

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0057

DECISION

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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 September 20, 2010, [REDACTED] (collectively referred to as 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 July 23, 2010.<sup>1</sup> 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.<sup>2</sup>

In the IAD, RAM determined that Appellant had met the minimum participation requirements for 2008, the recent participation period, but that Appellant had not reported a minimum of five bottomfish logbook fishing trips in 2004 or 2005 to meet minimum participation requirements for the qualifying period. RAM noted that Appellant

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<sup>1</sup> Case File, Pleadings Tab, Appellant's appeal submission received December 8, 2010, Original File Tab, IAD dated July 23, 2010.

<sup>2</sup> 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.

had made a claim of an unavoidable circumstance that occurred in the qualifying period and advised Appellant that such claims had to be resolved by OAA.<sup>3</sup>

In her appeal, Appellant renews her claim that an unavoidable circumstance in 2005 prevented her from operating her charter fishing business in 2005. Appellant states that due to [REDACTED] health complications, she was unable to complete the 2005 charter fishing season and had to cancel scheduled fishing trips that year. As a consequence, she was unable to conduct and report a minimum of five bottomfish logbook fishing trips during the 2005 season.<sup>4</sup>

I reviewed Appellant's appeal and the case record and determined that an oral hearing would best resolve the issues of adjudicative fact presented in this case.<sup>5</sup> Accordingly, I ordered a hearing on May 11, 2011, and provided Appellant with at least thirty days advance notice of the date, place, and time of the oral hearing and of the issues to be determined at the hearing.<sup>6</sup> In advance of the hearing, Appellant submitted a two-page document containing a statement from her physician. I accepted this document into the record and marked it as Appellant's Exhibit 1. Following the hearing, Appellant submitted a three-page document containing a two-page statement from Appellant, offering additional comments that she wished me to consider in reviewing her case. I accepted this document into the record and marked it as Appellant's Exhibit 2. Appellant later submitted a two-page document containing another statement from her physician that she recently received. I accepted this document into the record and marked it as Appellant's Exhibit 3. Following my conclusion of the hearing on May 11, 2011 and acceptance of Appellant's exhibits, I determined the record contained sufficient information on which to reach final judgment and I closed the record. This decision follows.<sup>7</sup>

## 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 she 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, meaning participation in 2004 or 2005, and in 2008, then I must determine whether the unavoidable circumstance provision of the

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<sup>3</sup> Case File, Original File Tab, IAD dated July 23, 2010.

<sup>4</sup> Case File, Pleadings Tab, Appellant's appeal submission received September 20, 2010.

<sup>5</sup> 50 C.F.R. §§ 679.43(g)(3)(i) 679.43(h)(2), and 679.43(n)(1).

<sup>6</sup> Case File, Appeals Correspondence Tab, Notice of Scheduled Hearing; 50 C.F.R. § 679.43(n)(1)-(2).

<sup>7</sup> 50 C.F.R. §§ 679.43(n)(8), (j), and (k).



6. [REDACTED] Appellant visited the hospital emergency room in mid July 2005. Following that visit, Appellant was advised by medical personnel as well as her treating physician to remain on light duty. [REDACTED]  
[REDACTED] Appellant complied with these medical directives. This light duty restriction was effective July 26, 2005 and until such time that Appellant felt she could resume regular physical activity.<sup>15</sup>
7. [REDACTED]<sup>6</sup>
8. Due to her [REDACTED] medical complications, Appellant cancelled approximately four bottomfish fishing trips in 2005 that were scheduled during the late July and early August 2005 timeframe since she could not physically engage in charter fishing activities during this time.<sup>17</sup>
9. Appellant did not schedule further bottomfish fishing trips for the 2005 season in light of the medical complications she had experienced and the fact that charter fishing activity became increasingly difficult as [REDACTED]  
[REDACTED] made it more difficult to engage in physically demanding activities, like charter fishing.<sup>18</sup>
10. Since Vessel was new and of significant cost to Appellant to have built, Appellant did not seek a relief captain because she was afraid to have someone else operate Vessel in Appellant's absence.<sup>19</sup> Also, as a new small business owner and sole operator, Appellant was unfamiliar with the details of hiring an employee to operate Vessel. Appellant believed the simplest remedy, [REDACTED]  
[REDACTED] was to cancel the fishing trips that had been booked during the two to three week period she was confined to light duty.<sup>20</sup>

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<sup>15</sup> Case File, Original File Tab, Appellant's April 1, 2010 statement accompanying her CHP application, Pleadings Tab, Appellant's appeal submission received September 20, 2010, Evidence Tab, Appellant's Exhibit 1, Page 2 of 2 and Exhibit 3, Page 2 of 2; Appellant's Hearing Testimony.

<sup>16</sup> Appellant's Hearing Testimony.

<sup>17</sup> Case File, Original File Tab, Appellant's April 1, 2010 statement accompanying her CHP application, Pleadings Tab, Appellant's appeal submission received September 20, 2010; Appellant's Hearing Testimony

<sup>18</sup> Appellant's Hearing Testimony.

<sup>19</sup> Case File, Original File Tab, Invoice dated February 9, 2004; Appellant's Hearing Testimony.

<sup>20</sup> Case File, Evidence Tab, Appellant's Exhibit 2, Page 3 of 3; Appellant's Hearing Testimony.

11. In 2008, using Vessel, Appellant reported seven halibut logbook fishing trips to ADF&G for Area 3A.<sup>21</sup>
12. 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 stated she was applying for a CHP based on an unavoidable circumstance that occurred in 2004 or 2005. Appellant also selected 2005, for Area 3A, as her “applicant selected year.”<sup>22</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 the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements.<sup>23</sup> 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.<sup>24</sup>

An applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves the following: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; 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 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 at least one year of the qualifying period.<sup>25</sup>

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<sup>21</sup> Case File, Internal Correspondence Tab, Appellant's logbook data for 2005 through 2008, Original File Tab, CHP application received by RAM on April 5, 2010, Appellant's April 1, 2010 statement accompanying her CHP application; Appellant's Hearing Testimony; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

<sup>22</sup> Case File, Original File Tab, CHP application received by RAM on April 5, 2010.

<sup>23</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>24</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

<sup>25</sup> 50 C.F.R. § 300.67(g)(2)(i)-(iv).

If the applicant proves the foregoing elements of an unavoidable circumstance claim then the applicant will receive either one non-transferable permit with an angler endorsement of four, or the number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.<sup>26</sup>

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.<sup>27</sup>

The angler endorsement number for the first non-transferable or 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.<sup>28</sup>

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.<sup>29</sup>

“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 non-transferable permits.<sup>30</sup>

## 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 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

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<sup>26</sup> 50 C.F.R. § 300.67(g)(v)(A)-(B).

<sup>27</sup> 50 C.F.R. § 300.67(c)(1) and (2).

<sup>28</sup> See *generally*, 50 C.F.R. § 300.67(e)(1).

<sup>29</sup> 50 C.F.R. § 300.67(f)(5).

<sup>30</sup> 50 C.F.R. § 300.67(f)(1).

during the recent participation period, namely 2008.<sup>31</sup> My review of the record reveals Appellant does not meet such minimum participation requirements.

In 2004, Appellant had not yet begun operating a charter fishing business and, consequently, did not report any bottomfish logbook fishing trips in that year. However, in 2005, Appellant's charter fishing business was operational. In 2005, Appellant reported two bottomfish logbook fishing trips to ADF&G, falling short of the five-trip minimum specified in the CHLAP regulations.<sup>32</sup> In 2008, Appellant reported seven halibut logbook fishing trips to ADF&G, exceeding the five-trip minimum specified in the CHLAP regulations.<sup>33</sup> Since Appellant did not meet the minimum participation requirements in both periods (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 qualifies Appellant to receive a CHP in lieu of her insufficient participation in 2005.

The CHLAP regulations provide, specific to the issue at hand, that an applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(2)(i)-(iv). I will now address each element.

Fifty C.F.R. § 300.67(g)(2)(i) requires that the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period. The evidence presented shows that Appellant intended to, and did, operate a charter halibut fishing business in 2005. Appellant took and properly reported two bottomfish logbook fishing trips to ADF&G in 2005. Additional trips Appellant had booked for the 2005 season had to be cancelled due to Appellant's medical condition ██████████

██████████<sup>34</sup> The evidence also shows that Appellant owned Vessel, which was newly constructed and which was delivered in time for Appellant to participate in the 2005 fishing season. Appellant possessed her sport fish business owner and guide license from the ADF&G for 2005 as well as her U.S. Coast Guard operator's license.<sup>35</sup>

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

<sup>32</sup> Case File, Internal Correspondence Tab, Appellant's logbook data for 2005 through 2008, Original File Tab, CHP application received by RAM on April 5, 2010; Appellant's Hearing Testimony; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

<sup>33</sup> Case File, Internal Correspondence Tab, Appellant's logbook data for 2005 through 2008, Appellant's April 1, 2010 statement accompanying her CHP application; Appellant's Hearing Testimony; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

<sup>34</sup> Case File, Original File Tab, Appellant's April 1, 2010 statement accompanying her CHP application.

<sup>35</sup> Case File, Original File Tab, Appellant's April 1, 2010 statement accompanying her CHP application, 2005 Sport Fish Business Owner/Guide License; Appellant's Hearing Testimony.

Appellant also maintained an Alaska business owner's license in 2005.<sup>36</sup> Thus, the preponderance of the evidence presented in this case convinces me that Appellant had a specific intent to operate a charter halibut fishing business in 2005.

Fifty C.F.R. § 300.67(g)(2)(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. Fifty C.F.R. § 300.67(g)(2)(iii) requires that the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred.

The evidence presented establishes that Appellant's intent to operate a charter halibut fishing business in 2005 was thwarted by a circumstance, namely medical complications [REDACTED]

[REDACTED] Appellant visited the hospital emergency room. Following that visit, Appellant was advised by medical personnel as well as her treating physician to remain on light duty. [REDACTED]

[REDACTED] Appellant's light duty restriction was effective July 26, 2005 and until such time that Appellant felt she could resume regular physical activity.<sup>37</sup> As a consequence, Appellant cancelled approximately four bottomfish fishing trips in 2005 that were scheduled during the late July and early August 2005 timeframe since her [REDACTED] health complications prevented her from engaging in charter fishing activities during this time.<sup>38</sup> Appellant did not schedule further bottomfish fishing trips for the 2005 season given the medical complications she earlier experienced and given the fact that charter fishing activity became increasingly difficult as Appellant's [REDACTED] Specifically, Appellant [REDACTED]

<sup>36</sup> Case File, Original File Tab, Alaska Business Owner's License from March 14, 2005 through December 31, 2006; Appellant's Hearing Testimony.

<sup>37</sup> Case File, Original File Tab, Appellant's April 1, 2010 statement accompanying her CHP application, Pleadings Tab, Appellant's appeal submission received September 20, 2010, Evidence Tab, Appellant's Exhibit 1, Page 2 of 2 and Exhibit 3, Page 2 of 2; Appellant's Hearing Testimony.

<sup>38</sup> Case File, Original File Tab, Appellant's April 1, 2010 statement accompanying her CHP application, Pleadings Tab, Appellant's appeal submission received September 20, 2010; Appellant's Hearing Testimony.

<sup>39</sup> Appellant's Hearing Testimony.



duty.<sup>43</sup> The preponderance of the evidence presented in this case convinces me that Appellant took all reasonable steps to overcome the circumstance that prevented her from operating a charter halibut fishing business in 2005.

Under the CHLAP regulations, if the applicant proves the elements of an unavoidable circumstance claim found in 50 C.F.R. § 300.67(g)(2)(i)-(iv) then the applicant will receive either one non-transferable permit with an angler endorsement of four, or the number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period. 50 C.F.R. § 300.67(g)(v)(A)-(B).

The evidence presented in this case shows that Appellant actually took and properly reported two bottomfish logbook fishing trips to ADF&G in 2005 using Vessel. Approximately four additional bottomfish trips Appellant had booked for the 2005 season had to be cancelled due to Appellant's medical condition ██████████.██████████<sup>44</sup> Thus, Appellant would have likely taken at least six bottomfish logbook fishing trips in 2005 but for the health-related circumstance that thwarted Appellant's intent to operate her charter halibut fishing business that year. This information coupled with Appellant's established history of having taken and properly reported to ADF&G seven halibut logbook fishing trips in 2008, thereby already meeting the minimum participation requirements for the recent period of participation, demonstrates that Appellant qualifies for one non-transferable permit for Area 3A.<sup>45</sup>

As to the angler endorsement number associated with the one non-transferable permit Appellant is qualified to receive, the CHLAP regulations provide that a charter halibut permit will be endorsed for the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period.<sup>46</sup> Additionally, a Final Rule published in the Federal Register by NMFS on September 17, 2010, which revised the method of assigning angler endorsements to charter halibut permits issued to applicants that receive more than one permit in an area, provides some general guidance on the issue. See 75 Fed. Reg. 56903-56910 (September 17, 2010). In this Final Rule, NMFS noted its prior and continued use of the "total clients" field in the logbook data received from ADF&G to determine the angler endorsement on a charter halibut permit. See 75 Fed.

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<sup>43</sup> Case File, Evidence Tab, Appellant's Exhibit 2, Page 3 of 3; Appellant's Hearing Testimony.

<sup>44</sup> Original File Tab, Appellant's April 1, 2010 statement accompanying her CHP application.

<sup>45</sup> Case file, Original File Tab, CHP application received by RAM on April 5, 2010; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(c)(1) and (2).

<sup>46</sup> See 50 C.F.R. § 300.67(e) and 75 Fed. Reg. 56904 (September 17, 2010).

Reg. 56907 (September 17, 2010) (response to comment 2). NMFS also noted that an angler endorsement number is determined by the applicant's past participation in the charter halibut fishery as reported in ADF&G logbooks. See 75 Fed. Reg. 56907 (September 17, 2010) (response to comment 4).

In the instant case, Appellant's logbook data from the two bottomfish fishing trips she did take in 2005 shows that the greatest number of anglers Appellant took on Vessel was five.<sup>47</sup> Appellant confirmed that, on average, she takes five anglers on charter fishing trips, although Vessel can accommodate up to six anglers.<sup>48</sup> I considered Appellant's argument that the ability to carry the sixth angler on Vessel can affect the profitability of her business.<sup>49</sup> However, the program requirements imposed by regulation are clear on this point. The determination of the number of anglers for which a CHP is endorsed is directly tied to the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period. Consequently, the non-transferable CHP for Area 3A that Appellant is qualified to receive is endorsed for five anglers.

#### 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) and (B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004 or 2005. However, in lieu of such participation, Appellant has proven the elements of 50 C.F.R. § 300.67(g)(2) and established her qualifications for one non-transferable CHP for Area 3A with an angler endorsement number of five.

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<sup>47</sup> Case File, Internal Correspondence Tab, Appellant's logbook data for 2005 through 2008.

<sup>48</sup> Appellant's Hearing Testimony.

<sup>49</sup> Appellant's Hearing Testimony.

ORDER

The IAD dated July 23, 2010 is vacated. RAM is directed to issue Appellant one non-transferable CHP for Area 3A with an angler endorsement number of five. This decision takes effect (30) days from the date issued, June 22, 2011<sup>50</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, June 2, 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]

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Christine D. Coughlin  
Administrative Judge

Date Issued: May 23, 2011

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