

and, therefore, did not have a basis for an unavoidable circumstance claim in the recent participation period of 2008.⁴

In his appeal, Appellant acknowledges that he was not in business during the 2004-2005 period, but states that he purchased Vessel and all associated documentation, including operating logbooks. Appellant also states that in 2008 he purchased a business license for operating a charter halibut business. Appellant contends that in 2008 he requested a logbook from the Alaska Department of Fish and Game (ADF&G) but was not given one since he did not have paying clients in 2008. Appellant argues that RAM's denial of his permit application should be reversed because not having a permit places his business, which is based on providing guided halibut fishing, in immediate hardship.⁵

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

At issue in this appeal is whether RAM correctly denied Appellant's application for a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he met the qualifications for a CHP, which include meeting minimum participation requirements. If Appellant did not meet minimum participation requirements to qualify for a CHP, then I must determine whether the unavoidable circumstance provisions of the CHLAP regulations qualify Appellant to receive a CHP in lieu of such participation. To resolve that issue, I must determine whether the CHLAP regulations permit a claim of unavoidable circumstance for both periods of participation, that is 2004 or 2005, and 2008.

FINDINGS OF FACT

1. Appellant did not operate a charter fishing business in 2004 or 2005. Sometime thereafter, Appellant purchased a resort/lodge from which to operate a guided fishing business.⁶
2. In 2008, Appellant obtained a license from the Alaska Department of Commerce, Community, and Economic Development, to conduct business from

⁴ Case File, Original File Tab, IAD dated July 26, 2010, Pages 2, 4, and 5.

⁵ Case File, Original File Tab, Appellant's statement, Application for Charter Halibut Permit, April 1, 2010, Pleadings Tab, Appellant's appeal letter received by RAM on September 17, 2010, Appellant's 2-page appeal letter transmitted December 2, 2010.

⁶ Case File, Pleadings Tab, Appellant's 2-page appeal letter transmitted December 2, 2010, Appellant's statement in support of appeal received by RAM on September 17, 2010.

approximately mid-June to December 31, 2008 for accommodation and food services and for arts, entertainment, and recreation.⁷

3. On June 29, 2009, Appellant and his wife purchased Vessel.⁸
4. On April 1, 2010, Appellant submitted and RAM received an Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A. In his application for a CHP, Appellant identified Vessel as the charter halibut fishing vessel upon which he based his qualification for a permit. In his application, Appellant claimed an unavoidable circumstance that occurred in 2004 or 2005, and in 2008.⁹
5. In a letter dated May 17, 2010, RAM notified Appellant that the Official Record contained no record of Appellant prior to the CHP application and no record of bottomfish or halibut logbook fishing trips during the qualifying or recent participation periods. RAM noted Appellant did not claim that he operated during the qualifying years, but claimed operation of a charter business in 2008 and 2009. RAM notified Appellant of the opportunity to submit evidence; however, Appellant waived such opportunity and requested RAM make an IAD on his application.¹⁰
6. In a letter dated July 26, 2010, RAM issued an IAD that denied Appellant's application for a CHP. RAM determined that the Official Record did not contain bottomfish or halibut logbook fishing records associated with Appellant's Vessel and that Appellant had not met the minimum participation requirements for the qualifying period of 2004 or 2005 and, therefore, did not have a basis for an unavoidable circumstance claim in the recent participation period of 2008.¹¹
7. Appellant submitted an appeal to the IAD, which RAM received on September 17, 2010.¹²

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 non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements. 50 C.F.R. § 300.67(b)(1)(ii). Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more

⁷ Case File, Pleadings Tab, Alaska Business Licenses.

⁸ Case File, Pleadings Tab, Bill of Sale dated June 29, 2009.

⁹ Case File, Original Tab, CHP application dated April 1, 2010.

¹⁰ Case File, Original Tab, May 17, 2010 letter from RAM and May 31, 2010 response from Appellant.

¹¹ Case File, Original Tab, IAD dated July 26, 2010.

¹² Case File, Pleadings Tab, Appellant's appeal letter received by RAM on September 17, 2010.

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); 50 C.F.R. § 300.67(f)(6) and (7).

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).

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 are limited to the following circumstances: (1) An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period, and (2) An applicant for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period. In each circumstance, certain conditions must be met for the applicant to prevail. 50 C.F.R. § 300.67(g)(1) and (2).

ANALYSIS

The first issue I must resolve in this case is whether Appellant has established by a preponderance of the evidence that he satisfied the minimum participation requirements to qualify for a CHP. Under the CHLAP regulations, NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements. 50 C.F.R. § 300.67(b)(1)(ii). 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, 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); 50 C.F.R. § 300.67(f)(6) and (7).

Appellant concedes that he did not operate a charter fishing business in 2004 or 2005. It was not until some time later, presumably in or around 2008, that Appellant purchased a lodge/resort and obtained licensing from the state to operate a business from approximately mid June to December 31, 2008. The Official Record accurately reveals, and the evidence presented in this case confirms, that Appellant was not a person to which the ADF&G issued an ADF&G license to authorize logbook fishing trips that meet the minimum participation requirements. Further, the evidence in the case record is clear that Appellant did not report five or more bottomfish logbook fishing trips during 2004 or 2005 and Appellant did not report five or more halibut logbook fishing trips during the 2008 recent participation period. In fact, the evidence presented by Appellant establishes that he did not purchase Vessel until June 2009. Accordingly, I find no error in RAM's decision to deny Appellant's application for a CHP.

I considered Appellant's arguments presented in this appeal, but conclude that they do not establish error in RAM's decision. Appellant asserts that he purchased Vessel and all associated documentation, including operating logbooks. However, the evidence presented in this record, including that which Appellant presented, does not establish that the minimum participation requirements to qualify for a CHP were met. In fact, the evidence reveals there are no records of logbook fishing trips associated with Vessel. To the extent Appellant's arguments are a claim against the seller of Vessel, issues relating to the sale of Vessel and the conveyance of documents associated with the sale are outside the scope of this proceeding and beyond the authority of this office.

I also considered Appellant's claim that he requested a logbook from the ADF&G in 2008, but was not given one since he did not have paying clients, and that the denial of a logbook compromised Appellant's ability to meet the recent participation period requirements in 2008 (Appellant asserts he took family and friends fishing during the summer of 2008 in exchange for the help they provided in renovating for the 2009 season and that these "for trade" fishing trips could have been used to qualify Appellant for the 2008 season¹³). However, I do not find Appellant's argument convincing. According to the bill of sale Appellant presented, Appellant did not purchase Vessel until June 2009, about one year after the alleged trips were made.

Having determined that Appellant did not meet the minimum participation requirements to qualify for a CHP, I now turn to the question of whether the unavoidable circumstance provisions of the CHLAP regulations qualify Appellant to receive a CHP in lieu of such

¹³ Case File, Original File Tab, Appellant's statement, Application for Charter Halibut Permit, April 1, 2010, Pleadings Tab, Appellant's 2-page appeal letter transmitted December 2, 2010, Appellant's statement in support of appeal received by RAM on September 17, 2010.

participation. Specifically, the question to resolve is whether the CHLAP regulations permit a claim of unavoidable circumstance for both periods of participation, that is 2004 or 2005, and 2008. I have determined the regulations do not permit claims in both periods. See 50 C.F.R. § 300.67 (g)(1)&(2) (“An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period” or “[a]n application for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period,” may nevertheless receive a permit if he or she meets the unavoidable circumstance exception requirements.). Since Appellant has not established that he met the participation requirements for one of the two periods of participation, that is 2004 or 2005, or 2008; he does not meet the threshold requirements for eligibility for a permit pursuant to the “unavoidable circumstance” exception under 50 C.F.R. § 300.67(g).

CONCLUSIONS OF LAW

RAM correctly followed its regulations governing the CHLAP when it denied Appellant’s application for a CHP after determining that Appellant did not meet the qualifications for a CHP, which included meeting minimum participation requirements.

The CHLAP regulations do not permit a claim of unavoidable circumstance for both periods of participation, that is 2004 or 2005, and 2008. Since Appellant has not established that he met the participation requirements for one of the two periods of participation, that is 2004 or 2005, or 2008, he does not meet the threshold requirements for eligibility for a permit pursuant to the “unavoidable circumstance” exception under 50 C.F.R. § 300.67(g).

ORDER

The IAD dated July 26, 2010 is AFFIRMED. 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. See <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>; 50 C.F.R. § 679.43(k) and (o).

[REDACTED]
Christine D. Coughlin
Administrative Judge

Date Issued: February 10, 2011