

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0076

DECISION

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STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On October 20, 2010, [REDACTED] doing business as [REDACTED] (collectively referred to as Appellant) timely filed an appeal challenging a National Marine Fisheries Service (NMFS) Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated September 20, 2010.<sup>1</sup> Appellant sought a transferable Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup> However, RAM determined Appellant did not qualify for a transferable CHP, but that Appellant did qualify for a non-transferable CHP with an angler endorsement of six for IPHC Regulatory Area 3A.<sup>3</sup>

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<sup>1</sup> Case File, Pleadings Tab, Appellant's appeal submission received by RAM on October 20, 2010, Original File Tab, IAD dated September 20, 2010.

<sup>2</sup> The CHLAP regulations became effective in 2010 and will be codified at 50 C.F.R. § 300.67. At present, the regulations can be obtained by accessing the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition, of the CFR. Citations to the CHLAP are to the e-CFR, unless otherwise noted; Case File, Original File Tab, CHP application dated February 22, 2010.

<sup>3</sup> Case File, Original File Tab, IAD dated September 20, 2010.

Based on its review of the Official Record, RAM concluded Appellant did not have the requisite number of logbook fishing trips in his fishing history to qualify for a transferable CHP. Appellant needed to have fifteen bottomfish logbook fishing trips in 2004 or 2005 and fifteen halibut logbook fishing trips in 2008 to qualify for a transferable CHP. Appellant chose 2004 as the year he wanted NMFS to use in determining his qualifications for a CHP, which is referred to as the "Applicant selected year." RAM determined that Appellant had fifteen or more bottomfish logbook fishing trips in 2004, but only fourteen halibut logbook fishing trips in 2008. Appellant had asserted that an unavoidable circumstance, namely his illness, prevented Appellant from making fifteen or more halibut logbook fishing trips in 2008 to qualify for a transferable CHP. RAM concluded the unavoidable circumstance provisions of the CHLAP regulations were inapplicable to Appellant's circumstances because the provisions are limited to those who would be excluded from the halibut fishery entirely unless their unavoidable circumstance is recognized. RAM reasoned the unavoidable circumstance provisions could not be used to change a non-transferable permit to a transferable permit. Consequently, RAM denied Appellant's request for a transferable CHP.<sup>4</sup>

In his appeal, Appellant contends he has been in the charter fishing business for fifteen years and has a history of conducting many charters each year sufficient to qualify for a transferable CHP, with the exception of 2008. Appellant argues that an unavoidable circumstance in 2008, namely a life-threatening illness, led to Appellant's physical inability to work as much as he would have liked, resulting in fewer charters that year than would have been customary for his business. Appellant seeks a transferable CHP based on the unavoidable circumstance provisions of the CHLAP.<sup>5</sup>

I have reviewed Appellant's 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. See 50 C.F.R. § 679.43(g)(2) and (k).

## ISSUES

The first issue I must resolve is whether the type of permit Appellant is qualified to receive is transferable, rather than non-transferable, as determined by RAM. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he met the minimum requirements of 50 C.F.R. § 300.67(d) to qualify for permit transferability. In other words, whether Appellant reported a minimum of fifteen bottomfish logbook fishing trips during 2004 and fifteen halibut logbook fishing trips

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<sup>4</sup> Case File, Original File Tab, IAD dated September 20, 2010.

<sup>5</sup> Case File, Pleadings Tab, Appellant's appeal submission received by RAM on October 20, 2010.

during 2008. I must also resolve whether a claim of unavoidable circumstance is applicable to Appellant's case and may be used as a basis to change the permit Appellant is qualified to receive from a non-transferable CHP to a transferable CHP.

#### FINDINGS OF FACT

1. Appellant has been in the charter fishing business for approximately fifteen years.<sup>6</sup>
2. In 2004, Appellant reported fifteen or more bottomfish logbook fishing trips. The greatest number of anglers Appellant reported for these trips was six.<sup>7</sup>
3. The greatest number of charter vessel anglers Appellant reported on any logbook trip in the qualifying period was six.<sup>8</sup>
4. From January 2008 through July 2008, Appellant was unable to work in his charter fishing business due to a medical illness and due to the treatment he received for that illness. Appellant was left fatigued from the medical treatment he received for his illness and had to "take it easy" when he returned to work. As a result, in 2008 Appellant was unable to make as many charter fishing trips as he would otherwise have expected to make given his fishing history.<sup>9</sup>
5. In 2008, Appellant reported fourteen halibut logbook fishing trips.<sup>10</sup>
6. On February 22, 2010, Appellant signed a completed "Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A." In the application, Appellant chose 2004 as his "Applicant Selected Year." In the application, Appellant stated he should be eligible to receive one transferable permit, rather than one non-transferable permit as reflected in the Official Record summary. In the application, Appellant claimed eligibility for a transferable CHP based on an unavoidable circumstance that occurred in 2008.<sup>11</sup>

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<sup>6</sup> Case File, Pleadings Tab, Appellant's appeal submission received by RAM on October 20, 2010, Original File Tab, Appellant's letter dated February 20, 2010.

<sup>7</sup> Case File, Original File Tab, IAD dated September 20, 2010, Internal Correspondence Tab, Appellant's 2004 logbook data.

<sup>8</sup> Case File, Original File Tab, Summary of Official Charter Halibut Record.

<sup>9</sup> Case File, Original File Tab, Appellant's February 20, 2010 letter.

<sup>10</sup> Case File, Original File Tab, IAD dated September 20, 2010, Internal Correspondence Tab, Appellant's 2008 logbook data.

<sup>11</sup> Case File, Original File Tab, CHP application dated February 22, 2010.

7. In a letter dated May 25, 2010, RAM provided Appellant with notice of the opportunity to submit evidence challenging the information contained in the Official Record, particularly with regard to Appellant's qualifications for a transferable CHP.<sup>12</sup> Appellant responded to RAM in a letter dated June 5, 2010, in which he submitted medical documents to confirm his illness in 2008 that affected his participation in his charter fishing business in 2008.<sup>13</sup>
8. In a letter dated September 20, 2010, RAM issued its IAD, denying Appellant's application for a transferable CHP. RAM determined, based on the information in the Official Record, that Appellant did not qualify for a transferable permit since Appellant did not have fifteen or more logbook fishing trips in 2004 and 2008. Although Appellant took fifteen or more bottomfish logbook trips in 2004, he took only fourteen halibut logbook fishing trips in 2008. RAM concluded Appellant qualified for a non-transferable permit. Since the greatest number of anglers Appellant reported on any logbook trip in the qualifying period, namely 2004 or 2005, was six, RAM issued Appellant a non-transferable permit with an angler endorsement of six.<sup>14</sup>
9. On October 20, 2010, Appellant timely filed an appeal to the IAD dated September 20, 2010.<sup>15</sup>

#### PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. Minimum participation requirements to qualify for a non-transferable CHP 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. 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) and 50 C.F.R. § 300.67(f)(6) and (7).

For a transferable permit, minimum participation criteria for a transferable permit are as follows: an applicant must have reported fifteen bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period, namely 2004 or 2005, and must have reported fifteen halibut logbook fishing trips or more from the same vessel during the recent participation period, namely 2008. 50 C.F.R. § 300.67(d)(1)(i) and (ii) and 50 C.F.R. § 300.67(f)(6) and (7). The number of transferable CHPs issued to an applicant will be equal to the lesser of the number of vessels that met the minimum transferable permit qualifications described above. 50 C.F.R. § 300.67(d)(2).

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<sup>12</sup> Case File, Original File Tab, RAM letter dated May 25, 2010.

<sup>13</sup> Case File, Original File Tab, Appellant's letter dated June 5, 2010.

<sup>14</sup> Case File, Original File Tab, IAD dated September 20, 2010.

<sup>15</sup> Case File, Pleadings Tab, Appellant's appeal submission received by RAM on October 20, 2010.

An applicant that meets the participation requirements in 50 C.F.R. § 300.67(b) will be issued the number of charter halibut permits equal to the lesser of the number of: (1) The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business License in the applicant-selected year divided by five, and rounded down to a whole number; or (2) The number of vessels that made the bottomfish logbook fishing trips in the applicant-selected year. 50 C.F.R. § 300.67(c).

The angler endorsement number for the first non-transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period for a vessel not already used to determine an angler endorsement in that area. 50 C.F.R. § 300.67(e)(3).

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. 50 C.F.R. § 300.67(f)(4).

"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 nontransferable permits. 50 C.F.R. § 300.67(f)(1).

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. 50 C.F.R. § 300.67(f)(2).

A "halibut logbook fishing trip" 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. 50 C.F.R. § 300.67(f)(3).

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. 50 C.F.R. § 300.67(f)(5).

Unavoidable circumstance claims must be made pursuant to 50 C.F.R. § 300.67(h)(6), and will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. 50 C.F.R. § 300.67(g). NMFS concluded that the proposed unavoidable circumstance exception should be narrow, and that, if an applicant could get any charter halibut permit based on the applicant's actual participation, the applicant would be limited to that permit. See 74 Fed. Reg. 18188 (April 21, 2009).

## ANALYSIS

The first issue presented in this case concerns whether the type of permit Appellant is qualified to receive is transferable, rather than non-transferable as determined by RAM. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he met the minimum requirements of 50 C.F.R. § 300.67(d) to qualify for permit transferability. In other words, I must evaluate whether Appellant reported a minimum of fifteen bottomfish logbook fishing trips during 2004 (the “Applicant selected year,” meaning the year Appellant chose for NMFS to use in determining the number and type of permit Appellant was eligible to receive) and a minimum of fifteen halibut logbook fishing trips during 2008 to qualify for a transferable CHP. The evidence presented in this case shows he did not.

The case record in this appeal establishes that Appellant reported fifteen or more bottomfish logbook fishing trips during 2004, but reported only fourteen halibut logbook fishing trips during 2008. Hence, Appellant fell short of meeting the minimum requirements of 50 C.F.R. § 300.67(d) to qualify for a transferable CHP. However, based on the logbook fishing trips reported, Appellant met the minimum requirements to receive a non-transferable CHP, for which a minimum of five logbook trips in each participation period was needed. See 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) and 50 C.F.R. § 300.67(f)(6) and (7). Consequently, RAM correctly determined that Appellant was qualified to receive a non-transferable CHP, but not a transferable CHP.

The CHLAP regulations further provide that the angler endorsement number for the first non-transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period for a vessel not already used to determine an angler endorsement in that area. 50 C.F.R. § 300.67(e)(3). In this case, the greatest number of charter vessel anglers Appellant reported in 2004 was six. Accordingly, RAM correctly determined that the non-transferable CHP Appellant was qualified to receive should be endorsed for six anglers.

While Appellant has not disputed the information contained in the Official Record concerning the number of logbook fishing trips he reported in 2004 and 2008 and the number of anglers he reported in 2004, he argues that an unavoidable circumstance, namely illness, prevented him from participating in the 2008 fishing season as he otherwise would have. For this reason, Appellant contends he is qualified to receive a transferable CHP.

While I empathize with the unfortunate medical challenges Appellant has faced, the unavoidable circumstance provisions of the CHLAP regulations that apply to this case do not authorize a change in designation of Appellant's CHP from non-transferable to transferable. The CHLAP regulations provide that unavoidable circumstance claims will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. 50 C.F.R. § 300.67(g). Noteworthy is the preamble language of the CHLAP proposed rule in which NMFS concluded that the proposed unavoidable circumstance exception should be narrow, and that, if an applicant could get any charter halibut permit based on the applicant's actual participation, the applicant would be limited to that permit. See 74 Fed. Reg. 18188 (April 21, 2009).

In this case, Appellant's actual participation qualifies him for one non-transferable permit with an angler endorsement of six, as RAM determined. Thus, Appellant is not excluded from the charter halibut fishery entirely and the unavoidable circumstance provisions of the CHLAP regulations are inapplicable to his case. The CHLAP regulations do not permit the use of an unavoidable circumstance claim to change the designation of transferability of a CHP. Accordingly, I find no error in RAM's determination and I uphold RAM's IAD dated September 20, 2010.

#### CONCLUSIONS OF LAW

Pursuant to CHLAP regulations, Appellant is eligible to receive one non-transferable CHP with an angler endorsement of six.

Pursuant to CHLAP regulations, the unavoidable circumstance provisions are not applicable to Appellant's case, as he is not otherwise entirely excluded from the charter halibut fishery.

ORDER

The IAD dated September 20, 2010 is upheld. This decision is effective thirty (30) days from the date issued and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made or the Regional Administrator elects to review this decision.<sup>16</sup>

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Christine D. Coughlin  
Administrative Judge

Date Issued: April 8, 2011

<sup>16</sup> <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).