

that explained he attempted to take seven trips in 2005 without having a logbook because ADF&G refused to issue him one late in the year.⁵ To further substantiate his claim, Appellant attached various receipts, licenses, and agreements to his application. After reviewing Appellant's application, on May 3, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).⁶ The Notice provided Appellant thirty days to provide additional information in support of their application. In response, Appellant resubmitted a memorandum and affidavit explaining his unavoidable circumstances dated May 25, 2010.

On June 17, 2010, RAM issued the IAD at issue in this appeal. In the IAD, RAM denied Appellant's application for a CHP. RAM reasoned that the Official Record, which RAM uses to determine applicant's eligibility, showed Appellant had not met the minimum participation requirements of reporting five or more bottomfish logbook fishing trips during 2004 or 2005.⁷ RAM also stated that Appellant must file an appeal to OAA to resolve his claim of unavoidable circumstances.

On August 9, 2010, OAA received Appellant's attorney timely appeal of the IAD.⁸ In the appeal, Appellant renews his claim that he was unable to operate his business due to unavoidable circumstances.⁹ Appellant's attorney requested a hearing as well as additional time to submit additional documentation.¹⁰ On August 20, 2010, OAA acknowledged Appellant's appeal.¹¹

Following a recorded telephone conference with Appellant and Counsel on October 13, 2010, a hearing was scheduled for December 7, 2010.¹² A hearing notice was mailed to Appellant on November 19, 2010.¹³ The hearing was held, as scheduled. At the recorded hearing, Appellant testified, as did his father, ██████████, and a friend, ██████████.

On December 6th and 7th, 2010, Counsel provided the OAA Contractor then assigned to review the appeal, with a copy of a press release from the ADF&G explaining the change in the logbooks between 2005 and 2006, a copy of a September 2009 publication ("Participation, Effort, and Harvest in the Sport Fish Business/Guide Licensing and Logbook Programs, 2006 – 2008), and proffered the testimony of an ADF&G official who could explain the changes in the log books between 2005 and 2006.¹⁴ Additionally, Counsel also provided pictures and education resources.¹⁵ Contractor accepted the documents and informed Counsel that the record was sufficient

⁵ Original File Tab, Appellant's Affidavit received March 2, 2011.

⁶ Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated May 5, 2010.

⁷ Original File Tab, IAD page 2

⁸ Pleadings File Tab, Handwritten appeal letter from Appellant's attorney received on August 9, 2010.

⁹ Pleadings File Tab, Handwritten appeal letter from Appellant's attorney received on August 9, 2010.

¹⁰ Pleadings File Tab, Handwritten appeal letter from Appellant's attorney received on August 9, 2010.

¹¹ Appeals Correspondence Tab, OAA letter dated August 20, 2010.

¹² Appeals Correspondence, Order Scheduling Hearing (November 19, 2010).

¹³ Appeals Correspondence, Order Scheduling Hearing (November 19, 2010).

¹⁴ Pleadings File, Fax from Appellant's attorney dated December 6, 2010.

¹⁵ Pleadings File, Fax from Appellant's attorney dated December 6, 2010.

to render a decision and the testimony of the ADF&G official would have been cumulative, and was not needed.¹⁶

On March 31, 2011, Contractor reopened the record for the purpose of including data on charter halibut fishing trips in December 2004, December 2005, and December 2008, derived from the Official Charter Halibut Record.¹⁷ Counsel responded that he wished to consult with his client before commenting on the documents and then agreed that his comments should be provided by Wednesday, April 13, 2011. No response was received. Contractor subsequently closed the record.

ISSUES

The only issue on appeal involves Appellant's unavoidable circumstance claim. In this case, the unavoidable circumstance claim involves five basic questions:

1. Did Appellant prove by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business during 2005?
2. If the answer to Question 1 is "yes," did Appellant prove by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable "unavoidable circumstance" that "actually occurred?"
3. If the answer to Question 2 is "yes," did Appellant prove by a preponderance of the evidence that he took all reasonable steps to overcome the unavoidable circumstance?
4. If the answer to Question 3 is "yes," then I must determine the type (transferable or nontransferable) of permit for which Appellant is eligible and the angler endorsement on the permit by answering the following:
 - a. Did Appellant prove he would have taken at least five logbook trips in 2005 and did in fact take at least five logbook trips in 2008, and therefore are eligible for a non transferable permit?
 - b. Did Appellant prove that the largest number of anglers he would likely have taken on charter fishing trips in 2005 was six, and therefore his non transferable permit should be endorsed for six anglers?

¹⁶ Electronic Message, Judge Smith to Counsel (April 26, 2011).

¹⁷ 50 C.F.R § 300.67(f)(5): "Official charter halibut record means the information prepared y NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program, and evaluate applications for charter halibut permits."

FINDINGS OF FACT

1. In October 2005, Appellant started his Business and obtained a State of Alaska Business License.¹⁸
2. To prepare for his business, Appellant purchased Vessel as well as equipment for charter fishing.¹⁹
3. On November 30, 2005, Appellant purchased vessel and business insurance.²⁰
4. On or about December 14, 2005, Appellant went to the local office of ADF&G to purchase his sport fish business license and to obtain his charter vessel logbook. Appellant was told during his visit by ADF&G personnel that it was too late in the year to purchase a logbook and that he would be “wasting his money.”²¹ Appellant was advised to return at the beginning of 2006 to receive a newly-designed logbook.²²
5. Several days later, Appellant attempted for a second time to purchase a logbook, this time accompanied by another charter fisherman.²³ Appellant was again given the same advice by ADF&G personnel.²⁴
6. In 2005, Appellant reported no bottomfish logbook fishing trips to ADF&G.²⁵
7. In 2008, Appellant reported twenty-three halibut logbook fishing trips to ADF&G.²⁶

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 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.²⁷ Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish “logbook fishing

¹⁸ Testimony of Appellant and Father at Oral Hearing (December 9, 2010).

¹⁹ Testimony of Appellant and Father at Oral Hearing (December 9, 2010).

²⁰ St. Paul Fire and Marine Ins. Co., “Commercial Marine Insurance, Policy Declarations Page” issued by Charles Lake Marine Insurance Company (November 30, 2005).

²¹ Testimony of Appellant and Father at Oral Hearing (December 9, 2010).

²² Testimony of Appellant and Father at Oral Hearing (December 9, 2010).

²³ Testimony of Appellant and Father at Oral Hearing (December 9, 2010).

²⁴ Testimony of Appellant and Father at Oral Hearing (December 9, 2010).

²⁵ Electronic Mail from NMFS Information Services Division; information derived from Official Charter Halibut Record (April 26, 2011).

²⁶ Electronic Mail from NMFS Information Services Division; information derived from Official Charter Halibut Record (April 26, 2011).

²⁷ See 50 C.F.R. § 300.67(b) (1) (ii).

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, 2008.²⁸ The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP, including evaluating applications for Charter Halibut Permits.²⁹

“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.”³⁰

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2004, but does meet the participation requirements for the other period, 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule.³¹

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 2008, but not for 2005;
- (2) he specifically intended to operate a charter halibut fishing business in 2004;
- (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.³²

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.³³ Whether the CHP is designated as transferable depends on how many logbook fishing trips Appellants proves he would have taken in 2005 but for the unavoidable circumstance.³⁴ If the applicant proves he would likely have taken fifteen or more trips in the qualifying year (2005) and did in fact take fifteen or more trips in the participation year (2008), then his permit will be transferable.³⁵ Further, the number of anglers for which the permit will be endorsed depends on the

²⁸ 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).

²⁹ See 50 C.F.R. § 300.67(f) (5); 75 Fed.Reg. 554, 556 (2010).

³⁰ 50 C.F.R. § 300.67(f) (1).

³¹ See 50 C.F.R. § 300.67(g) (2).

³² See 50 C.F.R. § 300.67(g) (2).

³³ 50 C.F.R. § 300.67(g)(2)(v).

³⁴ See 50 C.F.R. § 300.67(g)(2)(v)(B).

³⁵ See 50 C.F.R. § 300.67(d).

highest number of anglers that would have been on the trips Appellant would have taken in 2005 but for the unavoidable circumstance.³⁶

ANALYSIS

In analyzing this case, I considered the entire record, including the hearing testimony and the 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 2005, I will address the only issue raised in this appeal, namely Appellant's unavoidable circumstance claim. The first criterion I consider is whether Appellant held the specific intent to operate a charter halibut business during 2005.

Did Appellant prove by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business during 2005?

Appellant in this case began preparing to launch his business in October, 2005. By November 30, 2005, Appellant had already applied for and been issued a State of Alaska Business License, purchased Vessel as well as equipment, and insured his business and Vessel, and also designed a website to attract business.

When taking into consideration the totality of the circumstances, I conclude that Appellant held the specific intent to operate a charter halibut fishing business in 2005. I turn, then, to the next inquiry in the unavoidable circumstances analysis.

Did Appellant prove by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable "unavoidable circumstance" that "actually occurred?"

After preparing Business for launch, Appellant attempted to purchase a logbook from his ADF&G local office for ██████████. Appellant arrived to the office with the necessary paperwork and payment in hand. However, when Appellant attempted to purchase a 2005 logbook he was told by personnel that buying a logbook was a waste of money. ADF&G personnel explained to Appellant that it was too late in the year and that he should just wait until 2006 when the newly designed logbooks were released. On that day, Appellant conceded to ADF&G's suggestions; however, Appellant changed his mind and returned again to purchase a logbook, this time with another fisherman. They were again discouraged from purchasing the logbook. Appellant's deadline to meet the qualifying period requirement quickly passed. Without a logbook issued by ADF&G, he could not record and report his charter halibut fishing activities for 2005.

Appellant made two attempts to purchase a logbook but was dissuaded by ADF&G personnel. Given the position of those working for the agency, it is plausible that Appellant would take their word and not purchase a logbook. Under the circumstances

³⁶ See 50 C.F.R. § 300.67(e)(1) and (g)(2)(v)(B). See also 74 Fed. Reg. 18178, 18187 (2009).

of this appeal, I find the events were unique, unforeseen, and reasonably unforeseeable. Appellant's testimony and gathered statements are credible; therefore, I conclude that Appellant met his burden of proving that he suffered from a unique, unforeseen, and reasonably unforeseeable unavoidable circumstance that actually occurred.

Did Appellant prove by a preponderance of the evidence that he took all reasonable steps to overcome the unavoidable circumstance?

Appellant intended to comply with all licensing and reporting requirements and went to the ADF&G office to purchase his license. When ADF&G refused to sell Appellant his 2005 sport fishing business license and to provide a 2005 saltwater charter vessel logbook he requested, there were no practical options available to Appellant. Because both the license and the logbooks were exclusively available through ADF&G, Appellant had no place else to go for a logbook. Under these circumstances, I conclude Appellant took all reasonable steps to overcome the circumstances that kept him from operating his charter halibut fishing business in 2005.

Did Appellant prove he would have taken at least five logbook trips in 2005 and did in fact take at least five logbook trips in 2008 and therefore is eligible for a non-transferable permit?

To be eligible for a CHP, the applicant must prove he took five or more qualifying trips during both the qualifying year and participation year.³⁷ RAM and Appellant are in agreement that in 2008 Appellant recorded twenty-three halibut logbook fishing trips. Therefore, I find he exceeded the number of trips needed in 2008 to qualify for a non-transferable permit. I turn then to the number of trips Appellants would likely have taken in 2005.

If Appellant would have received his 2005 logbook when he sought it (in mid-December 2005), he would have had less than fifteen days to operate his business before the 2005 sport halibut fishing season ended. In consideration of the time of year (i.e., December, the time with the shortest periods of daylight and the highest potential for poor weather), the novelty of his operation, and the fact that he was operating during the holiday season, I conclude Appellant would likely have reported at least five bottomfish logbook fishing trips. Therefore, his permit should be designated as non-transferable.

Did Appellant prove that the largest number of anglers he would likely have taken on charter fishing trips in 2005 was six, and therefore his non-transferable permit should be endorsed for six anglers?

An applicant can be awarded a transferable permit with an angler endorsement for the highest number of anglers he likely would have taken had it not been for the

³⁷ See 50 C.F.R. § 300.67(d) and (g) (2).

unavoidable circumstances.³⁸ Appellant testified he carried between three and six clients on average on most of his charter halibut fishing trips.³⁹ Therefore, I find it likely that in 2005, Appellant would have taken six anglers on at least one trip. As a result, Appellant's permit shall be endorsed for six anglers.

CONCLUSIONS OF LAW

Appellant held the specific intent to operate a charter halibut business during 2005.

In 2005 Appellant suffered an "unavoidable circumstance" that "actually occurred."

Appellant's specific intent was thwarted by the unavoidable, unique, unforeseen, and reasonably unforeseeable circumstances.

Appellant took all reasonable steps to overcome the unavoidable circumstances.

Appellant proved he would likely have taken five logbook trips in 2005 and took at least five logbook trips in 2008 and therefore is eligible for a non-transferable permit.

Appellants proved that the largest number of anglers he would likely have taken on charter fishing trips in 2005 was six; therefore his non-transferable permit should be endorsed for six anglers.

ORDER

The IAD dated June 17, 2010 is vacated. RAM is directed to issue Appellants a transferable CHP for Area 3A with an angler endorsement of six.

This decision takes effect thirty days from the date issued, December 23, 2011,⁴⁰ 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

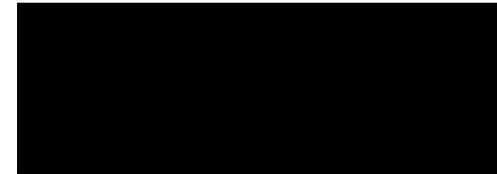
³⁸ 50 C.F.R. § 300.67(g) (2) (v) (B). In the Proposed Rule NMFS explained that in a section 300.67(g)(2) situation, if an Appellants proves his unavoidable circumstances claim, then NMFS could not use logbook data to determine the number or type (transferable or nontransferable) of permits and the number of anglers for which the permit would be endorsed. Thus, NMFS created a default provision of one nontransferable permit with an angler endorsement of four, or, if an applicant can so prove a different permit(s) based on the number of vessels, number of trips and highest number of anglers an applicant can prove he likely would have taken in 2004 or 2005. "For example, if an applicant states that it should receive one transferable charter halibut permit with an angler endorsement of six, then the applicant must show that the applicant likely would have reported at least 15 logbook fishing trips with a vessel in 2004 or 2005 and would have taken six anglers on one of those trips." 74 Fed. Reg. 18178, 18187 (2009).

³⁹ Appellants' Hearing Testimony.

⁴⁰ 50 C.F.R. § 679.43(k) and (o).

Administrator elects to reverse, remand, or modify this decision pursuant to 50 C.F.R. § 679.43(k) and (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 Time on December 5, 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 in support of the motion.



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Eileen G. Jones
Chief Administrative Judge

Date Issued: November 23, 2011