

Appellant to submit evidence to RAM in support of Appellant's claim. In response, on September 1, 2010, Appellant waived an opportunity to submit additional evidence.⁴

On November 12, 2010, RAM sent Appellant its Initial Administrative Determination (IAD), Notice of Right to Appeal. In the IAD RAM notified Appellant that it would not be issuing him a permit. RAM reasoned that although the Official Record showed fourteen qualifying trips for Appellant in 2004, the Official Record also showed zero qualifying trips for Appellant in 2008. Since the Charter Halibut Limited Access Program (CHLAP) regulations require proof of participation in both 2004 (or 2005) and 2008, Appellant was not eligible for a permit. (The regulatory requirements are more fully explained in this Decision in the sections on Principles of Law and Analysis.) In the IAD RAM also noted that it was not making a decision about Appellant's unavoidable circumstance claim, since under the CHLAP regulations those claims had to be adjudicated by OAA.

On January 11, 2011, Appellant timely filed his appeal with OAA.⁵ In his appeal, Appellant argues that he experienced an unavoidable circumstance in 2008 in the form of surgery. The details of Appellant's appeal are more fully explored in the Analysis section of this Decision.

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.⁶

ISSUES

At issue in this appeal is whether Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate the following:

1. Did Appellant establish by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, i.e., he reported at least five logbook fishing trips in 2004 or 2005, and 2008?
2. If the answer to Question 1 is "no," I must evaluate the applicability of the unavoidable circumstance provisions of the CHLAP regulations. That is, I must consider whether Appellant proved by a preponderance of the evidence the following elements of an unavoidable circumstances claim: he reported at least five logbook fishing trips in 2004 or 2005; he specifically intended to operate a charter halibut fishing business in 2008; he suffered from an actual, unavoidable circumstance in 2008; the circumstance was unforeseen, reasonably unforeseeable and unique to Appellant, and; he took all reasonable steps to overcome the unavoidable circumstance.

⁴ Original File Tab, signed Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence.

⁵ Pleadings Tab, appeal letter dated January 6, 2011 with attachments.

⁶ See 50 C.F.R. § 679.43(g)(2) and (k).

3. If the answer to the inquiries in Question 2 are all “yes,” then I must determine whether: Appellant operated one vessel and therefore is eligible for one permit; substituting Appellant’s participation in the qualifying period in 2004, i.e., forty-one logbook fishing trips, for his participation in 2008, results in Appellant qualifying for a transferable permit; the highest number of anglers on Appellant’s charter halibut trips in 2004 was fourteen and therefore Appellant’s permit should be endorsed for fourteen anglers.

FINDINGS OF FACT

1. In 1986, Appellant and his wife built a floating lodge from which they could provide charter halibut trips.⁷

2. Appellant’s primary source of income has been in the charter fishing industry, including providing lodging in 1995, 1996, 1999, 2000, 2002, 2003, 2004, 2005, and 2006.⁸

3. In 1995, 1996, 1999, 2000, 2002, 2003, 2004, 2005, and 2006, Appellant’s primary occupation was as a fishing tour and/or lodge operator.⁹

4. Vessel was used by Appellant to provide charter halibut trips in 2000, 2001, 2002, and 2003.¹⁰

4. In 2004, Appellant’s charter halibut business was ██████████ (Corporation).¹¹

5. For 2004, Corporation held an Alaska Business License.¹²

6. For 2004 usage, ADF&G issued Corporation a Saltwater Charter Logbook for Vessel.¹³

7. Vessel was the boat Appellant used in his charter operations in 2004 as recorded in Appellant’s 2004 Saltwater Charter Vessel Logbook.¹⁴

⁷ Original File Tab, Appellant’s letter dated March 24, 2010.

⁸ Pleadings File, Federal Tax Returns.

⁹ Pleadings File, Federal Tax Returns.

¹⁰ Original File, Saltwater Charter Vessel Logbook for Vessel for 2000, 2001, 2002, and 2003.

¹¹ Original File, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A; Pleadings Tab, 2004 Federal Tax Return.

¹² Original File, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A; Original File, Alaska Business License.

¹³ Original Logbook submitted in support of Application. Based on another logbook in the record, it appears ADF&G also issued a logbook for another vessel, other than Vessel. However, Appellant did not use that logbook or otherwise use 2004 trips from that vessel to support his Application. Nor does it appear from the IAD that RAM thought Appellant was operating more than one vessel for his charter operations.

8. Appellant's 2004 Saltwater Charter Vessel Logbook data indicates Appellant timely reported forty-one bottomfish logbook fishing trips to ADF&G.¹⁵
9. In 2004, Appellant did in fact timely reported forty-one bottomfish logbook fishing trips to ADF&G.¹⁶
10. Of the logbook trips reflected in Findings of Fact 8 and 9, the greatest number of anglers on any trip was fourteen.¹⁷
11. Appellant's 2004 logbook fishing trips occurred in International Pacific Halibut Commission (IPHC) regulatory area 3A.¹⁸
11. In 2005, Appellant did not report any bottomfish logbook fishing trips to ADF&G.¹⁹
12. Appellant is a crucial component to the success of his business, particularly in establishing and maintaining commercial goodwill.²⁰
13. In 2008, Vessel was registered with the United States Coast Guard.²¹
14. Vessel can carry up to sixteen passengers.²²
15. ██████████ 2008, Appellant's physician informed him it was medically necessary for him to undergo surgery.²³

¹⁴ Original File, 2004 Saltwater Charter Logbook Data.

¹⁵ In response to my email, NMFS provided Appellant's logbook data as well as a computer print-out of Appellant's logbook data for 2004 and 2005. That information shows forty-one trips for 2004 with the highest number of anglers as fourteen. The email exchange as well as data has been placed in the case record under the Evidence Tab.

¹⁶ In response to my email, NMFS provided Appellant's logbook data as well as a computer print-out of Appellant's logbook data for 2004 and 2005. That information shows forty-one trips for 2004 with the highest number of anglers as fourteen. The email exchange as well as data has been placed in the case record under the Evidence Tab.

¹⁷ In response to my email, NMFS provided Appellant's logbook data as well as a computer print-out of Appellant's logbook data for 2004 and 2005. That information shows forty-one trips for 2004 with the highest number of anglers as fourteen. The email exchange as well as data has been placed in the case record under the Evidence Tab.

¹⁸ In response to my email, NMFS provided Appellant's logbook data as well as a computer print-out of Appellant's logbook data for 2004 and 2005. That information shows Appellant's logbook fishing trips for 2004 were in Area 3C. The email exchange as well as data has been placed in the case record under the Evidence Tab.

¹⁹ Email dated May 10, 2011 indicating zero halibut logbook trips for Appellant for 2005.

²⁰ Original File Tab, Appellant's letter dated March 24, 2010; Pleadings Tab, appeal letter dated January 6, 2011.

²¹ Original File Tab, Forms CG-1270.

²² Original File, Appellant's letter dated March 24, 2010.

²³ Original File Tab, medical practitioners' letter dated March 24, 2010.

16. Because of Appellant's illness in 2008, at least nineteen persons were diverted from taking or cancelled trips with Appellant.²⁴

17. ██████████ 2008, Appellant was unable to operate a charter fishing vessel.

18. ██████████ Appellant was unable ██████████ for most of the summer in 2008.

19. On April 2, 2010, Appellant applied for a CHP.²⁷

20. On the Application, Appellant did not check a box, for 2004 or 2005, indicating his "Applicant Selected Year."²⁸

21. In the IAD, RAM stated Appellant "did meet the minimum participation requirements in 2004 by reporting 14 bottomfish logbook fishing trips in an ADF&G Saltwater Charter Vessel Logbook issued to you doing business as [Corporation]."²⁹

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 ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements.³⁰

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 2008.³¹

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.³²

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

²⁴ Original File, undated letters received by RAM April 2, 2010, letter dated March 20, 2010, and letter dated March 23, 2010.

²⁵ Original File Tab, medical practitioners' letter dated March 24, 2010.

²⁶ Pleadings File Tab, Appellant's appeal letter dated January 6, 2011.

²⁷ Original File Tab, Application.

²⁸ Original File, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

²⁹ Original File, IAD, Page 2.

³⁰ 50 C.F.R. § 300.67(b)(1)(ii).

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

³² 50 C.F.R. § 300.67(f)(4).

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.³³

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.³⁴

“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.³⁵

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.³⁶

An applicant that meets the participation requirements will be issued the number of charter halibut permits equal to the lesser of the number of permits as follows: (1) The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business License in the applicant-selected year divided by five, and rounded down to a whole number; or (2) The number of vessels that made the bottomfish logbook fishing trips in the applicant-selected year. 50 C.F.R. § 300.67(c)(1) and (2).

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 criteria for what is known as an unavoidable circumstances claim. The threshold criterion for an unavoidable circumstance claim, as it applies to this appeal, is that the applicant meets the participation requirement for the qualifying period (2004 or 2005) but does not meet the participation requirement for the recent participation period (2008). If that threshold criterion is met, the applicant must also prove by a preponderance of the evidence the following: the applicant had a specific intent to operate a charter halibut fishing business in the recent participation period (2008); the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the applicant, and unforeseen and reasonably unforeseeable by the applicant; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period (2008).³⁷ If the applicant proves the foregoing, the applicant will receive the number of transferable and non-

³³ See 50 C.F.R. § 300.67(f)(2).

³⁴ See 50 C.F.R. § 300.67(f)(3).

³⁵ 50 C.F.R. § 300.67(f)(1).

³⁶ 50 C.F.R. § 300.67(f)(5).

³⁷ 50 C.F.R. § 300.67(g)(1)(i)-(iv).

transferable permits and the angler endorsements on these permits that result from the application of criteria in 50 C.F.R. § 300.67 (b) through (f).

The angler endorsement number for the first transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area. 50 C.F.R. § 300.67(e)(1).

To explain the type and number of permits qualified applicants will receive, NMFS stated the following in the preamble to the Proposed Rule for the CHLAP regulations:

NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.³⁸

The preamble to the Final Rule implementing the CHLAP NMFS affirmed the approach articulated in the Proposed Rule: “The preamble to the proposed rule...contains a detailed description of the unavoidable circumstances exception to the qualification requirements.”³⁹

To qualify for a transferable permit, an applicant must prove he reported at least fifteen logbook fishing trips in 2004 or 2005 and 2008.⁴⁰

“A charter halibut permit for IPHC [International Pacific Halibut Commission] regulatory [A]rea 2C must be based on meeting participation requirements in [A]rea 2C. A charter halibut permit for IPHC regulatory [A]rea 3A must be based on meeting participation requirements in [A]rea 3A. Qualifications for a charter halibut permit in each area must be determined separately and must not be combined.”⁴¹

ANALYSIS

Did Appellant establish by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, i.e., he reported at least five logbook fishing trips in 2004 or 2005, and 2008?

As indicated in the Principles of Law section, above, to be eligible for a CHP, generally an applicant has to show participation in the charter halibut business during two periods

³⁸ See 74 Fed. Reg. 18187 (April 21, 2009).

³⁹ See 75 Fed. Reg. 586 (January 5, 2010)(response to comment 109).

⁴⁰ See 50 C.F.R. § 300.67(d).

⁴¹ 50 C.F.R. § 300.67(b).

of time. One period of time is the qualifying period in 2004 or 2005. The other period of time is the recent participation period in 2008. To be eligible for a nontransferable permit, ordinarily one must have five qualifying trips during each period. However, for a transferable permit, one needs at least fifteen qualifying trips in both periods.

With respect to the qualifying period, RAM stated in the IAD that Appellant logged fourteen qualifying trips. Thus, according to RAM, Appellant was shy one qualifying trip to meet the minimum fifteen trip requirement needed to support the requirements for a transferable permit. In considering this issue, as well as all issues in this case, I carefully reviewed the entire file. Based on that review, it seems that RAM made a typographical or inadvertent clerical error in the statement in the IAD referring to Appellant having fourteen qualifying trips for 2008. The records in the case file show Appellant actually had forty-one qualifying trips, not fourteen, as reflected in the Findings of Fact. Thus, I find that Appellant did in fact have forty-one logbook fishing trips for 2004, and as no one disputes, no logbook fishing trips for 2008. Since Appellant does not meet the minimum participation requirements, namely with regard to the 2008 recent participation period, I must now determine whether under the unavoidable circumstance provision of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(1), Appellant qualifies for a CHP.

Did Appellant prove by a preponderance of the evidence the following elements of an unavoidable circumstances claim: he reported at least five logbook fishing trips in 2004 or 2005; he specifically intended to operate a charter halibut fishing business in 2008; he suffered from an actual, unavoidable circumstance in 2008; the circumstance was unforeseen, reasonably unforeseeable and unique to Appellant, and; he took all reasonable steps to overcome the unavoidable circumstance?

The CHLAP regulations provide that an applicant for a CHP that meets the participation requirement for the qualifying period (in this case 2004), but does not meet the participation requirement for the recent participation period (2008), may receive one or more permits if the applicant proves the elements of an unavoidable circumstance claim as provided in 50 C.F.R. § 300.67(g)(1)(i)-(iv).

Fifty 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 (2008). The evidence presented in favor of Appellant with regard to his intent is an established history of providing charter halibut trips, including a lodge in existence more than twenty years and from which Appellant offered charter fishing trips. Further, at least nineteen clients would have been on charter fishing trips with Appellant in 2008 but for his unexpected surgery and recovery. Further, Appellant stated that he fully intended to operate but that his medical needs and health had to take precedence over business.⁴² Under the circumstances, I conclude that Appellant had the specific intent to operate a charter halibut business in 2008.

⁴² Pleadings Tab, appeal letter dated January 6, 2011.

Fifty C.F.R. § 300.67(g)(1)(ii)(A)-(C) requires that the circumstance actually occurred and was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable. Appellant had surgery; there is proof in the record that surgery was in fact performed on Appellant. Medical care is generally not avoidable, and in this case Appellant presented written documentation that the surgery he underwent was medically necessary.⁴³ I therefore conclude that the surgery constituted an unavoidable circumstance within the meaning of the CHLAP regulations. For similar and obvious reasons, the circumstance was unique to Appellant inasmuch as it was his body that needed and in fact underwent surgery.⁴⁴ Under the circumstances, I conclude that the unavoidable circumstance was unique to Appellant, the owner of the charter halibut business reflected in this Decision. And, lastly, I address the unforeseen and reasonably unforeseen nature of Appellant's unavoidable circumstance. Appellant received the news about the necessity of surgery on ██████████ ██████ just a month or two before the heart of the charter halibut season. There is nothing in the record to indicate that this was an expected event, and based on the totality of the evidence, I conclude the surgery was in fact unforeseen and reasonably unforeseeable.

The next inquiry concerns whether Appellant's specific intent was "thwarted" by the unavoidable circumstance, in this case, as established, the surgery that occurred on May 27, 2008. Appellant has a history of operating his charter business. Further, he has stated he would have taken clients charter halibut fishing had he not undergone the surgery. In fact, he did have nineteen clients lined up for trips that were either cancelled, or diverted to other operators or rescheduled. Under the circumstances presented in this case, I conclude that Appellant's intent was thwarted by the unavoidable circumstance.

Fifty C.F.R. § 300.67(g)(1)(iv) requires that the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period. The evidence presented shows that Appellant is the captain of Vessel used in charter operations and has been crucial to the development of client goodwill. Without Appellant, I conclude, Appellant could not maintain the goodwill he had built up over the years nor provide the level of service his clients expected. Further, the surgery was medically necessary, from which I conclude means the surgery could not be delayed. Under the facts of this case, I conclude that Appellant took all reasonable steps to overcome the unavoidable circumstance.

⁴³ Original File Tab, medical practitioners' letter dated March 24, 2010.

⁴⁴ Original File Tab, medical practitioners' letter dated March 24, 2010.

Did Appellant operate one vessel and therefore is eligible for one permit; does substituting Appellant's participation in the qualifying period in 2004, i.e., forty-one logbook fishing trips, for his participation in 2008, result in Appellant qualifying for a transferable permit; since the highest number of anglers on Appellant's charter halibut trips in 2005 was fourteen should Appellant's permit be endorsed for fourteen anglers?

Having determined Appellant meets the criteria of 50 C.F.R. § 300.67(g)(1), I must now determine the number and type of CHP Appellant is qualified to receive, meaning a transferable or nontransferable permit, and the angler endorsement for that permit.⁴⁵ As to the number of permits Appellant is qualified to receive, 50 C.F.R. § 300.67(c) specifies that the number of permits allowed will be the lesser of two factors, one of which is "the number of vessels that made the bottomfish logbook fishing trips in the applicant selected year." Appellant's "applicant selected year" is 2004. Appellant used only one vessel, Vessel, for the bottomfish logbook fishing trips he made in 2004. Hence, Appellant is qualified to receive one CHP.

As to the type of permit Appellant is qualified to receive, transferable or nontransferable,⁴⁶ the preamble to the Proposed Rule and to the Final Rule of the CHLAP provide guidance on these issues. In the preamble to the Proposed Rule for the CHLAP regulations NMFS states:

NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.⁴⁷

In the preamble to the Final Rule NMFS indicated that the reasoning articulated in the Proposed Rule remained valid: "The preamble to the proposed rule...contains a detailed description of the unavoidable circumstances exception to the qualification requirements."⁴⁸ Further, to qualify for a transferable permit the key requirement is proof of fifteen or more qualifying trips in both periods of participation.⁴⁹

Thus, for purposes of resolving the type of permit Appellant is qualified to receive, I must examine the extent of Appellant's participation during the qualifying period, 2004, as a substitute for Appellant's participation in 2008. In 2004, Appellant reported forty-one logbook fishing trips to ADF&G. The forty-one logbook trips taken in 2004 are used

⁴⁵ See 50 C.F.R. § 300.67(g)(1)(v), and 50 C.F.R. § 300.67 (b) through (f).

⁴⁶ See 50 C.F.R. § 300.67(g)(2).

⁴⁷ See 74 Fed. Reg. 18187 (April 21, 2009).

⁴⁸ See 75 Fed. Reg. 586 (January 5, 2010)(response to comment 109).

⁴⁹ See 50 C.F.R. § 300.67(d).

as a substitute for Appellant's participation in 2008, had he not experienced an unavoidable circumstance. Since in both participation periods, 2004 and 2008, Appellant did or is deemed to have taken more than fifteen logbook trips, he qualifies for a transferable permit.

With regard to the angler endorsement on the permit, CHLAP regulations provide that the angler endorsement number for the first transferable permit will be the greatest number of charter vessel anglers reported on any logbook trip in the applicant's qualifying period.⁵⁰ In 2004, the qualifying period for Appellant, the maximum number of anglers reported was fourteen anglers. Accordingly, I conclude that Appellant's nontransferable CHP will be endorsed for fourteen anglers.

CONCLUSIONS OF LAW

Appellant has not established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, because he did not report at least five logbook fishing trips in 2008.

Appellant meets the following elements of an unavoidable circumstances claim: he reported at least five logbook fishing trips in 2004; he specifically intended to operate a charter halibut fishing business in 2008; he suffered from an actual, unavoidable circumstance in 2008; the circumstance was unforeseen, reasonably unforeseeable and unique to Appellant, and; he took all reasonable steps to overcome the unavoidable circumstance.

Appellant is eligible for one permit; Appellant qualifies for a transferable permit; Appellant's permit will be endorsed for fourteen anglers.

⁵⁰ 50 C.F.R. § 300.67(e)(1).

ORDER

The IAD dated April 2, 2010 is vacated. RAM is directed to issue Appellant a transferable CHP for Area 3A with an angler endorsement number of fourteen.

This decision takes effect (30) days from the date issued, July 5, 2011,⁵¹ 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, June 13, 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.

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Eileen G. Jones
Chief Administrative Judge

Date Issued: June 2, 2011

⁵¹ 50 C.F.R. § 679.43(k) and (o).