

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

In re Application of )  
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 )  
 ) Appeal No. 10-0019  
 )  
 ) DECISION  
 )  
 Appellant )

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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, Maryland and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with OAA. The undersigned is the administrative judge assigned to review and decide this matter.<sup>1</sup>

This appeal comes before NAO based on a timely appeal filed by [REDACTED] doing business as [REDACTED] (Appellant). Appellant is appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM) program on May 27, 2010.<sup>2</sup> In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (CHP) pursuant to the regulations governing the Charter Halibut Limited Access Program (CHLAP).

The application referred to in the IAD was filed by Appellant on April 3, 2010.<sup>3</sup> On the application, Appellant indicated he took seven logbook fishing trips in 2005 on the [REDACTED] (Vessel).<sup>4</sup> Appellant listed no trips for the 2008 recent participation period. Appellant checked unavoidable circumstances on the application as the reason for not taking logbook fishing trips in 2008.<sup>5</sup> Appellant attached a letter from his wife to the application. In the letter, Appellant's wife explained that on February 13, 2008, she was

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<sup>1</sup> See 50 C.F.R. § 679.43. I was assigned this appeal after the completion of the contract for a former contractor (Contractor) of OAA.

<sup>2</sup> Case File, Pleadings Tab, Appellant's appeal submission received July 29, 2010; Original File Tab, IAD dated May 27, 2010.

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

<sup>4</sup> Original File Tab, Application page 5.

<sup>5</sup> Original File Tab, Application page 5.

diagnosed [REDACTED]<sup>6</sup> Appellant's wife further explained that after the diagnosis, Appellant nursed her back to health and had to miss the 2008 season.<sup>7</sup> Appellant also attached medical documentation supporting his wife's illness.

After reviewing Appellant's application, on April 26, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>8</sup> In the Notice, RAM provided Appellant thirty days to provide additional information in support of his application. On May 26, 2010, Appellant resubmitted his wife's medical documentation.<sup>9</sup>

On May 27, 2010, RAM issued the IAD at issue in this appeal. In the IAD, RAM denied Appellant's application for a CHP. RAM reasoned the Official Record, which RAM uses to determine applicants eligibility, showed Appellant had not met the minimum participation requirements of reporting five or more halibut logbook fishing trips during 2008.<sup>10</sup> RAM also stated Appellant must file an appeal to OAA to resolve his claim of unavoidable circumstances.<sup>11</sup>

On July 29, 2010, OAA received Appellant's timely appeal of the IAD.<sup>12</sup> In the appeal, Appellant renewed his claim that he was unable to operate his business during the 2008 charter fishing season due to the sickness of his wife.<sup>13</sup> Appellant further explained that his wife's diagnosis occurred early in the year; therefore, he did not renew his State of Alaska Department of Fish and Game (ADF&G) Business Owner License or insure his boat for the 2008 fishing season.<sup>14</sup>

On September 24, 2010, Contractor held an oral hearing.<sup>15</sup> At the hearing, Appellant testified his wife was initially diagnosed [REDACTED] in 2005 and had a relapse in 2007. In 2007, after the relapse, Appellant testified he sold the kayaking portion of his business (Business) but retained the charter portion of the business.<sup>16</sup> On February 18, 2008, Appellant's wife suffered [REDACTED]<sup>17</sup> Due to this injury, Appellant did not apply for a business license and instead continued to care for his wife.<sup>18</sup> At the conclusion of the hearing, Contractor closed the record. However, on February 22, 2011, Contractor conducted a supplemental hearing in order to explore Appellant's intent to operate his charter fishing business in 2008.<sup>19</sup> During this hearing, Appellant confirmed that at the time of his

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<sup>6</sup> Original File Tab, Letter from Appellant's wife received April 3, 2010.

<sup>7</sup> Original File Tab, Letter from Appellant's wife received April 3, 2010.

<sup>8</sup> Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated April 26, 2010.

<sup>9</sup> Original File Tab, Letter from Appellant dated May 26, 2010.

<sup>10</sup> Original File Tab, IAD page 2

<sup>11</sup> Original File Tab, IAD

<sup>12</sup> Pleadings File Tab, Appellant's appeal letter received on July 29, 2010.

<sup>13</sup> Pleadings File Tab, Appellant's appeal letter received on July 29, 2010.

<sup>14</sup> Pleadings File Tab, Appellant's appeal letter received on July 29, 2010.

<sup>15</sup> Appeals Correspondence Tab, Notice to Schedule Hearing dated August 31, 2010.

<sup>16</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>17</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>18</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>19</sup> Testimony of Appellant at Oral Hearing (February 22, 2011).



6. In 2008, Appellant did not renew his ADF&G Business Owner License.<sup>30</sup>
7. Appellant also did not insure Vessel for the 2008 fishing season.<sup>31</sup>
8. Appellant did not advertise his charter fishing business or take reservations from clients for the 2008 charter season.<sup>32</sup>
9. In 2008, Appellant did not report any halibut logbook fishing trips to ADF&G.<sup>33</sup>

## PRINCIPLES OF LAW

Pursuant to the CHLAP regulations, NMFS will issue a CHP if an applicant meets certain requirements. One requirement is that the applicant is an individual, or entity, to which the ADF&G issued an ADF&G Business Owner License that authorized logbook fishing trips.

Logbook fishing trips are used to meet minimum participation requirements.<sup>34</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, 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, 2008.<sup>35</sup>

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2005, but does meet the participation requirements for the other period, as in this case the recent participation period in 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” provision.<sup>36</sup>

Under the unavoidable circumstances provision as it applies to this case, an applicant for a CHP may be eligible for a permit if:

- (1) he met the participation requirements for 2005, but not for 2008;

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<sup>28</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>29</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>30</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>31</sup> Pleadings File Tab, Appellant’s appeal letter received on July 29, 2010; Testimony of Appellant at Oral Hearing (February 22, 2011) During the hearing, Appellant testified that his insurance policy was set to expire May 2008 and that he had no intentions of renewing it.

<sup>32</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>33</sup> Testimony of Appellant at Oral Hearing (September 24, 2010).

<sup>34</sup> See 50 C.F.R. § 300.67(b) (1) (ii).

<sup>35</sup> See 50 C.F.R. § 300.67(b) (1) (ii) (A) and (B); 50 C.F.R. § 300.67(f) (6) and (7); and 50 C.F.R. § 300.67(d) (1).

<sup>36</sup> See 50 C.F.R. § 300.67(g) (2).

- (2) he specifically intended to operate a charter halibut fishing business in 2008;
- (3) his intent was thwarted by an unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred, and;
- (4) he took all reasonable steps to overcome the unavoidable circumstance.<sup>37</sup>

## ANALYSIS

In analyzing this case, I considered the entire record, including hearing testimony and documents submitted by Appellant in support of his appeal. Since Appellant does not dispute the substantive basis for the denial of his Application articulated in the IAD, i.e., that he did not have sufficient logbook trips in 2008 to qualify for a CHP, I will address the only issue raised in this appeal, namely Appellant's unavoidable circumstance claim. The criterion I consider is whether Appellant held the specific intent to operate a charter halibut business in 2008.

### **Did Appellant show by a preponderance of the evidence that he held the specific intent to operate his charter halibut business in 2008?**

Appellant testified during both hearings that due to his wife's state of health he was unsure about when he would resume his participation in the charter fishing industry. By 2008, Appellant had not participated in the charter fishing industry since 2005 because his wife's state of health. During the hearing, Appellant testified he took no formal steps to participate in the 2008 season. Appellant was unable to provide evidence that he held an ADF&G Business Owner license in 2008 or evidence that he advertised his charter fishing business or took reservations from clients.

Although Appellant owned Vessel in 2008, that fact alone does not meet Appellant's burden to show specific intent. During the hearing, Appellant testified that charter fishing was a side business, mainly supported by his kayaking business. However, in 2007, Appellant sold the kayaking business. This act further reduced Appellant's chances of resuming charter fishing. After taking into consideration the totality of the circumstances, based on the record before me I find Appellant did not hold the specific intent to operate a charter halibut fishing business in 2008. Appellant did not have the essential elements of a charter fishing business in place, and did not take substantial or meaningful steps toward operating such a business in 2008. Since Appellant cannot prove he specifically intended to operate his charter halibut business in 2008, he cannot establish an unavoidable circumstances claim.

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<sup>37</sup> See 50 C.F.R. § 300.67(g) (2).

In reaching my Decision, I have carefully considered Appellant's circumstances. I acknowledge the challenges Appellant and his wife faced in the last few years. I also understand Appellant's general desire to reenter the charter halibut industry. Yet, unfortunately under the evidence presented, Appellant does not qualify for a permit under the CHLAP regulations.

### CONCLUSIONS OF LAW

Appellant is not eligible for a CHP under the basic requirements because he did not meet the minimum participation requirements in 2008.

Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because he did not have the specific intent to operate a charter halibut business in 2008.

The IAD is consistent with the CHLAP regulations.

### ORDER

The IAD dated May 27, 2010 is upheld. This decision takes effect thirty days from the date issued, December 15, 2011, 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 reverse, remand, or modify this decision pursuant to 50 C.F.R. § 679.43(k), (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 Standard Time on November 25, 2011, the tenth day after the date of this Decision. 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 of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

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Eileen G. Jones  
Chief Administrative Judge

Date Issued: November 15, 2011