

which revealed that the highest number of charter vessel anglers Appellant reported on any logbook fishing trip during either qualifying year, 2004 or 2005, was five.³

In his appeal, Appellant does not dispute the fact that the vessel he operated during the qualifying years, the ██████████ (Vessel 1), “only carried a maximum of 5 charter halibut anglers.” Rather, Appellant argues for an endorsement of more anglers because the new boat he started to have built in 2004 and began using in 2008, the ██████████ (Vessel 2), is able to accommodate up to twelve halibut anglers.⁴ Appellant contends he was not able to operate Vessel 2 earlier than 2008 because construction of the boat was not finished due to unavoidable circumstances. Appellant argues he cannot realistically operate Vessel 2 with an angler endorsement of five because that number of anglers, on a vessel that can accommodate twelve anglers, will not generate business profits and allow Appellant to recoup his investment in the charter operation.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 eligible to receive an angler endorsement of twelve, rather than five, for the one transferable CHP Appellant is qualified to receive. To resolve this issue, I must determine whether the CHLAP regulations tie the angler endorsement number for the first transferable permit issued to an applicant to the number of anglers reported on any logbook trip in the qualifying period, meaning 2004 or 2005. I must also resolve whether a claim of unavoidable circumstance is applicable to Appellant’s case and may be used to increase the angler endorsement number for an issued CHP.

FINDINGS OF FACT

1. Appellant has been in the charter fishing business since 2000. Appellant operated Vessel 1 from 2000 until 2007, after which it was sold.⁶ Vessel 1

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

⁴ Case File, Pleadings Tab, Appellant’s timeline and letter of appeal received October 20, 2010.

⁵ Case File, Pleadings Tab, Appellant’s letter of appeal received October 20, 2010.

⁶ Case File, Appeals Correspondence, e-mail correspondence between Appellant and NAO dated December 13, 2010, Original File Tab, Appellant’s letter dated May 24, 2010, Pleadings Tab, Appellant’s letter of appeal received October 20, 2010.

typically carried a maximum of five charter halibut anglers, including during 2004 and 2005.⁷

2. In 2002, Appellant began considering designing and building a new boat for his charter operation business, which he intended to expand from a part-time business to a full-time business. Appellant personally knew the custom boat builder of Vessel 2 and agreed to boat construction without a formal written contract. In February 2004, physical construction of the new boat, Vessel 2, began.⁸ Ensuing delays that were attributable to construction and other reasons led to a delay in operating Vessel 2 until the 2008 charter fishing season.⁹ Vessel 2 is currently the only vessel Appellant operates.¹⁰
3. On February 6, 2010, Appellant signed an "Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A." Appellant chose 2005 for Area 3A as his "Applicant Selected Year." On the application, Appellant stated he did not agree with the number of anglers endorsed for his permit, as based on the Official Record summary. Appellant also asserted a claim of an unavoidable circumstance that occurred in 2004 or 2005.¹¹
4. The Summary of the Official Charter Halibut Record for 2004 and 2005 revealed that Appellant qualified for one transferable CHP for Area 3A, with an angler endorsement of five anglers.¹²
5. In a revised notice dated April 28, 2010, RAM notified Appellant of the opportunity to submit evidence regarding his application for a CHP. In the letter Ram noted that the official record showed Appellant was eligible for a CHP with an angler endorsement of five, yet Appellant claimed an angler endorsement of twelve. RAM also noted Appellant claimed an unavoidable circumstance in 2004 or 2005 that prevented him from having additional anglers on his vessel. RAM explained that the unavoidable circumstance provision is limited to use by persons who would be excluded from the charter halibut fishery entirely. RAM also explained Appellant had to provide documentation demonstrating more

⁷ Case File, Original File Tab, Appellant's letter dated May 24, 2010, Pleadings Tab, Appellant's letter of appeal received October 20, 2010.

⁸ Case File, Pleadings Tab, Appellant's timeline and letter of appeal received October 20, 2010, Original File Tab, Appellant's letter dated February 6, 2010.

⁹ Case File, Original File Tab, Appellant's letter dated February 6, 2010, Pleadings Tab, Appellant's timeline and letter of appeal received October 20, 2010, Appeals Correspondence, e-mail correspondence between Appellant and NAO dated December 13, 2010.

¹⁰ Case File, Pleadings Tab, Appellant's timeline and letter of appeal received October 20, 2010, Appeals Correspondence, e-mail correspondence between Appellant and NAO dated December 13, 2010.

¹¹ Case File, Original File Tab, Appellant's CHP application dated February 6, 2010 and accompanying letter also dated February 6, 2010.

¹² Case File, Original File Tab, Summary of Official Charter Halibut Record.

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). "Qualifying period" means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005. 50 C.F.R. § 300.67(f)(6).

Unavoidable circumstance claims must be made pursuant to 50 C.F.R. § 300.67(h)(6), and will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. 50 C.F.R. § 300.67(g). NMFS concluded that the proposed unavoidable circumstance exception should be narrow, and that, if an applicant could get any charter halibut permit based on the applicant's actual participation, the applicant would be limited to that permit. See 74 Fed. Reg. 18188 (April 21, 2009).

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).

ANALYSIS

At issue in this case is whether Appellant is eligible to receive an angler endorsement of twelve, rather than five, for the one transferable CHP he is qualified to receive. To resolve this issue, I must determine whether the CHLAP regulations tie the angler endorsement number for the first transferable permit issued to an applicant to the number of anglers reported on any logbook trip in the qualifying period, meaning 2004 or 2005.

The CHLAP regulations provide that 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). "Qualifying period" means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005. 50 C.F.R. § 300.67(f)(6).

The Summary of the Official Charter Halibut Record for 2004 and 2005 reveals that Appellant qualifies for one transferable CHP for Area 3A, with an angler endorsement of five anglers. Appellant does not dispute the fact that, during the qualifying years of 2004 and 2005, Appellant operated Vessel 1, which "only carried a maximum of 5 charter halibut anglers." Further, Appellant designated 2005 as his "Applicant Selected Year." Under 50 C.F.R. § 300.67(e)(1) and § 300.67(f)(6), Appellant is eligible for a transferable permit endorsed for the highest number of anglers he reported in 2005. The uncontroverted facts of this case establish that the greatest number of charter

[REDACTED]
Appeal No. 10-0077

Pursuant to CHLAP regulations, the unavoidable circumstance provisions are not applicable to Appellant's case as he is not otherwise entirely excluded from the charter halibut fishery.

ORDER

The IAD dated August 25, 2010 is upheld. 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.¹⁷

[REDACTED]

Christine D. Coughlin
Administrative Judge

Date Issued: March 28, 2011

¹⁷ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).