

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

In re Application of ) Appeal No. 10-0062  
 )  
 [REDACTED] ) DECISION  
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 )  
 Appellant )

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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'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 (OAA), Alaska Region, and is charged with processing appeals that are on file with the Office of Administrative Appeals, Alaska Region.

On March 31, 2010 and April 1, 2010, [REDACTED] doing business as [REDACTED] (Appellant), applied for a Charter Halibut Permit (CHP).<sup>1</sup> In Alaska, NMFS's Restricted Access Management program (RAM) administers the Charter Halibut Limited Access Program, the source of CHPs. In response to Appellant's applications, on April 26, 2010, RAM sent Appellant a letter captioned "Notice of Opportunity to Submit Evidence." RAM explained in the letter that it understood Appellant was claiming he should receive a CHP because he qualified under the "unavoidable circumstances" provisions of the CHLAP. The unavoidable circumstances provisions are a regulatory exception to the general requirements for eligibility for a CHP, and are more fully described later in this decision under the Principles of Law section and Analysis section.

On May 26, 2010, RAM received from Appellant additional documents in support of his unavoidable circumstance claim. The documents included about twenty 2008 logbook pages.<sup>2</sup> Logbook pages are used to record a charterer's fishing activity to the Alaska Department of Fish and Game (ADF&G), as explained in more depth in this decision under the Principles of Law section and Analysis section. RAM asked ADF&G about Appellant's newly-submitted logbook pages: "The official record has only 3 pages (pg.

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<sup>1</sup> Original File Tab, Applications for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A. The applications are collectively referred to in this decision as "application."

<sup>2</sup> Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence with attachments.

2, 3 and 4.) Do you have any record of receiving more pages from this logbook?"<sup>3</sup>

ADF&G responded: "[O]ur records show that pages 2, 3, and 4 were the only pages submitted from [Appellant's] logbook # [REDACTED]. I also perused the 'late submission' box, a box containing 2008 datapages that were submitted long after the final due date for 2008 data and did not find any additional pages."<sup>4</sup>

On July 21, 2010, RAM issued an Initial Administrative Determination (IAD), which is the subject of this appeal. In the IAD, RAM notified Appellant that it would not be issuing Appellant a CHP. First, RAM stated that Appellant did not meet the general criteria for eligibility for a CHP because he lacked five or more halibut logbook fishing trips in 2008, as required by CHLAP regulations. Second, RAM recognized Appellant's claim that he encountered unavoidable circumstances in 2008, and informed him that RAM did not reach a decision on that claim because by regulation only the OAA, upon timely request by Appellant, could resolve it.<sup>5</sup>

On September 20, 2010, Appellant timely appealed the IAD to OAA.<sup>6</sup> Subsequently, Appellant engaged counsel.<sup>7</sup> Counsel added additional documentation to the record and then appeared as Appellant's representative at a hearing held in this case on March 25, 2011.<sup>8</sup>

At the hearing, Appellant, through Counsel, argued that RAM erred in the IAD and that he was eligible for a CHP under the unavoidable circumstances provisions of the CHLAP regulations. Appellant also testified and presented the president (President) of the local electric company to testify on Appellant's behalf. At the hearing I established April 15, 2011 as a deadline for submitting additional argument and documentation in support of Appellant's claim. On April 15, 2011, Counsel submitted a post-hearing brief and additional documentation to NAO. The brief and documentation have been made part of the record.

I have determined that the information in the record is sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(k)&(n)(8). I therefore close the record and render this decision. In reaching my decision, I have read the entire case record, including the recording of the hearing and post-hearing submissions.

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<sup>3</sup> Original Tab, Email message dated 26 May 2010, from Tracy Buck, RAM Acting Program Administrator, to Halldora Sigurdsson, ADF&G.

<sup>4</sup> Original Tab, Email message dated 27 May 2010, from Halldora Sigurdsson, ADF&G to Tracy Buck, RAM Acting Program Administrator.

<sup>5</sup> Original Tab, Initial Administrative Determination dated July 21, 2010.

<sup>6</sup> Pleadings Tab, Notice of Appeal dated September 16, 2010 and date-stamped by RAM on September 20, 2010.

<sup>7</sup> Pleadings File, Letter of [REDACTED] (Counsel) dated December 6, 2010.

<sup>8</sup> The additional documentation is Counsel's letter dated January 11, 2011 and email message dated December 6, 2010. Counsel also added twenty-eight pages of other documents on March 24, 2011.

## ISSUES

The dispute overall in this case is whether Appellant is eligible for a CHP. In order to resolve the dispute I must decide the following:

1. Did Appellant show by a preponderance of the evidence that within the deadline established by ADF&G, Appellant provided the state with his Saltwater Charter Logbook for 2008 for five or more halibut logbook fishing trips?
2. If the answer to Question 1 is “no,” I will decide whether Appellant’s specific intent to operate a charter halibut fishing business was thwarted by an unavoidable circumstance.

If the answer to both Questions is “no,” then I must uphold the IAD and find that Appellant is not eligible for a CHP.

## FINDINGS OF FACT

1. Appellant has provided charter halibut trips from the same remote location in Alaska since 1996.<sup>9</sup>
2. Since 2001, Appellant has taken charter anglers to fish on a new boat that he constructed between approximately 1998 and 2000.<sup>10</sup>
3. In 2004, Appellant timely reported twenty-nine bottomfish fishing trips to ADF&G.<sup>11</sup>
4. In 2005, Appellant timely reported twenty-four halibut fishing trips to ADF&G.<sup>12</sup>
5. Prior to and at the time of construction of a hydro electrical plant (HP), Appellant’s remote community relied on diesel fuel for energy. The HP produces electricity at a lower cost and has lower carbon emissions than diesel.<sup>13</sup>
6. To obtain approval for HP construction, it literally required an act of Congress.<sup>14</sup>
7. In 2004, the Federal Energy Regulatory Commission issued a license for the construction of a HP in Appellant’s town of residence.<sup>15</sup>

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<sup>9</sup> Appellant’s Hearing Testimony.

<sup>10</sup> Appellant’s Hearing Testimony.

<sup>11</sup> Original File, Print Summary.

<sup>12</sup> Original File, Print Summary.

<sup>13</sup> President of electric company (President) Hearing Testimony.

<sup>14</sup> President’s Hearing Testimony.

<sup>15</sup> President’s Hearing Testimony.

8. Funding for the HP was from multiple sources, including the Denali Commission, Rural Utilities Service of the United States Department of Agriculture, and the State of Alaska. Funding included loans and equity. Each funding source had various terms and conditions attached to the expenditure of funds for the HP construction project. Among the terms and conditions was that the welder needed to be certified to be able to meet the welding specifications of the project and that the welder be from rural Alaska.<sup>16</sup>

9. Appellant completed specialized training in metallurgy.<sup>17</sup> This training helped Appellant qualify as a Certified Welder (CW) with the type and level of skill required of the HP construction project.<sup>18</sup>

10. When the HP construction project was planned, Appellant was the only CW, of the type required by the HP construction project, in his remote town.<sup>19</sup>

11. When the HP construction project was planned, Appellant was the only CW, of the type required by the HP construction project, in rural Alaska known to President.<sup>20</sup>

12. In 2006, construction of the HP began.<sup>21</sup>

13. In 2007, Appellant was working as a CW at the HP.<sup>22</sup>

14. In 2007, Appellant planned on participating as an operator in the 2008 charter halibut season and had lined up clients to take on trips. Appellant also advertised for charter halibut trip clients for the 2008 season.<sup>23</sup>

15. In the fall of 2007 or winter of 2008, the construction of the HP was ordered to shut down by a government entity.<sup>24</sup>

16. Appellant did not expect the shutdown of the HP project.<sup>25</sup>

17. Appellant continued working as a CW for the HP from May 2008 to September 2008.<sup>26</sup>

18. In 2008, Appellant operated at least fifteen charter halibut trips.<sup>27</sup>

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<sup>16</sup> President's Hearing Testimony; Post-Hearing Submission, Quality Control Inspection Program, 1.4 Specialized Construction Techniques and Equipment.

<sup>17</sup> Appellant's Hearing Testimony.

<sup>18</sup> Appellant's Hearing Testimony; Post-Hearing Submission of Welder's Certificate.

<sup>19</sup> President's Hearing Testimony.

<sup>20</sup> President's Hearing Testimony.

<sup>21</sup> President's Hearing Testimony.

<sup>22</sup> Appellant's Hearing Testimony.

<sup>23</sup> Appellant's Hearing Testimony.

<sup>24</sup> Appellant's Hearing Testimony.

<sup>25</sup> Appellant's Hearing Testimony.

<sup>26</sup> President's Hearing Testimony; Post-Hearing Submission, Transaction List by Vendor.

19. Appellant timely sent ADF&G records of two halibut logbook fishing trips in 2008.<sup>28</sup>
20. The Official Record indicates Appellant timely reported two halibut logbook fishing trips to ADF&G in 2008.<sup>29</sup>
21. ADF&G did not timely receive more than two records for logbook halibut fishing trips taken by Appellant.<sup>30</sup>
22. Other than two halibut logbook fishing trips records, Appellant sent his records to ADF&G at the end of the summer.<sup>31</sup>
23. Some of Appellant's 2008 halibut logbook fishing trip records were lost.<sup>32</sup>

### PRINCIPLES OF LAW

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP and evaluating applications for Charter Halibut Permits. See 50 C.F.R. § 300.67(f)(5).

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business in regulatory area 3A, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. See 50 C.F.R. § 300.67(a),(b)&(f)(1) and Notes to Final Rule, 75 Fed.Reg. 554, 554-555.

Proof of participating in the industry during the *recent participation period* in 2008 consists of an applicant reporting at least five "halibut logbook fishing trips." See 50 C.F.R. § 300.67(b)(ii)(B).

A "halibut logbook fishing trip" is one timely reported to ADF&G by the deadline in a Saltwater Charter Logbook and includes information about the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred, or the boat hours that the vessel was used for bottomfish fishing. See 50 C.F.R. § 300.67(f)(3) and (4). A logbook page is timely if submitted within eight to fourteen days of a trip. Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

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<sup>27</sup> Appellant's Hearing Testimony.

<sup>28</sup> IAD, Page 2; Original File, Print Summary.

<sup>29</sup> Original File, Print Summary; IAD, Page 2.

<sup>30</sup> IAD, Page 2; Original File, Print Summary.

<sup>31</sup> Appellant's Hearing Testimony.

<sup>32</sup> Appellant's Hearing Testimony.

An applicant, who meets the participation requirements for the qualifying period in 2004 or 2005 but not the recent participation period in 2008, may nevertheless be eligible for a charter halibut permit if he or she can meet the requirements for an “unavoidable circumstance claim.” See 50 C.F.R. § 300.67(g).

Under the unavoidable circumstances rule as it is applicable in this case, an applicant may be eligible for a permit if:

(1) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation period (2008);

(2) The applicant’s specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

(3) The circumstances that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(4) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period.

See 50 C.F.R. § 679.43(g).

## ANALYSIS

Given the facts that are not in dispute,<sup>33</sup> in order to show that RAM erred in the IAD, Appellant must show by a preponderance of the evidence, that within the deadline established by ADF&G, he provided the state with his Saltwater Charter Logbook for 2008 for five or more halibut logbook fishing trips. See 50 C.F.R. § 300.67(a),(b)&(f)(1) and Notes to Final Rule, 75 Fed.Reg. 554, 554-555. Thus, I must consider the definition of “halibut logbook fishing trips.” That term is defined in the CHLAP regulations as: A “halibut logbook fishing trip” is one timely reported to ADF&G by the deadline in a Saltwater Charter Logbook and includes information about the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing

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<sup>33</sup> RAM and Appellant agree that Appellant met all eligibility criteria but those for the 2008 participation period.

occurred, or the boat hours that the vessel was used for bottomfish fishing. See 50 C.F.R. § 300.67(f)(3) and (4). A logbook page is timely if submitted within eight to fourteen days of a trip.<sup>34</sup>

Appellant testified at the hearing that he probably did not send in his halibut logbook fishing books until the end of the season, that some were lost, and that he was very busy with welding and that caused delays in sending in the logbooks. ADF&G confirmed that it only had two recorded halibut logbook fishing trips for Appellant for 2008. Based on this evidence, I conclude that Appellant did not timely submit more than two 2008 halibut logbook fishing trip records to ADF&G. That means that Appellant does not meet the requirements of 50 C.F.R. § 300.67(a),(b)&(f)(1)(3)&(4).<sup>35</sup> I therefore conclude that Appellant is not eligible for a CHP under the general CHLAP requirements for a CHP permit, and that the IAD in this regard is not in error.

However, that does not end my inquiry because Appellant may still be eligible for a permit if he proves he meets the requirements for the exception to the general rule, namely that he meets the elements for an “unavoidable circumstance” claim. The CHLAP has several requirements to an unavoidable circumstances claim. The four basic requirements relevant to this case are:

(1) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation period (2008);

(2) The applicant’s specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

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<sup>34</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

<sup>35</sup> In order to show participation for 2008, an applicant must show he *timely* reported qualifying trips. This requires timely submission to the State of Alaska [ADF&G] an operator’s 2008 logbook pages which include “the number of halibut...kept, the number...released, the statistical area(s) where bottomfishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.” See 50 C.F.R. § 300.67(f)(3)&(4). As explained by NMFS in the Final CHLAP rules: “[T]he 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.*”<sup>35</sup>

(3) The circumstances that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(4) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period.

See 50 C.F.R. § 679.43(g).

On the first criterion concerning intent, I conclude that Appellant had the specific intent to operate a charter halibut fishing business in 2008. I base that conclusion on Appellant's testimony that he had a long history in the industry, he advertised for the 2008 season, that he said he wanted to and had taken steps to charter in 2008, and in fact took as many charters as he could given his commitment to the HP project. I find that testimony credible, and based on that testimony I conclude that Appellant had the specific intent to operate a charter halibut business in 2008.

The next criterion of an unavoidable circumstance claim is that the unavoidable circumstance thwarted Appellant's specific intent. Appellant testified, and I find his testimony on this point credible, that despite his duties as a CW in the summer of 2008, he was able to fit in seventeen or eighteen days of charter halibut fishing trips. As indicated previously, I have also credited Appellant's testimony that he most likely sent in his logbook records to ADF&G at the end of the summer of 2008. Further, I credit Appellant's testimony and other evidence of record consistent with that testimony,<sup>36</sup> that in a typical year he averaged twenty to twenty-five charter trips. I conclude from this evidence, that Appellant in point of fact took at least fifteen halibut logbook fishing trips in 2008. I must therefore conclude that Appellant's work as a CW on the HP project did not prevent, or "thwart" his participation in the industry. The significance of that conclusion is that Appellant has not proven his unavoidable circumstance claim.

Since I have found that Appellant's intent was not thwarted by what he argued was an unavoidable circumstance, I do not reach whether the facts of this case show that in fact an unavoidable circumstance existed. For the purposes of this decision, I assumed for the sake of argument that Appellant's work on the HP constituted an unavoidable circumstance; however, I am not making a ruling or finding on that issue. The question of whether Appellant's intent was thwarted is dispositive.

In reaching my decision about this case, I have carefully reviewed the entire record. I have been mindful of Appellant's background and experience. I recognize Appellant's long-standing charter operations and his interest in continuing in charter halibut fishing.

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<sup>36</sup> See Original File, Print Summary created January 26, 2010 showing Appellant recorded twenty-nine charter trips in 2004 and forty-four charter trips in 2005.

Appellant expressed concern about his lifestyle and the financial effects of not receiving a permit from NMFS. Nevertheless, I am bound to follow the CHLAP regulations, and as such, am not authorized to provide Appellant relief under those regulations and the facts of this case.

### CONCLUSIONS OF LAW

Appellant did not show by a preponderance of the evidence that within the deadline established by ADF&G, Appellant provided the state with his Saltwater Charter Logbook for 2008 for five or more halibut logbook fishing trips.

Appellant proved by a preponderance of the evidence that he held the specific intent to operate a charter halibut business in 2008.

Appellant did not prove by a preponderance of the evidence that his specific intent to operate a charter halibut was thwarted by what he alleged was an unavoidable circumstance.

### ORDER

The IAD dated July 21, 2010 is affirmed. Appellant's claim under the unavoidable circumstance rule is denied.

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 pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k) and (o). If the Regional Administrator does not review the decision, the decision is final thirty days from the date issued and may be appealed to a federal court of competent jurisdiction.



Eileen G. Jones  
Chief Administrative Judge

Date Issued: April 29, 2011