



circumstance in all three relevant years, 2004, 2005, and 2008. RAM explained that to prevail on an unavoidable circumstances, among the criteria, is that an applicant met participation requirements in at least one relevant year, 2004, 2005 or 2008. RAM invited Appellant to submit evidence to show that the Official Record was wrong.

By letter with attachments dated June 23, 2010, Appellant responded to the Notice with additional information.<sup>5</sup> In summary, in Appellant's July 23, 2010 documentation he argued that he should be granted a permit because of unavoidable circumstances. Appellant claimed unavoidable circumstances in 2002 in the form [REDACTED] for his wife and in 2006 in the form of [REDACTED]

After receiving Appellant's response to the Notice, RAM issued the IAD at issue in this case. On November 10, 2010, RAM sent Appellant that IAD. In the IAD RAM denied Appellant a charter halibut permit (CHP or permit), because he lacked the requisite logbook trips as explained in the Notice and as reiterated in the IAD. RAM noted that the "Official Record contains no record of [Appellant] beyond the Application for a Charter Halibut Permit." RAM also noted that Appellant "did not have participation in one of the qualifying years or in the recent participation year," as required to establish a claim under the unavoidable circumstances regulation.<sup>6</sup>

On February 2, 2011, Appellant filed an appeal with NAO. On February 10, 2011, Appellant submitted additional documents to NAO.<sup>7</sup> Although the appeal was filed more than sixty days after the date of the IAD, I deem it timely filed because of delays caused by Appellant's attending to two family medical emergencies.

In his appeal paperwork, Appellant writes he was told he could not claim an exemption for both periods (2004 or 2005 and 2008). He explains that he moved to Alaska in 1993 and began provided guided fishing in 1995. In the 1990s his records were destroyed in a fire. In 2002 Appellant was again a victim of a fire. By 2005 he had "regrouped" and geared up for the 2006 fishing season. However, he suffered an injury [REDACTED] which required [REDACTED]. Appellant states that it took "several years of trying to get [his] [REDACTED] strong enough to handle the rigors of rowing a boat to catch Halibut. This last year [2010] was the first time [he] was able to row and handle the demands of the job."<sup>8</sup> Appellant notes he has been assigned a temporary permit for area 2C, but would like a permit for both 2C and 3A. He also advises that he has lots of records and proof of his participating in the fishery for more than a decade. Lastly, Appellant requests "a meeting with those in charge to explain myself in person."

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<sup>5</sup> Original File, Signed and dated Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence with attachments.

<sup>6</sup> Original File, IAD dated November 10, 2010.

<sup>7</sup> Appeal letter dated February 10, 2011. See 7 C.F.R. § 679.43(d).

<sup>8</sup> Appeal letter dated February 10, 2011.

I construe Appellant's request for a meeting as one asking for a hearing. Under applicable regulations, I have the discretion to order an oral hearing if Appellant's appeal documentation shows an adjudicative fact or a factual issue that needs to be resolved by an oral hearing. See *generally* 50 C.F.R. § 679.43(g). However, as addressed in more detail below, because Appellant concedes he did not report logbook fishing trips in 2004, 2005 and 2008, testimony is not required. I have determined that the information in the record is sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(g)(2)&(k). I therefore close the record and render this decision.

### ISSUES

The broad issue in this case is whether Appellant is eligible for a permit under the CHLAP rules. To resolve that issue, I must answer the following:

Did Appellant prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004, 2005 or 2008?

If the answer to that question is "no," Appellant is not eligible for a permit and I must uphold the IAD. I must also deny Appellant eligibility for a permit under the unavoidable circumstances rule.

### FINDINGS of FACT

1. The Official Record does not show logbook fishing trips recorded for Appellant in 2004, 2005, and 2008.<sup>9</sup>
2. Appellant did not timely report at least five logbook fishing trips to the Alaska Department of Fish and Game (ADF&G) in 2004, 2005, and 2008.<sup>10</sup>
3. Appellant did not hold an ADF&G Business Owner's License for 2004, 2005, or 2008.<sup>11</sup>
4. Appellant did not operate a charter halibut fishing business in 2004, 2005, and 2008.<sup>12</sup>
5. On March 30, 2010, Appellant applied for a CHP.<sup>13</sup>

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<sup>9</sup> Original File tab, IAD.

<sup>10</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A; Original File tab, IAD.

<sup>11</sup> Original File tab, IAD.

<sup>12</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>13</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

6. On his CHP application, Appellant claimed he experienced unavoidable circumstances in 2004, 2005 and 2008.<sup>14</sup>

#### 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 ADF&G issued an ADF&G Business Owner License 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).

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to ADF&G 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). The time limit to submit data about logbook fishing trips was within eight to fourteen days of a qualifying trip, as delineated in the logbooks.<sup>15</sup>

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to ADF&G 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 ADF&G 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).

“Applicant selected year” means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and nontransferable permits. 50 C.F.R. § 300.67(f)(1).

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).

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<sup>14</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>15</sup> Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

If an applicant for a permit cannot meet the requirements for a permit outlined above, he may still be eligible for a permit if he can prove he meets the requirements for what is known as an “unavoidable circumstances claim.” An unavoidable circumstance claim has a threshold requirement, and that requirement can be met one of two ways. First, the threshold requirement for an applicant for a CHP does not meet the participation requirement for the qualifying period (2004 or 2005) but does meet the participation requirement for the recent participation period (2008). Second, the threshold requirement is that an applicant for a CHP meets the participation requirement for the qualifying period (2004 or 2005) but does not meet the participation requirement for the recent participation period (2008). See 50 C.F.R. § 300.67(g)(1)&(2). In short, the threshold requirement for an unavoidable circumstance claim is proof of five or more reported logbook fishing trips in either 2004 or 2005, or in 2008. In other words, an applicant who claims he experienced unavoidable circumstances for both periods of participation cannot prevail on under the unavoidable circumstances rule.

### **ANALYSIS**

#### **Did Appellant prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004, 2005 or 2008?**

To qualify for a permit, the general participation requirements mandate a minimal level of participation in the industry, or charter halibut fishing business, in certain areas in waters off the Alaska coast. To be more precise and as pertaining to the particular regulatory requirements relevant to the case before me, an appellant must prove his charter halibut fishing participation in two periods: one, known as the qualifying period, which occurred in 2004 or 2005; two, known as the recent participation period, which occurred in 2008. To establish that Appellant met those participation requirements, he must show that for 2004 or 2005 he timely reported at least five bottomfish logbook fishing trips and for 2008 he timely reported at least five halibut logbook fishing trips.

Appellant does not dispute that he did not report five or more qualifying trips in 2004 or 2005, and 2008. Therefore, he cannot qualify for a permit under 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

Alternatively, Appellant may pursue eligibility for a permit under what is known as the unavoidable circumstances rule. As a threshold requirement, to make out a claim for unavoidable circumstances, an applicant must show that he met the participation requirements in either the qualifying period in 2004 or 2005, or the recent participation period in 2008. Appellant concedes he did not meet the participation requirements in 2004, 2005, and 2008. Therefore, Appellant does not meet the threshold requirement for an unavoidable circumstance claim, namely participation in one of two time periods, either 2004 or 2005, or in 2008.

In deciding that Appellant does not have the requisite evidence to prove participation in 2004, 2005 or 2008, I have carefully considered Appellant's arguments made on review as well as the entire file. Appellant has faced a number of challenges to sustaining a business, among which are fires and illnesses. However, the regulations are clear that certain minimal level of participation in the charter halibut industry is necessary. And, as stated above, Appellant was not providing charters in the relevant years of 2004, 2005 and 2008. Indeed, he did not submit proof that he held an ADF&G Business Owner's License in 2004, 2005 or 2008. I understand Appellant asserts he has been in the fishing business for more than a decade; however, that does not change the fact that Appellant lacks the proof of the requisite level of participation in the years identified in the CHLAP regulations.

### CONCLUSION

Appellant did not prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004, 2005, or 2008.

The IAD is consistent with CHLAP regulations.

Because Appellant did not prove at least five logbook fishing trips in one of the qualifying participation years, he is ineligible for a permit under the provisions of the unavoidable circumstances rule.

### ORDER

The IAD dated November 10, 2010 is Upheld. This decision takes effect (30) days from the date issued, August 22, 2011,<sup>16</sup> 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 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.

  
Eileen G. Jones  
Chief Administrative Judge

Date issued: July 21, 2011

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<sup>16</sup> 50 C.F.R. § 679.43(k) and (o).