

After reviewing Appellants' application, on May 5, 2010, RAM sent Appellants a Notice of Opportunity to Submit Evidence (Notice).⁶ The Notice provided Appellants thirty days to provide additional information in support of their application. The record does not show RAM received additional documentation.

On July 23, 2010, RAM issued the IAD at issue in this appeal. In the IAD, RAM denied Appellants' application for a CHP. RAM reasoned that the Official Record, which RAM uses to determine applicants eligibility, showed Appellants had not met the minimum participation requirements of reporting five or more bottomfish logbook fishing trips during 2004 or 2005.⁷ RAM also stated that Appellants must file an appeal to OAA to resolve their claim of unavoidable circumstances.

On August 9, 2010, OAA received Appellants' timely appeal of the IAD.⁸ In the appeal, Appellants renew their claim that they were unable to operate their business in 2004 after the mechanical and structural failure of Vessel I at the beginning of the 2004 season.⁹

On September 8, 2010, an oral hearing was held.¹⁰ At the hearing Appellants testified that they had to save up in order to purchase a new vessel.¹¹ Appellants indicated that because the failure of Vessel I occurred so suddenly, in order to preserve the season they had no choice but to guide for other charter businesses.¹² Appellants stated they attempted to get Vessel I fixed; however, their mechanic refused to work on it due to safety concerns. Appellants decided after the 2004 season ended that Vessel I had to be completely taken out of commission.¹³ Appellants decided to continue to guide in order to save for another boat. At the conclusion of the hearing, Contractor closed the record. I have determined that the information in the record is sufficient to render a decision.¹⁴ In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

ISSUES

The only issue on appeal involves Appellants' unavoidable circumstance claim. In this case, the unavoidable circumstance claim involves five basic questions:

1. Did Appellants prove by a preponderance of the evidence that they held the specific intent to operate a charter halibut fishing business during 2004?

⁶ Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated May 5, 2010.

⁷ Original File Tab, IAD page 2

⁸ Pleadings File Tab, Appellants' appeal letter received on August 9, 2010.

⁹ Pleadings File Tab, Appellants' appeal letter received on August 9, 2010.

¹⁰ Appeals Correspondence Tab, Notice to Schedule Hearing dated September 1, 2010.

¹¹ Appellants' Hearing Testimony.

¹² Appellants' Hearing Testimony.

¹³ Appellants' Hearing Testimony.

¹⁴ See 50 C.F.R. § 679.43(g) (2).

2. If the answer to Question 1 is “yes,” did Appellants prove by a preponderance of the evidence their specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable “unavoidable circumstance” that actually occurred?

3. If the answer to Question 2 is “yes,” did Appellants prove by a preponderance of the evidence that they took all reasonable steps to overcome the unavoidable circumstance?

4. If the answer to Question 3 is “yes,” then I must determine the type (transferable or nontransferable) of permit for which Appellants are eligible and the angler endorsement on the permit by answering the following:

- a. Did Appellants prove they likely would have taken at least fifteen logbook trips in 2004 and did in fact take at least fifteen logbook trips in 2008, and therefore are eligible for a transferable permit?
- b. Did Appellants prove that the largest number of anglers they likely would have taken on charter fishing trips in 2004 was six, and therefore their transferable permit should be endorsed for six anglers?

FINDINGS OF FACT

1. Appellants have been operating their charter fishing business since 1990.
2. In 2003, Appellants took over fifteen logbook fishing trips.¹⁵
3. Late May 2004, Appellants attempted to launch Vessel I for the beginning of the 2004 fishing season. At that time, Appellants discovered that Vessel I was leaking fuel.¹⁶
4. Appellants took Vessel I to mechanic; however due to the extent of damage, mechanic refused to repair Vessel I.¹⁷
5. Appellants decided to salvage the season and began guiding for other charter fishing businesses.¹⁸
6. In the fall of 2004, Appellants decided to replace Vessel I with a new boat.¹⁹

¹⁵ Appellants’ Hearing Testimony.

¹⁶ Appellants’ Hearing Testimony.

¹⁷ Appellants’ Hearing Testimony.

¹⁸ Appellants’ Hearing Testimony.

¹⁹ Appellants’ Hearing Testimony.

7. Appellants needed to save for a new vessel and as a result continued to guide for other charter fishing businesses.²⁰
8. In 2007, Appellants purchased Vessel II.²¹
9. In 2008, the State of Alaska Department of Fish and Game (ADF& G) issued Appellants' charter fishing business an ADF& G Business Owner License.²²
10. In 2008, Appellants reported fifty-seven halibut logbook fishing trips to ADF&G.

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or entity, to which the ADF&G issued an ADF&G Business Owner License that authorized logbook fishing trips.

Logbook fishing trips are used to meet minimum participation requirements.²³ Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, 2008.²⁴

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2004, but does meet the participation requirements for the other period, 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the "unavoidable circumstances" rule.²⁵

Under the unavoidable circumstances rule as it applies to this case, an applicant for a CHP may be eligible for a permit if:

- (1) he met the participation requirements for 2008, but not for 2004;
- (2) he specifically intended to operate a charter halibut fishing business in 2004;

²⁰ Appellants' Hearing Testimony.

²¹ Appellants' Hearing Testimony.

²² Original File Tab, Application page 3.

²³ See 50 C.F.R. § 300.67(b) (1) (ii).

²⁴ See 50 C.F.R. § 300.67(b) (1) (ii) (A) and (B); 50 C.F.R. § 300.67(f) (6) and (7); and 50 C.F.R. § 300.67(d) (1).

²⁵ See 50 C.F.R. § 300.67(g) (2).

(3) his intent was thwarted by an unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred, and;

(4) he took all reasonable steps to overcome the unavoidable circumstance.²⁶

If Appellants proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.²⁷ Whether the CHP is designated as transferable depends on how many logbook fishing trips Appellants proves he would likely have taken in 2004 but for the unavoidable circumstance.²⁸ If the applicant proves he would likely have taken fifteen or more trips in the qualifying year (2004) and did in fact take fifteen or more trips in the participation year (2008), then his permit will be transferable.²⁹ Further, the number of anglers for which the permit will be endorsed depends on the highest number of anglers that would likely have been on the trips Appellants would have taken in 2004 but for the unavoidable circumstance.³⁰

ANALYSIS

In analyzing this case, I considered the entire record, including the hearing testimony and the documents submitted by Appellants in support of their appeal. Since Appellants do not dispute the substantive basis for the denial of their Application articulated in the IAD, i.e., that they did not have sufficient logbook trips in 2004 to qualify for a CHP, I will address the only issue raised in this appeal, namely Appellants' unavoidable circumstance claim. The first criterion I consider is whether Appellants held the specific intent to operate a charter halibut business during 2004.

Did Appellants prove by a preponderance of the evidence that they held the specific intent to operate a charter halibut fishing business during 2004?

Appellants have operated a charter fishing business since 1990. Appellants testified they had every intention to operate their business for the 2004 fishing season.³¹ In an attempt to participate in the 2004 fishing season, Appellants first sought to have Vessel I repaired before applying for a license.³² However, once Appellants became aware of the fuel leak in Vessel I and its severity, this became a hardship.³³ To further support their claim, Appellants produced letters from some of their booking agencies who

²⁶ See 50 C.F.R. § 300.67(g) (2).

²⁷ 50 C.F.R. § 300.67(g)(2)(v).

²⁸ See 50 C.F.R. § 300.67(g)(2)(v)(B).

²⁹ See 50 C.F.R. § 300.67(d).

³⁰ See 50 C.F.R. § 300.67(e)(1) and (g)(2)(v)(B). See also 74 Fed. Reg. 18178, 18187 (2009).

³¹ Appellants' Hearing Testimony.

³² Appellants' Hearing Testimony.

³³ Appellants' Hearing Testimony.

confirmed that Appellants did have returning clients for the 2004 season already booked.³⁴

When taking into consideration the totality of the circumstances, based on Appellants' history in the industry, I conclude that Appellants held the specific intent to operate a charter halibut fishing business in 2004. I turn, then, to the next inquiry in the unavoidable circumstances analysis.

Did Appellants prove by a preponderance of the evidence their specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable “unavoidable circumstance” that actually occurred?

After launching Vessel I and discovering the fuel leak in late May 2004, the mechanic's unexpected refusal to fix Vessel I further exacerbated Appellants situation.³⁵ Appellants explained at the hearing that the presence of fuel in the bilge and fuel soaked into the foam surrounding the fuel tanks had never occurred before. Appellants' testimony was credible. Appellants also provided a signed statement from the mechanic who examined Vessel I in 2004. The mechanic confirmed that he refused to do the repairs due to other concerns that were discovered such as the need for the engine to be overhauled.³⁶ The mechanic stated that he became nervous about customer safety and did not want to assume responsibility.³⁷ The mechanic is the person who suggested that the vessel be taken out of commission and that Vessel II be purchased.³⁸

Under the circumstances, I find that the above-mentioned events were unique, in that they only happened to Appellants. The events were unforeseen and reasonably unforeseeable inasmuch as this type of severe breakdown had not occurred previously and Vessel I had been used for chartering in the past. I conclude that Appellants met their burden of proving that they suffered from a unique, unforeseen, and reasonably unforeseeable unavoidable circumstance that actually occurred.

Did Appellants prove by a preponderance of the evidence that they took all reasonable steps to overcome the unavoidable circumstance?

As soon as Appellants discovered that there was a problem with Vessel I, they immediately took it out of the water and inspected it to determine what the problem was. When they realized it could not be repaired without professional assistance, they brought it to a marine service company. The marine service company would not work on the vessel for safety reasons.

³⁴ Evidence Tab, Fax sent by Appellants on August 31, 2010 containing letters from the booking agencies.

³⁵ Original File Tab, Letter submitted by mechanic dated February 15, 2010.

³⁶ Original File Tab, Letter submitted by mechanic dated February 15, 2010.

³⁷ Original File Tab, Letter submitted by mechanic dated February 15, 2010

³⁸ Original File Tab, Letter submitted by mechanic dated February 15, 2010.

At that point, with the pendency of the season upon them, Appellants thought their best option was to abandon their intent to operate their charter halibut fishing business in 2004 and work for another charter fishing business for the rest of the season.

Further, Appellants testified that it was hard to attain funds to purchase another boat and saving was the best option. Therefore, to speed up the process, Appellants decided to continue to work for other charter businesses while they accumulated enough money to purchase another vessel. Appellants were not prepared to make such a large purchase within such short notice. Again, Appellants' testimony was credible.

Preparing to resume their own operations in the near future, Appellants maintained all necessary business licenses, moorage agreement with the city Ports and Harbors Department. When they obtained the replacement vessel, they put it in service and reactivated their business. Based on all these factors, I conclude that Appellants took all reasonable steps to overcome the unavoidable circumstance of the mechanical failure of their boat.

Appellants have proven the four prongs of their unavoidable circumstance claim. Therefore, I now will decide the type (transferable or nontransferable) of permit for which Appellants are eligible and the angler endorsement on the permit.

Did Appellants prove they likely would have taken at least fifteen logbook trips in 2004 and did in fact take at least fifteen logbook trips in 2008, and therefore are eligible for a transferable permit?

To be eligible for a transferable CHP, the applicant must prove they took fifteen or more qualifying trips during both a qualifying year and recent participation year.³⁹ RAM and Appellants are in agreement that in 2008 Appellants recorded fifty-seven halibut logbook trips. Therefore, I find they exceed the number of trips needed in 2008 to qualify for a transferable permit. I turn then to the number of trips Appellants would likely have taken in 2004.

The conclusion that Appellants likely would have taken at least fifteen trips is supported by their preceding charter fishing history. Appellants supplied several letters of reference from the booking agencies with which they have worked. One booking agency indicated that Appellants were booked eighteen times by their company alone for the 2003 season.⁴⁰ Appellants added in their testimony that they reported sixty-one trips in the 2003 season.⁴¹ Moreover, in 2008, Appellants recorded fifty-seven logbook fishing trips. From these facts I find that Appellant likely would have taken well over the fifteen logbook trips in 2004, if they had not faced an unavoidable circumstance. Thus, Appellants are eligible for a transferable permit.⁴²

³⁹ See 50 C.F.R. § 300.67(d) and (g)(2).

⁴⁰ Evidence Tab, Letter from charter booking agency dated August 27, 2010.

⁴¹ Appellants' Hearing Testimony.

⁴² See 50 C.F.R. § 300.67(d) and (g) (2) (v).

Did Appellants prove that the largest number of anglers they would likely have taken on charter fishing trips in 2004 was six, and therefore their transferable permit should be endorsed for six anglers?

An applicant can be awarded a transferable permit with an angler endorsement for the highest number of anglers he likely would have taken had it not been for the unavoidable circumstances.⁴³ Appellants testified that they carried six clients on average on most of their charter halibut fishing trips.⁴⁴ I find that testimony credible. NMFS's records also show that in 2008, the highest number of anglers Appellants took on charters at one time was six.⁴⁵ Appellant was licensed to take six passengers. Based on the evidence of record, I conclude Appellants' permit shall be endorsed for six anglers.

CONCLUSIONS OF LAW

Appellants held the specific intent to operate a charter halibut business during 2004.

In 2004 Appellants suffered an "unavoidable circumstance" that "actually occurred."

Appellants' specific intent was thwarted by the unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred.

Appellants took all reasonable steps to overcome the unavoidable circumstances.

Appellants likely would have taken at least fifteen logbook trips in 2004 and took at least fifteen logbook trips in 2008; therefore Appellants are eligible for a transferable permit.

The highest number of anglers Appellants likely would have taken on charter fishing trips in 2004 was six; therefore, their transferable permit should be endorsed for six anglers.

⁴³ 50 C.F.R. § 300.67(g) (2) (v) (B). In the Proposed Rule NMFS explained that in a section 300.67(g)(2) situation, if an Appellants proves his unavoidable circumstances claim, then NMFS could not use logbook data to determine the number or type (transferable or nontransferable) of permits and the number of anglers for which the permit would be endorsed. Thus, NMFS created a default provision of one nontransferable permit with an angler endorsement of four, or, if an applicant can so prove a different permit(s) based on the number of vessels, number of trips and highest number of anglers an applicant can prove he likely would have taken in 2004 or 2005. "For example, if an applicant states that it should receive one transferable charter halibut permit with an angler endorsement of six, then the applicant must show that the applicant likely would have reported at least 15 logbook fishing trips with a vessel in 2004 or 2005 and would have taken six anglers on one of those trips." 74 Fed. Reg. 18178, 18187 (2009).

⁴⁴ Appellants' Hearing Testimony.

⁴⁵ Evidence Tab, Email transmittal from NMFS's ISD Applications Group dated July 29, 2011.

ORDER

The IAD dated July 23, 2010 is vacated. RAM is directed to issue Appellants a transferable CHP for Area 3A with an angler endorsement of six.

This decision takes effect thirty days from the date issued, September 6, 2011,⁴⁶ 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). Appellants or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, August 15, 2011. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.



Eileen G. Jones
Chief Administrative Judge

Date Issued: August 4, 2011

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⁴⁶ 50 C.F.R. § 679.43(k) and (o).