this requirement in both his 2016 and 2018 HMP applications.¹⁷ RAM reiterated it was Appellant’s responsibility to submit a complete application, and stated it would not process his HMP application until Appellant submitted the requested documentation.

Subsequently, on February 26, 2019, at 8:33 a.m., Appellant replied to RAM; restating his previous assertion concerning RAM’s past practices, and insisting that RAM “d[id] not have the authority to arbitrarily set or change rules.”¹⁸ Appellant also requested RAM “specify how ‘near’ to the date of the application the ‘contemporary’ [AOT] must be,” and identify the applicable laws and regulations outlining the contemporaneous AOT requirement.¹⁹

⁸ Pre-IAD Communications Tab, *Email from [REDACTED] to Tracy Buck*, dated February 25, 2019, at 2:46 p.m.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pre-IAD Communications Tab, *Email from Tracy Buck to [REDACTED]*, dated February 25, 2019, at 3:05 p.m.

¹² *Id.*

¹³ *Id.*

¹⁴ Pre-IAD Communications Tab, *Email from [REDACTED] to Tracy Buck*, dated February 25, 2019, at 4:11 p.m.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Pre-IAD Communications Tab, *Email from Tracy Buck to [REDACTED]*, dated February 26, 2019, at 7:18 a.m.

¹⁸ Pre-IAD Communications Tab, *Email from [REDACTED] to Tracy Buck*, dated February 26, 2019, at 8:33 a.m.

¹⁹ *Id.*

Additionally, Appellant argued that even if an applicant provides RAM with an AOT dated the same day he or she submits a HMP application, it “would not guarantee that the quota share holder was still a 20% owner of the subject vessel the next day or months later.”²⁰ To that end, Appellant asserted, “[o]ther regulatory measures are in place to insure that I am a 20% owner when my hired master catches my quota.”²¹

That same day, Appellant followed up his 8:33 a.m. email with another email at 2:22 p.m. reasserting many of his prior statements, including that “[o]n multiple past occasions” RAM had issued Appellant HMPs so long as he submitted AOTs dated within 12 months of his application dates.²² Appellant then argued that although RAM has “the authority to interpret general policy,” it does not “have the authority to arbitrarily set or change it.”²³ Appellant closed his email by stating, “[u]nless and until RAM or some other governmental body formally adopts regulations specifically addressing the required contemporaneousness of [AOTs], applications such as mine should be accepted and promptly processed.”²⁴

On February 26, 2019, RAM sent Appellant a formal written request for an AOT demonstrating Appellant owned Vessel for the 12 months immediately preceding the date he submitted his HMP application.²⁵ In this letter, RAM explained that the AOT submitted with Appellant’s 2019 HMP application demonstrated that Appellant owned Vessel through February 2018, but was insufficient to establish that Appellant had continuously owned Vessel through February 5, 2019, the date Appellant submitted his HMP application.²⁶ RAM provided Appellant with telephone and website information for obtaining a current AOT, and directed Appellant to submit the updated documentation to RAM “within thirty days (30 days) from the date of th[e] letter.”²⁷ RAM closed the letter by advising Appellant that failing to comply with RAM’s instructions may result in RAM denying his HMP application.²⁸

Subsequently, on March 1, 2019, Appellant sent RAM an email acknowledging receipt of the RAM’s written request, and informing RAM that Appellant “ha[d] no intention of submitting a more recent [AOT] and, if necessary, would like to commence appeal proceedings ASAP.”²⁹ Appellant again indicated he would “gladly submit a notarized affidavit” stating he had continuously owned a twenty-percent interest in Vessel since March 15, 2017.³⁰

On March 7, 2019, RAM issued Appellant the IAD at issue in this case.³¹ In the IAD, RAM informed Appellant it had denied his HMP application because Appellant had failed to provide an AOT issued by the USCG demonstrating that he had continuously owned at least twenty-

²⁰ *Id.*

²¹ *Id.*

²² Pre-IAD Communications Tab, *Email from [REDACTED] to Tracy Buck*, dated February 26, 2019, at 2:22 p.m.

²³ *Id.*

²⁴ *Id.*

²⁵ Pre-IAD Communications Tab, *Letter Requesting Current Abstract of Title*, dated February 26, 2019.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Pre-IAD Communications Tab, *Email from [REDACTED] to Tracy Buck*, dated March 1, 2019, at 2:17 p.m.

³⁰ *Id.*

³¹ IAD Tab, *Initial Administrative Determination [and] Notice of Right to Appeal*, dated March 7, 2019.

percent of Vessel for the twelve-month period prior to the date of his application.³² As in their previous email exchanges, RAM informed Appellant that this requirement is mandated by the governing HMP regulations set forth in 50 C.F.R. § 679.42.³³ RAM reminded Appellant that this requirement also appeared on the first page of the IFQ/CDQ Head Master Permit Application, as well as the application's instructions.³⁴ In closing, RAM informed Appellant of his right to appeal the IAD to the NAO, and advised Appellant that the IAD would become the final agency action unless Appellant filed an appeal by 5:00 p.m. EST on April 22, 2019.³⁵

Appellant subsequently filed his appeal with NAO on March 11, 2019.³⁶ In his appeal, Appellant argued that RAM erred in finding the AOT submitted with his HMP application was "not contemporaneous enough" to establish Appellant had continuously owned a twenty-percent interest in Vessel for the twelve-month period prior to the date of his HMP application.

Appellant further argued that although the applicable regulations require applicants to submit an AOT with HMP applications, the regulations do not "stipulate how recently [the AOT] must have been issued . . . or that it alone must demonstrate that the applicant continuously owned a minimum of 20% interest in the subject vessel for a period of 12 months prior to the date of the application."³⁷ As such, Appellant requested NAO reverse RAM's denial of his HMP application, and instruct RAM "to revise its Application for Hired Master form to accurately reflect the regulations."³⁸

On April 11, 2019, NAO sent Appellant a letter acknowledging receipt of his appeal, and instructing Appellant to submit any additional materials concerning his appeal to NAO by April 22, 2019.³⁹ Thereafter, on April 21, 2019, Appellant faxed NAO 15 pages of additional documentation in support of his appeal.⁴⁰ This documentation included Appellant's successful HMP applications from 2010, 2012, and 2014.⁴¹

In his appeal letter, Appellant requested NAO "render a decision based on the case record."⁴² Having examined the documentation contained in the record, I have determined the information is sufficient to render a decision. I therefore close the record and issue this decision.⁴³ In reaching my decision, I have carefully reviewed the entire record.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Appeal Tab, *Appeal of Denial of Application for 2019 IFQ HMP*, dated March 11, 2019.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Appeal Correspondence Tab, *Acknowledgment Letter*, dated April 11, 2019.

⁴⁰ Pleadings Tab, *Appellant's Supplemental Materials*, dated April 21, 2019.

⁴¹ *Id.*

⁴² Appeal Tab, *Appeal of Denial of Application for 2019 IFQ HMP*, dated March 11, 2019.

⁴³ 15 C.F.R. § 906.11(a)(1) (2014); 15 C.F.R. § 906.12(a) (2014).

ISSUE

At issue in this case is whether RAM erred in denying Appellant's application for an IFQ HMP.

To resolve that issue, I must determine whether Appellant provided sufficient documentation to demonstrate Appellant continuously owned at least a twenty-percent interest in Vessel for the twelve-month period immediately preceding the date Appellant filed his HMP application.

If the answer to this question is yes, Appellant qualifies for an IFQ HMP.

FINDINGS OF FACT

1. Appellant filed his HMP application on January 29, 2019, and again February 5, 2019.
2. Appellant submitted a USCG AOT dated February 26, 2018, with his 2019 HMP applications.

PRINCIPLES OF LAW

The regulations governing Quota Share (QS) and IFQ use (Regulation) provide that IFQ holders may apply for a HMP allowing another individual to fish the applicant's IFQ and sign the IFQ landing reports, provided the applicant meets certain requirements.⁴⁴ Under the Regulation, applicants owning documented fishing vessels must demonstrate they "continuously owned a minimum 20-percent interest" in their fishing vessel for the twelve-month period prior to the date the applicant filed the HMP application.^{45, 46} Applicants can satisfy both requirements by submitting a "U.S. [AOT] issued by the [USCG]" showing the applicant owned at least a twenty-percent interest in his or her vessel for the twelve-month period preceding his or her HMP application.⁴⁷ The Regulation further states that an applicant may be required to submit "additional written documentation," if the AOT does not contain sufficient information to satisfy the Regulation's ownership requirements.⁴⁸

Upon receipt of a HMP application, NMFS reviews the application materials to determine whether the applicant has satisfied the Regulation's requirements.⁴⁹ In the event the applicant "fails to submit the information specified in the application for a hired master," NMFS will provide the applicant a "reasonable opportunity" to submit a revised application or the "specified information."⁵⁰ NMFS may also request the applicant "submit additional written documentation necessary to establish the required 20-percent interest in the vessel during the 12-month period previous to the application."⁵¹ If NMFS determines the HMP application is deficient, or the

⁴⁴ 50 C.F.R. § 679.42(i)(1)(i)-(ii) (2018).

⁴⁵ See 79 Fed. Reg. 9995-02, 10006 (Feb. 24, 2014) ("A documented vessel means a vessel documented with the United States Coast Guard in accord with Federal requirements.").

⁴⁶ 50 C.F.R. § 679.42(i)(1)(i) (2018).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 50 C.F.R. § 679.42(i)(1)(iv)(A) (2018).

⁵⁰ *Id.*

⁵¹ 50 C.F.R. § 679.42(i)(1)(v) (2018).

applicant fails to submit the necessary information, NMFS will issue and IAD listing the application's deficiencies and advising the applicant of his or her appeal rights.⁵²

ANALYSIS

Did Appellant provide sufficient documentation to demonstrate he continuously owned at least a twenty-percent interest in Vessel for at least twelve months immediately preceding the date Appellant filed his HMP application?

The question I must answer in this case is whether Appellant provided sufficient documentation to demonstrate he continuously owned at least a twenty-percent interest in Vessel for at least twelve months immediately preceding the date Appellant filed his HMP applications.

Record evidence establishes that Appellant submitted his HMP application on January 29, 2019, and again February 5, 2019. Accompanying Appellant's application was an AOT for Vessel issued by the USCG on February 26, 2018. This AOT indicates Vessel was built for Appellant and Vessel's co-owner [REDACTED] in 2017, and that Appellant acquired a twenty-percent interest in Vessel on March 15, 2017.⁵³

In the IAD issued to Appellant on March 7, 2017, RAM informed Appellant that it had denied his HMP application after determining Appellant's AOT was insufficient to establish his ownership in Vessel for the twelve months immediately preceding his HMP application. The IAD further recounted RAM's informal and formal requests for Appellant to provide an updated AOT for Vessel in order to rectify his application's deficiency, as well as Appellant's refusal to comply with RAM's requests.

In his appeal letter, Appellant acknowledged the AOT accompanying his HMP application was dated February 26, 2018. Appellant challenged, however, RAM's determination that the AOT "was not contemporaneous enough" to establish Appellant had continuously owned a twenty-percent interest in Vessel for twelve months prior to Appellant filing his HMP application. To that end, Appellant argued RAM "arbitrarily decided" that his AOT "could be no more than one-month old," despite the fact RAM "had previously accepted . . . [AOTs] that were nearly one year old" that Appellant had submitted with "similar applications." While Appellant conceded "[t]here is no question that a USCG [AOT] should and must be included with all applications for HMP[s]," he maintained the regulations do not clarify how recent an AOT must be.

Appellant further challenged RAM's refusal to accept his offer to provide "a notarized affidavit" attesting to his continuous ownership in the Vessel since March 15, 2017. According to Appellant, RAM's insistence that an AOT is the only acceptable proof of vessel ownership is contrary to the Regulation, which allows applicants to submit "additional written documentation, such as a notarized affidavit, . . . to show 20 percent (continuous) ownership for (the previous) 12 months."

⁵² 50 C.F.R. § 679.42(i)(1)(iv)(B) (2018).

⁵³ [REDACTED] is not a party to this appeal.

In support his argument that RAM's refusal to accept his AOT is contrary to their past practices, Appellant submitted his successful IFQ HMP applications for fishing years 2010, 2012, and 2014.⁵⁴ In each of these applications, the AOT Appellant submitted to RAM was issued many months prior to the date of his HMP application. For example, Appellant submitted his 2010 application on March 10, 2010.⁵⁵ The AOT Appellant submitted in support of his 2010 application, however, was issued on July 8, 2009.⁵⁶ Likewise, Appellant's June 12, 2012, application was accompanied by an AOT dated September 6, 2011; and his December 5, 2013, application included an AOT dated March 22, 2013.⁵⁷

I have carefully considered Appellant's arguments and the supporting documentation he provided. However, for the reasons listed below, I have determined RAM did not err in determining Appellant's 2019 HMP application did not comply with the Regulation's requirements.

Appellant's AOT

First, as stated above, the Regulation required Appellant submit an USCG AOT showing he continuously owned at least a twenty-percent interest in Vessel for the twelve-month period prior to the date he submitted his 2019 HMP application.⁵⁸ Appellant submitted his HMP application on January 29, 2019, and again on February 5, 2019. The AOT Appellant included with his application, however, was issued by the USCG approximately eleven months prior on February 26, 2018. Although Appellant contends this eleven-month-old AOT was sufficient to establish his continuous ownership of Vessel for the twelve months preceding his HMP application, it, at best, proves only that Appellant owned his twenty-percent interest in Vessel for just one of the twelve months required. Accordingly, I find it would be unreasonable to conclude Appellant's eleven-month-old AOT would satisfy the Regulation's continuous ownership requirement.

Appellant's Past HMP Applications

Likewise, I find no merit in Appellant's argument that RAM should have approved Appellant's 2019 HMP application because RAM had previously approved his 2010, 2012, and 2014 HMP applications, which were all accompanied by AOTs that were not contemporaneous with Appellant's HMP applications.

On February 24, 2014, NMFS adopted a final rule modifying the previous vessel ownership requirement for IFQ HMPs.⁵⁹ This rule introduced a twelve-month vessel ownership requirement, which had been absent from prior versions of the Regulation.⁶⁰ As explained in the final rule, prior versions of the Regulation required a HMP applicant submit an AOT as proof the

⁵⁴ Pleadings Tab, *Appellant's Supplemental Materials*, dated April 21, 2019.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See 50 C.F.R. § 679.42(i)(1)(i) (2018).

⁵⁹ See 79 Fed. Reg. 9995-02 (Feb. 24, 2014).

⁶⁰ 79 Fed. Reg. 9995-02, 9996 (Feb. 24, 2014).

applicant owned at least a twenty-percent interest in vessel, but did “not specify a duration—for how long—an [applicant] must have that 20-percent vessel ownership interest.”⁶¹

NMFS’ adoption of this final rule, which became effective March 23, 2015, created a new standard by which RAM evaluated IFQ HMPs.⁶² While the previous version of the Regulation—in place when Appellant filed his 2010, 2012, and 2014 HMPs—only required applicants to prove their ownership interest in the subject fishing vessel, the new Regulation required applicants to prove not only their ownership interest, but also that they had maintained that ownership interest for the previous twelve months before filing their HMP application. Consequently, I find that RAM approving Appellant’s previous HMP applications has no bearing whether RAM erred in denying Appellant’s 2019 HMP application.

Additional Written Documentation

Next, Appellant relied on language in the Regulation stating HMP applicants may “if necessary to show 20-percent ownership for 12 months” submit “additional written documentation,” to argue that RAM erred in not accepting his offer of providing a signed affidavit as evidence of his continuous ownership interest in Vessel. While Appellant is correct that the Regulation states applicants may be required to submit additional written documentation, he incorrectly assumes this language supersedes the Regulation’s contemporaneous AOT requirement.

On August 9, 2007, NMFS published a final rule introducing the requirement that HMP applicants submit an AOT proving the applicant has a minimum twenty-percent ownership interest in the vessel from which the hired master will fish the applicant’s QS.⁶³ The rule explains that HMP applicants may be required to supplement their application with “additional written documentation” if their AOT “do[es] not show percentage of ownership.”⁶⁴ Noticeably absent from this rule, however, is a requirement that applicants prove how long they have owned at least a twenty-percent interest in their vessel.⁶⁵

NMFS added the temporal ownership provision to the Regulation through a final rule published on February 24, 2014.⁶⁶ According to this rule, QS holders who owns documented vessels and wish to utilize a hired master must submit with their HMP applications, an AOT showing they have maintained at least a twenty-percent ownership interest in their vessels “for the past 12 months.”⁶⁷ If the AOT does not show the percentage or duration of an applicant’s ownership interest, “the [applicant] must submit additional written documentation” to prove either, or both, of these requirements.⁶⁸ NMFS went on to explain that proving vessel ownership through such additional documentation “should not require creating documents but merely retrieving them.”⁶⁹

⁶¹ 79 Fed. Reg. 9995-02, 9997 (Feb. 24, 2014).

⁶² 79 Fed. Reg. 9995-02, 9996 (Feb. 24, 2014).

⁶³ 72 Fed. Reg. 44795-01, 44797 (Aug. 9, 2007).

⁶⁴ *Id.*

⁶⁵ *Id.* (NMFS explained it did not adopt a temporal requirement because it was “seeking clarification from the Council” on how it would apply to quota share holders whose vessels required repairs.).

⁶⁶ *See* 79 Fed. Reg. 9995-02 (Feb. 24, 2014).

⁶⁷ 79 Fed. Reg. 9995-02, 10004 (Feb. 24, 2014).

⁶⁸ 79 Fed. Reg. 9995-02, 10006 (Feb. 24, 2014).

⁶⁹ 79 Fed. Reg. 9995-02, 10004 (Feb. 24, 2014).

As indicated above, RAM informed Appellant on multiple occasions that the AOT Appellant submitted with his HMP application was not sufficient to satisfy the Regulation's evidentiary requirements. The fault in Appellant's AOT, however, was not that it failed to accurately reflect the percentage or duration of Appellant's ownership of Vessel, it was that Appellant's AOT had been issued by the USCG on February 26, 2018; approximately eleven months before Appellant submitted his HMP application. NMFS recognized such a situation was possible in its 2012 proposed rule, stating:

Current regulations already require an applicant to submit the U.S. [AOT] issued by the [USCG], State of Alaska vessel license registration, or additional documentation establishing 20-percent ownership interest in a vessel on an Application for IFQ/CDQ Hired Master Permit. Therefore, the same types of documentation would be required by an applicant as a result of this proposed rule, *although more recent documentation may need to be provided* for NMFS to determine whether the QS holder has had at least 20-percent ownership interest in the vessel for at least 12 consecutive months.⁷⁰

Despite multiple requests, Appellant failed to provide RAM with a more recent AOT. In so doing, Appellant foreclosed RAM's ability to determine whether Appellant had maintained at least a twenty-percent ownership interest in Vessel for the twelve months preceding his 2019 HMP application.

RAM's interpretation of the Regulation was that a notarized affidavit from Appellant would be insufficient to establish Appellant's twenty-percent ownership interest in Vessel for the twelve months immediately preceding his HMP application. I find RAM's interpretation of the Regulation is reasonable. Accordingly, I find RAM did not err in denying Appellant's offer to substitute a signed affidavit in place of a more recent AOT.

Ownership Verification Method

Finally, Appellant appears to argue that requiring an HMP applicant to submit a contemporaneous AOT is not the best method to ensure the applicant has continuously owned his or her vessel. While I recognize Appellant may not agree with the verification method outlined in the Regulation, the administrative appeals process is not the appropriate vehicle for resolving substantive challenges to the Regulation's evidentiary requirements. Instead, my review is limited to determining whether RAM correctly applied the Regulation to Appellant's HMP application. Therefore, I have not considered this argument in reaching my decision.

CONCLUSIONS OF LAW

I conclude that the IAD RAM issued to Appellant was consistent with the Regulation. In reaching my decision, I have carefully examined the entire record and determined I must uphold

⁷⁰ 77 Fed. Reg. 65843-02, 65847 (Oct. 31, 2012) (emphasis added).

the IAD because Appellant has not established by a preponderance of the evidence that he continuously owned at least a twenty-percent interest in Vessel for twelve months immediately preceding the date he filed his HMP application.

ORDER

The IAD dated June 7, 2019, is upheld. Appellant may submit a Motion for Reconsideration.⁷¹ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than June 21, 2019. A Motion for Reconsideration must be in writing and contain a detailed statement of one or more specific material matters of fact or law that the administrative judge overlooked or misunderstood.

[REDACTED]
J. Kirk Essmyer
Administrative Judge

Date Issued: June 11, 2019

⁷¹ 15 C.F.R. § 906.16 (2014).