

indicated they did not participate in Appellants' 2008 charter halibut trips because of bad weather and due to a physical injury suffered by one of the clients.

On July 21, 2010, RAM sent Appellants the IAD at issue in this case.⁵ In its IAD, RAM denied Appellants a permit because they lacked the requisite logbook trips. Specifically, RAM stated that in order to receive a CHP, the State of Alaska Department of Fish and Game (ADF&G) must have issued a person seeking to apply for such a permit an ADF&G Business Owner License authorizing logbook fishing trips meeting the minimum participation requirements of reporting five or more bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005); and five or more halibut logbook fishing trips during the recent participation period (2008). RAM stated Appellants were not such persons. RAM noted Appellants had the right to appeal the IAD to OAA and that any appeal must be received by September 20, 2010. On September 8, 2010, Appellants appealed the IAD.⁶

On September 26, 2011, a scheduled hearing commenced, but was suspended until September 29, 2011, due to electronic recording problems at NAO. On September 29, 2011, Appellants testified during their hearing that in 2008, bad weather in their area and client injuries prevented them from achieving the minimum participation requirements necessary to qualify for a CHP, that bear-viewing and hiking are their primary business and charter halibut fishing is secondary to these activities, and that they could not change their business to focus more on halibut fishing rather than other activities.⁷ Appellants presented three witnesses at their hearing who corroborated Appellants' testimony regarding bad weather and client injuries.⁸

I have determined that the information in the record is sufficient to render a decision.⁹ I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

ISSUES

There is no factual or legal dispute in this appeal but the unavoidable circumstance claim. In this case, the unavoidable circumstance claim involves five basic questions:

1. Did Appellants prove by a preponderance of the evidence that they held the specific intent to operate a charter halibut fishing business during 2008?
2. If the answer to Question 1 is "yes," did Appellants prove by a preponderance of the evidence that in 2008, they suffered an "unavoidable circumstance" that "actually occurred."

⁵ Original File Tab, IAD dated July 21, 2010.

⁶ Pleadings Tab, type-written letter dated August 30, 2010, received September 8, 2010.

⁷ Audio recording of September 29, 2010, hearing.

⁸ Audio recording of September 29, 2010, hearing.

⁹ 50 C.F.R. § 679.43(g) (2).

3. If the answer to Question 2 is “yes,” did Appellants prove by a preponderance of the evidence their specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance.
4. If the answer to Question 3 is “no,” Appellants are not eligible for a permit, and I must uphold the IAD.

FINDINGS OF FACT

1. In 2004, Appellants timely and properly reported seven bottomfish logbook fishing trips to ADF&G.¹⁰
2. In 2005, Appellants timely and properly reported eight bottomfish logbook fishing trips to ADF&G.¹¹
3. In 2008, Appellants timely and properly reported three halibut logbook fishing trips to ADF&G.¹²
4. Appellants did not operate more charter vessel trips in 2008 due to bad weather and client injuries.¹³
5. In 2008, Appellants’ primary business was bear viewing and hiking, and charter halibut fishing was secondary to these activities.¹⁴
6. In 2008, Appellants did not change their business to focus more on halibut fishing rather than other activities.¹⁵

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued the ADF&G Business Owner License.¹⁶ This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.¹⁷

¹⁰ Original File Tab, printed summary.

¹¹ Original File Tab, printed summary.

¹² Original File Tab, printed summary.

¹³ Original File tab, three type-written letters, received May 26, 2010; audio recording of September 29, 2010, hearing.

¹⁴ Audio recording of September 29, 2010, hearing.

¹⁵ Audio recording of September 29, 2010, hearing.

¹⁶ An ADF&G Business Owner License includes a business registration, a sport fish business owner license, a sport fish business license, and an ADF&G business license. 50 C.F.R. § 300.67(b)(3).

¹⁷ 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 qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent publication period, namely 2008.¹⁸

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.¹⁹ The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.²⁰

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska 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.²¹

A “halibut logbook fishing tip” 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.²²

“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.²³

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.²⁴

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. Further, the participation must have occurred in the International Pacific Halibut Commission (IPHC) regulatory area (either 2C or 3A) for which the applicant seeks the permit. This threshold criteria may be referred to as the participation requirements.²⁵

¹⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

¹⁹ 50 C.F.R. § 300.67(f)(4).

²⁰ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

²¹ 50 C.F.R. § 300.67(f)(2).

²² 50 C.F.R. § 300.67(f)(3).

²³ 50 C.F.R. § 300.67(f)(1).

²⁴ 50 C.F.R. § 300.67(f)(5).

²⁵ See 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed. Reg. 554, 554-555 (January 5, 2010).

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the recent participation period of 2008, but does meet the participation requirements for the qualifying period, 2004 or 2005, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule.²⁶

Under the unavoidable circumstances rule 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 2004 or 2005, but not for 2008;
- (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.

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.²⁷

ANALYSIS

Appellants only argument on appeal is that they are eligible for a permit under the unavoidable circumstance provision of the CHLAP regulations. I therefore address the requirements of that claim below.

Did Appellants prove by a preponderance of the evidence that they held the specific intent to operate a charter halibut fishing business during 2008?

Appellants demonstrated their specific intent to operate their charter halibut fishing business in 2008. Appellants operated such a business in 2008, and conducted three charter vessel fishing trips that year. Appellants, therefore, held a specific intent to operate a charter halibut fishing business in 2008.

Did Appellants prove by a preponderance of the evidence that in 2008 they experienced an “unavoidable circumstance” that “actually occurred?”

²⁶ See 50 C.F.R. § 300.67(g)(1).

²⁷ 50 C.F.R. § 300.67(g)(1)(v).

Bad weather in Appellants' area and injuries that their clients suffered in 2008, were actual events that occurred. Appellants' witnesses' testimony was credible and corroborating. Appellants, therefore, experienced circumstances that actually occurred.

Did Appellants prove by a preponderance of the evidence their specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance?

Bad weather in Appellants area is not a unique circumstance only affecting Appellants. Although the manner in which bad weather may have affected Appellants may be different in the way it affected others operating similar businesses, it is not necessary for bad weather to affect everyone exactly the same way in order to find that a circumstance is not unique. It is not reasonable to conclude bad weather uniquely thwarted Appellants' specific intent to operate a charter halibut business in 2008.

Although some of Appellants' clients experienced injuries in 2008, resulting in those individual clients being unable to participate in Appellants' charter vessel trips that year, it does not necessarily follow that these circumstances thwarted Appellants' specific intent to operate their charter vessel business that year. Appellants' clients' injuries may have reduced the number of charter vessel trips that Appellants operated in 2008, however, Appellants continued to operate their charter vessel business that year despite these individual client cancellations. In 2008, Appellants reported three halibut logbook fishing trips to ADF&G. It is not reasonable to conclude, therefore, that Appellants' clients' injuries in 2008 thwarted their specific intent to operate their charter halibut business that year. Appellants did not establish by a preponderance of the evidence that their specific intent to operate their charter halibut business in 2008 was thwarted by an unavoidable circumstance.

CONCLUSIONS OF LAW

RAM correctly denied Appellants' application for a CHP. Appellants 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 Appellants did not meet the minimum participation requirement for the qualifying period of 2008. Appellants do not qualify under the unavoidable circumstance provisions of the CHLAP regulations to receive a CHP. Appellants have not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(2)(i)-(iv).

ORDER

The IAD dated July 21, 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 reverses, modifies, or remands this decision pursuant to 50 C.F.R. § 679.43 (k), (o).

Appellants 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.

[REDACTED]

Steven Goodman
Administrative Judge

Date Issued: November 15, 2011