

application. Appellant's responded to the Notice on June 3, 2010 by submitting additional documentation.⁵

On June 17, 2010, RAM issued the IAD at issue in this appeal. In the IAD, as noted above, RAM denied Appellants' application for a CHP. RAM denied Appellant's application because Appellants lacked sufficient trips (less than five) during a qualifying year, 2004 or 2005. RAM also advised Appellants their claim for unavoidable circumstances, by regulation, could only be resolved if they filed a timely appeal with OAA. On August 13, 2010, OAA (now NAO) received a timely appeal from Appellants' attorney.

On October 3, 2010 an oral hearing was held pursuant to prior written notice. The hearing was conducted by Contractor. At the hearing, Appellants testified. At the conclusion of the hearing Contractor closed the record. The record contains sufficient information on which to reach a final decision as contained herein.⁶ In rendering this decision, I have carefully reviewed the entire file, including the audio recording of the hearing.

ISSUES

The sole claim Appellants assert on appeal is that they should receive a permit based on the unavoidable circumstance provision of the CHLAP. To determine whether Appellants have met the requirements of the unavoidable circumstance provision, I will answer the following:

1. Did Appellants hold a specific intent to operate a charter halibut fishing business in 2004?
2. If the answer to Question 1 is "yes," then I must decide whether Appellants experienced an unavoidable circumstance in 2004?

If the answer to Question 2 is "no," then Appellants have not established eligibility for a CHP based on the unavoidable circumstances provision of the CHLAP regulations, and I must uphold the IAD.

⁵ Original File Tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, signed by one of the Appellants and dated June 3, 2010, with attachments.

⁶ See 50 C.F.R § 679.43(g)(2).

FINDINGS OF FACT

1. Appellants operated their charter halibut fishing business in International Pacific Halibut Commission (IPHC) Administrative Area 3A.⁷
2. In 2004, Appellants took clients on charter halibut fishing trips; in that year, they reported four bottomfish logbook fishing trips to the Alaska Department of Fish and Game (ADF&G) on the following dates: May 15, June 10, June 19, and June 20.⁸
3. On May 17, 2004, Appellants were charter fishing for salmon and decided to fish for halibut; however, the wind and waves intensified, causing them to abandon the halibut fishing effort and return to port.⁹
4. For 2005, Appellants reported three bottomfish logbook trips to ADF&G.¹⁰
5. For 2008, Appellants reported eighty halibut logbook fishing trips to the ADF&G.¹¹

PRINCIPLES OF LAW

Under the CHLAP regulations, to be eligible for a permit an applicant must prove he reported charter fishing trips during two participation periods: (1) the *qualifying* period, in 2004 and 2005,¹² and (2) the *recent participation* period, in 2008.¹³

If an applicant can only prove he met participation requirements during one period, he may still qualify for a permit under the unavoidable circumstance provision of the CHLAP.¹⁴ To prevail on an unavoidable circumstance claim as it applies in this case, Appellant must prove: (1) he held a specific intent to operate a charter halibut fishing business in 2004; (2) his intent was thwarted by an actual circumstance that was unavoidable, unique, and unforeseen and reasonably unforeseeable; and, (3) he took all reasonable steps to overcome the circumstance.¹⁵

⁷ 50 C.F.R. § 300.61: "Area 3A means all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41'15" N. latitude, 155°35'00" W. longitude) to Cape Ikolik (57°17'17" N. latitude, 154°47'18" W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44'50" N. latitude, 154°08'44" W. longitude), then 140° true."

⁸ Original File Tab, Print Summary created January 26, 2010.

⁹ Written Appeal (August 12, 2010); Appellants' hearing testimony (October 5, 2010); Letter to NMFS from Appellants (received by NMFS March 5, 2010); Letter "To whom it may concern" from charter client (received by NMFS June 3, 2010).

¹⁰ Original File Tab, Print Summary created January 26, 2010.

¹¹ Original File Tab, Print Summary created January 26, 2010.

¹² 50 C.F.R. § 300.67(c)(6).

¹³ See 50 C.F.R. § 300.67(c)(7).

¹⁴ 50 C.F.R. § 300.67(g).

¹⁵ 50 C.F.R. § 300.67(g)(2)(iv).

In reaching my decision, I have considered the entire file. I have read with care Appellants argument that with a larger vessel, they would have been able to complete five or more qualifying trips. I have also read carefully Appellants' concerns about their finances and need for a CHP. However, I am bound to follow the regulations, and as addressed above, under the applicable regulations, Appellants are not eligible for a permit.

CONCLUSIONS OF LAW

Appellants did not experience an unavoidable circumstance in 2004.

The IAD dated June 17, 2010 is consistent with CHLAP regulations.

ORDER

The IAD dated June 17, 2010 is upheld. This decision takes effect thirty days from the date issued, September 6, 2011,¹⁶ 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).

Appellant 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.

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date Issued: August 4, 2011

¹⁶ 50 C.F.R. § 679.43(k) and (o).