

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0078

DECISION

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) 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, Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On October 21, 2010, [REDACTED] (Appellant) timely filed an appeal with the Office of Administrative Appeals, challenging a National Marine Fisheries Service (NMFS) Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated August 25, 2010.¹ In that determination, RAM notified Appellant that it denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP), which conditions issuance of a permit on, among other factors, meeting participation requirements in 2004 or 2005, and in 2008.² RAM acknowledged Appellant's claim of eligibility for a CHP based on an unavoidable circumstance that occurred in 2008, but advised Appellant that such claims had to be resolved by OAA.³

¹ Case File, Pleadings Tab, Appellant's appeal submissions received October 21, 2010, Original File Tab, IAD dated August 25, 2010.

² The CHLAP regulations are codified at 50 C.F.R. § 300.67. Unless otherwise noted, citations to the CHLAP regulations are to the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition, of the CFR.

³ Case File, Original File Tab, IAD dated August 25, 2010.

RAM determined that although Appellant met the minimum participation requirements in the qualifying period, 2004 or 2005, by reporting more than the minimum number of bottomfish trips required (five trips for a non-transferable permit and fifteen trips for a transferable permit), Appellant did not report a minimum of five halibut logbook fishing trips in the recent participation period, 2008. RAM noted that, for 2008, the Official Record showed that no halibut logbook fishing trips were reported for Appellant's business in 2008.⁴

In his appeal, Appellant explains that, in 2008, the captain his business had used to operate his vessel, the ██████████ (Vessel), was unavailable. Appellant encountered difficulty locating a substitute captain with sufficient experience to navigate the dangerous waters in his fishing area. Eventually, once the 2008 fishing season was underway, Appellant agreed to lease his Vessel to the operator of another charter fishing business (Operator), whose own vessel was still under construction. As part of the lease agreement, Appellant agreed to allow Operator to record the 2008 halibut logbook fishing trips he conducted in Operator's Alaska Department of Fish and Game (ADF&G) logbook (thus, Operator's business was credited with those fishing trips). Appellant had hoped that sufficient time would have remained in the 2008 season for Operator to also conduct charter fishing trips on behalf of Appellant's business, however, due to complications with insurance issues and unfavorable weather conditions, it became too late to allow Appellant to obtain the fishing trips Appellant needed for his business to meet the CHP requirements.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 Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B). If Appellant does not meet the minimum participation requirements, specifically participation in 2004 or 2005 and in 2008, then I must determine whether the unavoidable circumstance provision of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(1), would enable Appellant to

⁴ Case File, Original File Tab, IAD dated August 25, 2010, Official Record summary; 50 C.F.R. §§ 300.67(b)(1)(ii)(A) and (B) and 300.67(d)(1)(i) and (ii).

⁵ Case File, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010, Original File Tab, Lease Agreement for [Vessel], Appellant's letter dated April 1, 2010.

receive a CHP in lieu of meeting the participation requirement for the 2008 recent participation period.

FINDINGS OF FACT

1. Appellant has operated a charter fishing business since 2001.⁶
2. Appellant's charter fishing business was licensed by the state of Alaska to operate in 2004, 2005, and 2008.⁷
3. Appellant used Vessel in his charter fishing operation, which was registered by ADF&G and documented by the U.S. Coast Guard.⁸
4. In 2004, Appellant reported to ADF&G 57 bottomfish logbook fishing trips.⁹
5. In 2005, Appellant reported to ADF&G 56 bottomfish logbook fishing trips.¹⁰
6. In 2008, the captain Appellant had used to operate Vessel for his charter fishing business was unavailable. Appellant encountered difficulty locating a substitute captain with sufficient experience to navigate the dangerous waters in his fishing area. Once the 2008 fishing season was underway, Appellant was approached by Operator, who was interested in locating a substitute vessel to lease so that he could conduct charter-fishing trips in 2008 for his business. Operator's vessel was still under construction and not yet available for the 2008 charter fishing season.¹¹
7. Appellant and Operator entered into a lease agreement that was valid through August 31, 2008. Under the terms of the lease agreement, Operator leased Vessel from Appellant to conduct charter fishing trips and Operator was to record the 2008 halibut logbook fishing trips he conducted using Vessel in Operator's ADF&G logbook (thus, Operator's business would be credited with those fishing trips), unless the parties agreed to other arrangements. Appellant and Operator did not agree to other arrangements for recording the 2008 halibut logbook fishing trips Operator conducted with Vessel. In retrospect, Appellant stated "It is

⁶ Case File, Original File Tab, Appellant's letter dated April 1, 2010, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010.

⁷ Case File, Original File Tab, Appellant's CHP application dated April 1, 2010.

⁸ Case File, Original File Tab, Appellant's CHP application dated April 1, 2010, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010.

⁹ Case File, Original File Tab, Official Record summary.

¹⁰ Case File, Original File Tab, Official Record summary.

¹¹ Case File, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010.

my fault that I didn't insist on this but [Operator] ended up recording all the trips under his own log book using [Vessel] as a substitute for his vessel."¹²

8. When Appellant entered into the lease agreement with Operator, Appellant hoped sufficient time would have remained in the 2008 season for Operator to conduct charter-fishing trips on behalf of Appellant's business in addition to the trips Operator was conducting for his own business. However, with complications relating to Appellant's business insurance coverage and unfavorable weather conditions, insufficient time remained in the 2008 season to conduct charter-fishing trips on behalf of Appellant's business.¹³
9. In 2008, Appellant reported no halibut logbook fishing trips to ADF&G.¹⁴
10. On April 1, 2010, Appellant signed a completed *Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A* (Application). In Application, Appellant claimed eligibility for a CHP based on an unavoidable circumstance that occurred in 2008.¹⁵
11. On August 25, 2010, RAM issued its IAD, notifying Appellant that it denied his application for a CHP. RAM determined Appellant did not qualify for a CHP because he had not met the basic eligibility requirements, namely minimum participation requirements in 2004 or 2005, and in 2008. RAM noted that applications for an unavoidable circumstance had to be made pursuant to an appeal of the IAD to OAA.¹⁶

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.¹⁷ Minimum participation requirements to qualify for a non-transferable CHP are as follows: an applicant must have reported five or more bottomfish logbook

¹² Case File, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010, Original File Tab, Lease Agreement for [Vessel], Appellant's letter dated April 1, 2010, agency e-mail correspondence dated April 27, 2010.

¹³ Case File, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010, Original File Tab, Lease Agreement for [Vessel].

¹⁴ Case File, Original File Tab, Official Record summary.

¹⁵ Case File, Original File Tab, CHP application.

¹⁶ Case File, Original File Tab, IAD dated August 25, 2010.

¹⁷ 50 C.F.R. § 300.67(b)(1)(ii).

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.²¹

ANALYSIS

The first issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to qualify for a CHP. Under the CHLAP regulations, minimum participation requirements to qualify for a non-transferable CHP require that an applicant reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and reported five or more halibut logbook fishing trips during the recent participation period, namely 2008 (for transferable permits the minimum number of trips that had to be reported in each period is fifteen).²² My review of the record reveals Appellant does not meet such minimum participation requirements.

In 2004, Appellant reported 57 bottomfish logbook-fishing trips to ADF&G. In 2005, Appellant reported 56 bottomfish logbook fishing trips ADF&G. Thus, for the qualifying period Appellant exceeded the minimum participation requirements. However, in 2008, Appellant reported no halibut logbook fishing trips to ADF&G.²³ Since Appellant did not meet the minimum participation requirements in both periods (2004 or 2005, and 2008) to qualify for a CHP, I must turn to the second issue presented in this case and determine whether the unavoidable circumstance provision of the CHLAP regulations enable Appellant to receive a CHP in lieu of his insufficient participation in 2008.

The CHLAP regulations provide, specific to the issue at hand, that an applicant for a CHP that meets the participation requirement for the qualifying period (2004 or 2005) but does not meet the participation requirement for the recent participation period (2008), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(1)(i)-(iv).

The first element, found at 50 C.F.R. § 300.67(g)(1)(i), requires that the applicant had a specific intent to operate a charter halibut fishing business in the recent participation period. The evidence presented shows that Appellant has operated a charter fishing business since 2001.²⁴ Appellant's CHP application shows that Appellant's charter

²¹ 50 C.F.R. § 300.67(f)(5).

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

²³ Case File, Original File Tab, Official Record summary; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

²⁴ Case File, Original File Tab, Appellant's letter dated April 1, 2010, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010.

fishing business was licensed by the state of Alaska to operate in 2004, 2005, and 2008.²⁵ Further, Appellant used Vessel in his charter fishing operation, which was registered by ADF&G and documented by the U.S. Coast Guard.²⁶ Based on these facts I conclude that Appellant had a specific intent to operate a charter halibut fishing business in 2008, the recent participation period.

The next element, found at 50 C.F.R. § 300.67(g)(1)(ii)(A)-(C), requires that the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business. The evidence presented convinces me that the basis for Appellant not meeting the minimum participation requirements in 2008 was not attributable to an unavoidable circumstance that thwarted his intent to participate in the charter fishing industry in 2008.

The facts of this case show that in 2008, the captain Appellant had used to operate Vessel for his charter fishing business was unavailable. Appellant tried to locate a substitute captain to operate Vessel but encountered difficulty finding someone with sufficient experience to navigate the dangerous waters in his fishing area. After the 2008 fishing season was underway, Appellant was approached by Operator, whose vessel was still under construction and not yet available for the 2008 charter fishing season. Operator was interested in locating a substitute vessel to lease so that he could conduct charter fishing trips in 2008 for his business.²⁷ Thereafter, Appellant and Operator entered into a lease agreement under which Operator would lease Vessel from Appellant to conduct charter fishing trips. The lease agreement was valid through August 31, 2008. A term of the lease agreement provided that Operator would record the 2008 halibut logbook fishing trips he conducted using Vessel in Operator's ADF&G logbook (thus, Operator's business would be credited with those fishing trips).²⁸ Specifically, the lease provision stated the following: "[Operator] will log clients in his ADF&G logbook, unless both parties agree to other arrangements."²⁹

At the time Appellant entered into the lease agreement with Operator, he had hoped that sufficient time would have remained later in the 2008 season for Operator to conduct charter fishing trips on behalf of Appellant's business; however, due to complications with business insurance related issues and unfavorable weather

²⁵ Case File, Original File Tab, Appellant's CHP application dated April 1, 2010.

²⁶ Case File, Original File Tab, Appellant's CHP application dated April 1, 2010, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010.

²⁷ Case File, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010.

²⁸ Case File, Pleadings Tab, Appellant's appeal submissions received on October 21, 2010, Original File Tab, Lease Agreement for [Vessel], Appellant's letter dated April 1, 2010.

²⁹ Case File, Original File Tab, Lease Agreement for [Vessel].

conditions, it became too late in the season to allow enough time for Appellant to obtain the fishing trips Appellant needed for his business to meet the CHP requirements.³⁰ In a letter dated April 1, 2010, Appellant acknowledged “[i]t is my fault that I didn’t insist on this but [Operator] ended up recording all the trips under his own log book using [Vessel] as a substitute for his vessel.”

I carefully considered the case record in this appeal and Appellant’s arguments. The evidence in the record establishes that Appellant’s inability to meet the minimum participation requirements in 2008 was not attributable to an unavoidable circumstance. In fact, Appellant’s circumstance was avoidable in that he was not forced to enter into the terms of his lease agreement with Operator. Appellant could have negotiated different lease terms, which would not have deprived his business of obtaining credit for the charter fishing trips conducted with Vessel. Alternatively, Appellant could have sought another substitute captain to operate Vessel on behalf of his business. While Appellant’s circumstances are unfortunate, the facts of this case do not convince me that Appellant’s intent to operate his charter fishing business in 2008 was thwarted by an unavoidable circumstance. Since resolution of this issue is dispositive, I need not address the remaining elements of 50 C.F.R. § 300.67(g)(1).

CONCLUSIONS OF LAW

Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B) since Appellant did not meet the minimum participation requirement for the recent participation period of 2008.

The unavoidable circumstance provisions of the CHLAP regulations do not enable Appellant to receive a CHP in lieu of such participation since Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(1).

ORDER

The IAD dated August 25, 2010 is Upheld. This decision takes effect (30) days from the date issued, August 19, 2011³¹, 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).

³⁰ Case File, Pleadings Tab, Appellant’s appeal submissions received on October 21, 2010, Original File Tab, Lease Agreement for [Vessel].

³¹ 50 C.F.R. § 679.43(k) and (o).

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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 1, 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]

Christine D. Coughlin
Administrative Judge

Date Issued: July 20, 2011