

submit evidence to show that the Official Record was wrong. By letter with attachments dated August 25, 2010, Appellant responded to the Notice with a copy of his medical records from March 2004.⁵

On November 23, 2010, RAM sent Appellant the IAD at issue in this case. In the IAD RAM denied Appellant a 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 showed no qualifying logbook trips for 2004 or 2005, and four properly recorded logbook trips for 2008, not the minimal number, five, as required by applicable regulations. RAM also acknowledged Appellant's claim under the unavoidable circumstances rule, and opined that Appellant could not prove a claim under the unavoidable circumstances rule because Appellant did not meet the participation requirements in at least one of the participation periods, namely 2004 or 2005, or 2008. However, RAM did not make a determination on that issue because pursuant to CHLAP regulations, OAA resolves unavoidable circumstance claims.⁶

On December 3, 2010, Appellant timely filed an appeal with NAO.⁷ On February 16, 2011, NAO sent Appellant a letter acknowledging his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by March 18, 2011.⁸ The record does not show that Appellant responded with additional evidence or information.

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

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:

1. Did Appellant prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005?
2. If the answer to Question 1 is "no," I will decide whether Appellant has established by a preponderance of the evidence the threshold requirement for an unavoidable circumstances claim, namely that he properly recorded at least five charter halibut logbook fishing trips for 2008.

⁵ Original File, Appellant's letter dated August 25, 2010 with attachments. The submission was late under CHLAP regulations; however, it is part of the record and I have exercised my discretion to consider it in reaching my decision.

⁶ Original File, IAD dated October 22, 2010. .

⁷ Appeal letter dated December 3, 2010. See 7 C.F.R. § 679.43(d).

⁸ Appeals Correspondence Tab, letter dated February 16, 2011.

If the answer to Question 2 is “no,” Appellant is not eligible for a permit and I must uphold the IAD.

FINDINGS of FACT

1. Appellant was a commercial fisherman for most of his life, up until [REDACTED].⁹
2. In 2004, Appellant was treated for a serious medical condition; one that if not treated would generally be considered life threatening.¹⁰
3. In 2004 and continuing into 2005, Appellant was starting his charter fishing business.¹¹
4. Appellant did not report any qualifying logbook fishing trips to ADF&G for 2004 and 2005.¹²
5. Appellant did not timely send ADF&G all of his records of his 2008 charter trips.¹³
6. For 2008, Appellant timely and properly reported to ADF&G four halibut logbook fishing trips.¹⁴
7. On March 24, 2010, Appellant applied to NMFS for a CHP.¹⁵
8. On Appellant’s application for a CHP, Appellant did not indicate that he took any qualifying logbook trips for any of the three relevant years, 2004, 2005 and 2008.¹⁶

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 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

⁹ Original File Tab, Letter dated August 25, 2010.

¹⁰ Original File Tab, Letter dated August 25, 2010 with attachment, Discharge Instructions dated March 3, 2004; Pleadings Tab, Appeal dated December 3, 2010.

¹¹ Original File Tab, Letter dated August 25, 2010.

¹² Original File Tab, IAD dated June 23, 2010. Appellant has not presented evidence of qualifying trips in 2004 and 2005.

¹³ Original File Tab, Letter dated August 25, 2010.

¹⁴ Original File Tab, IAD dated November 23, 2010.

¹⁵ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

¹⁶ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A

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 [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 eight to fourteen days, as delineated in the logbooks.¹⁷

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska [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 the State of Alaska [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).

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. That threshold requirement, as relevant to this case, is that 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). See 50 C.F.R. § 300.67(g)(1). In short and as relevant to this case, the threshold requirement is proof of five or more reported halibut logbook trips in 2008.

¹⁷ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

ANALYSIS

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

The CHLAP regulations have two general ways to qualify for a permit. First, an applicant can meet the general participation and other requirements. Second, as an exception to the general participation requirements, an applicant can qualify for a permit under what is known as the “unavoidable circumstances” rule. Below, each way to qualify for a permit is discussed.

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 he 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. 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). Appellant asks we consider his circumstances and personal history, and based on that, issue him a permit. Given Appellant’s appeal paperwork as well as the rest of the file, I construe Appellant’s central argument to be in support of a claim for unavoidable circumstances. I thus turn to whether Appellant can meet the threshold requirement for an unavoidable circumstance claim so that he may be eligible for a CHP permit notwithstanding his lack of fishing history in 2004 or 2005.

Has Appellant established by a preponderance of the evidence the threshold requirement for an unavoidable circumstances claim, namely that he properly recorded at least five charter halibut logbook fishing trips 2008?

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 (2004 or 2005) or the recent participation period in 2008. As stated previously, Appellant did not meet the participation requirements in 2004 or 2005. I must therefore examine the possibility that Appellant can meet the threshold requirement with proof of participation in 2008. The Official Record shows four halibut logbook fishing trips for 2008. Thus, it is Appellant’s burden to show that he timely reported to ADF&G at least one more halibut fishing trip in a logbook with the requisite information.

In an attempt to meet that burden, Appellant argues he knows he took at least five trips, although he also notes that he may not have reported all of those trips to ADF&G.

Given all of the evidence, I have concluded, as indicated in the Findings of Fact section of this Decision, that Appellant did not report more than four requisite trips to ADF&G for 2008.

I also note that merely taking trips is not sufficient to meet participation requirements, in this case, because of the regulatory definition of halibut logbook fishing trip and the timeliness requirement. As noted above in the Principles of Law section of this Decision, the regulations do not say merely that a trip was taken, but that it was a) timely reported, meaning within fourteen days of a charter halibut trip; b) in a logbook assigned to an applicant based on his business license, and; c) with certain information. Appellant has not shown that he submitted appropriate logbook pages to ADF&G within fourteen days of at least five charter halibut fishing trips. At best, Appellant's evidence shows he took charter trips, but not that he reported them in the manner and by the deadline established by law. Accordingly, Appellant does not show that he can meet the threshold requirement for an unavoidable circumstances claim. I need not address the other requirements for an unavoidable circumstances claim, since the threshold issue, establishment of participation in at least one period (in this case 2004/2005 or 2008), is dispositive. I therefore conclude Appellant is not eligible for a permit under the unavoidable circumstances rule.

In reaching my decision in this case, I carefully reviewed the entire record. I appreciate Appellant's service to the country in the time of war. I also recognize that Appellant sees himself as a smaller operator and therefore believes his operation would not have a significant adverse effect on the fishery. I have read his concerns about his finances with care, and understand he has faced health and medical challenges. However, under the CHLAP regulations, as analyzed above and as applied to this case, Appellant does not qualify for a CHP.

CONCLUSION

Appellant is not eligible for a permit under the CHLAP rules.

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

Appellant did not establish by a preponderance of the evidence the threshold requirement for an unavoidable circumstances claim, namely that he properly recorded at least five charter halibut logbook fishing trips for 2008.

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated November 23, 2010 is upheld. This decision is effective June 17, 2011, thirty days from the date issued¹⁸ 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).



Eileen G. Jones
Chief Administrative Judge

Date issued: May 18, 2011

¹⁸ 50 C.F.R. § 679.43(k) and (o).