

evidence to support his claim. Appellant responded to the Notice by waiving his opportunity to submit additional evidence.⁶

On June 17, 2010, RAM sent Appellant the IAD at issue in this case.⁷ In its IAD, RAM notified Appellant that according to information in the Official Record, Appellant met the participation requirements for 2008. However, RAM also stated that Appellant did not meet the minimum participation requirements in the qualifying period (2004 or 2005). Generally, “minimum participation requirements” for 2004 or 2005 means that an applicant properly reported to the State of Alaska Department of Fish and Game (ADF&G) five or more charter fishing trips. Appellant did not claim to have operated in 2004 or 2005, and RAM noted there was no indication that Appellant held an ADF&G Business Owner License to operate his business in 2004 or 2005.

RAM also acknowledged Appellant’s unavoidable circumstance claim, but it explained that the claim needed to be determined by OAA, provided Appellant filed an appeal with OAA to pursue his claim.⁸ In the Principles of Law section and Analysis section of this Decision, I explain in more detail the meaning and significance of the unavoidable circumstance claim.

On August 11, 2010, OAA received Appellant’s timely appeal.⁹ In his appeal, Appellant argues that an unavoidable circumstance occurred in 2004 and 2005. Appellant contends that he held a specific intent to operate a charter halibut fishing business in 2005 and that, but for an unavoidable circumstance, he would have done so. The circumstance that allegedly thwarted his intent was Appellant’s lack of a sufficient amount of “sea time” to qualify for the U.S. Coast Guard “Operator of Uninspected Vessel (OUPV, or “6-Pack”) license. In 2007, Appellant obtained the license after having satisfying the requirements, and he began operating his business.¹⁰

On August 20, 2010, OAA issued an order acknowledging Appellant’s appeal and requesting that any additional documentation or information in support of his appeal be submitted to OAA.¹¹ The record does not show that Appellant responded with additional evidence or information. Contractor conducted a telephone conference with Appellant on September 9, 2010.¹² At the conference, Appellant expressed an interest in obtaining counsel to assist him in preparing for a hearing. Contractor agreed to stay additional proceedings until Appellant obtained counsel.

⁶ Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated May 25, 2010.

⁷ Original File Tab, IAD dated June 17, 2010.

⁸ Original File Tab, IAD dated June 17, 2010.

⁹ Pleadings Tab, Appellant’s Letter of Appeal dated Aug. 9, 2010 (received by OAA on Aug. 11, 2010).

¹⁰ Pleadings Tab, Appellant’s Letter of Appeal dated Aug. 9, 2010 (received by OAA on Aug. 11, 2010); Original File Tab, Appellant’s Letter accompanying his Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Mar. 8, 2010 (received by RAM on Mar. 11, 2010).

¹¹ Pleadings Tab, Initial Order dated Aug. 20, 2010.

¹² Status telephone conference held on Sept. 9, 2010.

On both September 22, 2010, and January 4, 2011, Contractor contacted Appellant and asked him to identify his attorney and have that person contact the Contractor so a hearing could be scheduled.¹³ Appellant later responded that he had decided to proceed without an attorney.¹⁴ In an email message dated March 17, 2011, Contractor asked Appellant if he still desired a hearing.¹⁵ Appellant did not respond to that message, nor did he state an objection to NAO's preparation of a decision on the record. 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.¹⁶

ISSUES

On appeal, Appellant does not dispute that he does not meet the minimum participation requirements for eligibility for a CHP. Appellant met the minimum participation requirements for 2008, but he did not meet the minimum participation requirements for 2004 or 2005.

In order for Appellant to prevail in this appeal, he must show by a preponderance of the evidence that he meets the requirements of the unavoidable circumstances provision of the CHLAP regulations. I thus will decide whether Appellant has shown he meets one of the threshold requirements for an unavoidable circumstance claim, namely, that he held the specific intent to operate his charter halibut business in 2004 or 2005.

If Appellant has not demonstrated that he held the specific intent to operate his charter halibut business in 2004 or 2005, Appellant cannot establish his eligibility for a CHP under the unavoidable circumstance provision, and therefore, I must uphold the IAD.

FINDINGS OF FACT

1. In 2004, Appellant purchased a twenty-two foot vessel in an effort to start a charter halibut fishing business.¹⁷
2. In 2004, Appellant learned that he did not have sufficient documented sea time to qualify for the U.S. Coast Guard license needed to operate a vessel for hire in the charter fishery, the "6-Pack" license.¹⁸
3. In 2004 and 2005, Appellant did not hold an Alaska Business Owner License.¹⁹

¹³ Appeals Correspondence Tab, Email from Contractor to Appellant dated Sep. 22, 2010; Email from Contractor to Appellant dated Jan. 4, 2011.

¹⁴ Appeals Correspondence Tab, Email from Appellant to Contractor dated Feb. 24, 2011.

¹⁵ Appeals Correspondence Tab, Email from Contractor to Appellant dated Mar. 17, 2011.

¹⁶ See 50 C.F.R. § 679.43(g)(2), (k).

¹⁷ Pleadings Tab, Appellant's Letter of Appeal dated Aug. 9, 2010 (received by OAA on Aug. 11, 2010).

¹⁸ Pleadings Tab, Appellant's Letter of Appeal dated Aug. 9, 2010 (received by OAA on Aug. 11, 2010).

4. In 2004 and 2005, Appellant did not report any logbook fishing trips to ADF&G.²⁰
5. During the remainder of 2004 and throughout 2005 and 2006, Appellant worked to obtain and document the requisite time at sea to qualify for the license.²¹
6. In 2007, Appellant received a “6-Pack” license and began operating a charter halibut fishing business.²²
7. In 2008, Appellant reported fifteen halibut logbook fishing trips to the Alaska Department of Fish and Game (ADF&G) to meet the participation requirements of the recent participation period.²³

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued an ADF&G Business Owner License. This license authorized the logbook fishing trips that were used to meet the minimum participation requirements to qualify for a CHP.²⁴

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).²⁵

If an applicant does not qualify for a CHP based on the criteria outlined above, he may still be eligible for a permit if he meets the requirements of the unavoidable circumstance provision of the CHLAP regulations. Under the unavoidable circumstance provision as it applies to this case, an applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005) may receive one or more CHPs if the applicant proves the following:

¹⁹ Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Mar. 8, 2010 (received by RAM on Mar. 11, 2010).

²⁰ Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Mar. 8, 2010 (received by RAM on Mar. 11, 2010).

²¹ Pleadings Tab, Appellant’s Letter of Appeal dated Aug. 9, 2010 (received by OAA on Aug. 11, 2010).

²² Original File Tab, Appellant’s Letter accompanying his Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Mar. 8, 2010 (received by RAM on Mar. 11, 2010).

²³ Original File Tab, Application of Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Mar. 8, 2010 (received by RAM on Mar. 11, 2010).

²⁴ 50 C.F.R. § 300.67(b)(1)(ii).

²⁵ 50 C.F.R. § 300.67(b)(1)(ii) (A)-(B); 50 C.F.R. § 300.67(f)(6)-(7).

- he had a specific intent to operate a charter halibut fishing business in 2004 or 2005;
- his specific intent was thwarted by an actual circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable, and;
- he took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in 2004 or 2005.²⁶

ANALYSIS

Since Appellant does not dispute that he did not meet the minimum participation requirements to qualify for a CHP, I must determine whether the unavoidable circumstance provisions of the CHLAP regulations may provide a basis for Appellant to be eligible for a permit.²⁷ The unavoidable circumstance provision has a number of requirements. The provision first requires an applicant to demonstrate by a preponderance of the evidence that he had a specific intent to operate a charter halibut fishing business in 2004 or 2005. If an applicant did not have a specific intent to operate a charter fishing business, then the applicant cannot prove an unavoidable circumstances claim.

Although Appellant purchased a vessel that could have been used in the charter halibut fishing business and let others know of his general intent to operate such a business, Appellant took no steps to prepare to operate a charter fishing business during 2004 or 2005. There is no evidence Appellant held an ADF&G Business Owner license in 2004 or 2005. There is no evidence that Appellant advertised a charter fishing business or took reservations from clients. As well, Appellant was not certified to legally operate a charter vessel during the qualifying period. In 2004, Appellant learned he could not qualify for a "6-Pack" license because of a lack of documented time at sea. Once Appellant learned he could not qualify for the operator's license, Appellant focused on serving and documenting the necessary sea time.

While Appellant has explained the delay receiving his license, this delay was not fatal to his desire to operate a charter halibut business. Appellant could have hired a licensed captain to operate his vessel. However, there is no evidence Appellant attempted to obtain the services of a licensed captain during the qualifying years of 2004 and 2005. In addition, though Manager hoped to be able to book trips with Appellant in the future,²⁸ this desire does not demonstrate Appellant's intent to operate a business during 2004 or 2005. Given the totality of the circumstances and based on the record before me, I conclude that Appellant lacked the specific intent to operate a charter

²⁶ See 50 C.F.R. § 300.67(g)(2)(i)-(iv).

²⁷ See 50 C.F.R. § 300.67(g)(2).

²⁸ Evidence Tab, Letter from Recreation Vehicle Park Manager dated Feb. 24, 2011.

halibut fishing business in at least one year of the qualifying period, 2004 or 2005. Since Appellant cannot prove that he specifically intended to operate his charter halibut business in 2004 or 2005, he cannot establish an unavoidable circumstances claim.

I also note that Appellant did not take all reasonable steps to overcome the obstacles for starting his charter halibut business. As noted previously, holding a captain's license was not necessary to start Appellant's business. Appellant has not shown, as mentioned above, that in 2004 or 2005, he licensed a business, hired a captain, obtained a logbook, advertised, or attempted to take reservations from clients. Under the totality of the circumstances, Appellant did not take all reasonable steps to overcome the circumstance that prevented him from operating his charter halibut fishing business in 2004 and 2005.

In reaching my decision, I have carefully reviewed Appellant's appeal as well as the entire record. I recognize Appellant worked hard to satisfy the sea time requirements and honestly recorded his efforts. I understand Appellant has invested both time and money into developing his charter business. However, I note that in December 2005, the North Pacific Fishery Management Council (Council) adopted a control date of December 9, 2005, and NMFS published notice of the control date in February 2006.²⁹ In the control date notice, NMFS explained that

anyone entering the charter sport fishery for Pacific halibut in and off Alaska after December 9, 2005 (control date) will not be assured of future access to that fishery. . . . This notice is intended to promote public awareness. . . and to discourage new entrants into the charter halibut fishery while the Council discusses whether and how access to the halibut resource by the charter sport fishery should be controlled.³⁰

Appellant entered the charter fishing industry in 2007, well after the publicized control date. Though Appellant's investment is noteworthy, it does not make him eligible to receive a permit under the regulations.

²⁹ Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 61 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>.

³⁰ Fisheries of the Exclusive Economic Zone Off Alaska; Control Date for the Charter Sport Fishery for Pacific Halibut, 71 Fed. Reg. 6442 (advance notice of a proposed rulemaking Feb. 8, 2006), *available at* <http://alaskafisheries.noaa.gov/notice/71fr6442.pdf>. See also Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 563-64 (Jan. 5, 2010) (codified at 50 C.F.R. §300.61, .66-.67) (explaining the Council's reasoning for selecting 2004 and 2005 as the qualifying period and how industry participants were notified of the control date).

CONCLUSIONS OF LAW

Appellant is not eligible for a CHP under the basic requirements because he did not meet the minimum participation requirements in 2004 or 2005 and 2008.

Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because he did not have the specific intent to operate a charter halibut business in 2004 or 2005.

The IAD is consistent with the CHLAP regulations.

ORDER

The IAD dated June 17, 2010 is upheld. This decision takes effect thirty days from the date issued, September 19, 2011, 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), (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 Standard Time, on the tenth day after the date of this Decision, August 29, 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 of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.



Eileen G. Jones
Chief Administrative Judge

Date Issued: August 19, 2011