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

In re Application of [redacted] Appellant	))))))))	Appeal No. 10-0041 DECISION

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 Regional Office, and is charged with processing appeals that were filed with OAA. The undersigned is the administrative judge assigned to review this appeal and issue a decision pursuant to 50 C.F.R. § 679.43.

This appeal involves [redacted] doing business as (dba) [redacted] (Appellant). Appellant seeks an order for a transferable charter halibut permit (CHP or permit) endorsed for six anglers.

On January 26, 2010, NMFS's Restricted Access Management program (RAM), ran a report on the number of charter trips Appellant reported to the Alaska Department of Fish and Game (ADF&G) in 2004, 2005, and 2008.[1] That data is used to access whether Appellant may be eligible for a permit. The report showed no trips in 2004 or 2005, but fifty-eight trips in 2008.

On February 26, 2010, Appellant filed an application for a CHP with RAM.[2] On his application, Appellant indicated no charter trips for 2005, but forty-nine charter trips in 2008. In response to Appellant's application, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice) dated May 3, 2010.[3] In the Notice, RAM informed Appellant he had sufficient qualifying trips for the recent participation period, 2008, but not for the qualifying period, either 2004 or 2005. Both the recent

---

[1] Evidence Tab, Print Summary created January 26, 2010.
[2] Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with attachments.
[3] Original File Tab, Notice of Opportunity to Submit Evidence dated May 3, 2010.

participation period and qualifying period had to reflect at least five logbook trips in order to qualify for a permit. RAM set a deadline of June 3, 2010 for Appellant to produce evidence in support of his claim.

On May 21, 2010, Appellant sent RAM additional documents in support of his claim. Those documents included nine letters from clients stating they had signed-up to charter fish with Appellant in 2005, but could not because Appellant's charter vessel had a cracked hull.

On July 23, 2010, RAM issued the Initial Administrative Determination (IAD) which is the subject of this appeal.[4] In the IAD RAM denied Appellant's application for a permit because he did not have the minimum five logbook fishing trips recorded for 2004 or 2005. RAM did note that Appellant met the minimum requirements for trips in 2008.

On August 20, 2010 Appellant filed an appeal of the IAD with OAA.[5] In his appeal Appellant concedes he did not report qualifying trips for 2004 or 2005. However, Appellant argues he is still eligible for a permit under what is known as the unavoidable circumstance provision of the Charter Halibut Limited Access Program (CHLAP) regulations. Appellant contends he meets all elements of an unavoidable circumstance claim, starting with holding the specific intent to operate a charter halibut fishing business in 2005. Appellant explains that he had a business license, a logbook associated with that license, that he was a member of the Alaska Charter Association, that he had a captain on contract and clients lined up. Appellant also explains the circumstance he characterized as unavoidable – his charter vessel became inoperable early in the 2005 season because of a cracked hull. Appellant describes that event as unique to him and unforeseen and reasonably unforeseeable. Appellant notes that in 2004 his vessel worked fine and that when he winterized it, he saw nothing untoward. Appellant further delineates the steps he took to find a repair person in an attempt to show he took all reasonable steps to overcome the break-down of his vessel.

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 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 that in 2005 he suffered an "unavoidable circumstance" that "actually occurred."

[4] Original File Tab, IAD dated July 23, 2010.
[5] Pleadings Tab, appeal letter dated August 20, 2010 with attachments.

3. If the answer to Question 2 is "yes," did Appellant prove by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance.

4. If the answer to Question 3 is "yes," did Appellant prove by a preponderance of the evidence that he took all reasonable steps to overcome the unavoidable circumstance.

5. If the answer to Question 4 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 fifteen logbook trips in 2005 and did in fact take at least fifteen logbook trips in 2008 and therefore is eligible for a 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 transferable permit should be endorsed for six anglers?

FINDINGS OF FACT

1. In 2004, there was no visible damage to Appellant's charter vessel that would prevent the vessel from servicing clients in 2005. Appellant's vessel performed without issue for the 2004 fishing season.[6]

2. In 2005, Appellant retained ownership of the charter vessel he used in 2004.[7]

3. In 2005, Appellant's held a membership in a professional association of charter operators.[8]

4. In 2005, Appellant held the proper licensure and a 2005 Saltwater Charter Logbook issued by ADF&G;[9]

5. In 2005, Appellant had a contract with a licensed captain to run Appellant's vessel during the 2005 season.[10]

---

[6] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.
[7] Pleadings Tab, appeal letter dated August 20, 2010.
[8] Membership Application, "Alaska Charter Association" (Application is undated but cancelled check for dues is dated July 6, 2005); Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.
[9] ADF&G Saltwater Charter Vessel Logbook No. [redacted]; Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.
[10] [redacted] (Vessel) for (Appellant) for the Summer of 2005," signed by Appellant and licensed

6. In 2005, Appellant had at least twenty-five clients ready to go chartering with him.[11]

7. In the spring of 2005, in preparation for the charter halibut fishing season, Appellant launched his vessel from the trailer upon which it had been stored since the previous fall. Shortly after the vessel was launched, he noted that it was taking on water, so he hauled and inspected the vessel. His inspection revealed the fiberglass below the head on the starboard side of the vessel was soft, and the hull was cracked, allowing sea water to enter the vessel.[12]

8. The crack in the hull of Appellant's vessel was a serious safety hazard, since without repair the vessel could sink.[13]

9. Appellant sought a firm with expertise in fiberglass repair to fix his vessel's hull.[14] The first firm he contacted was no longer repairing boats due to other contracts.[15]

10. On May 2, 2005, a second fiberglass repair firm provided Appellant with an estimate, but noted that, due to other commitments, the firm was not "able to begin . . . repairs until approximately September-October 2005."[16]

11. Appellant offered the fiberglass repair firm extra money if it would start his repairs immediately, but the firm declined because of its obligations to their other clients.[17]

12. To meet his obligations to the clients who had agreed to charter with him in 2005, Appellant continued searching for another shop to repair his vessel.[18] However, his efforts to find another shop, were not successful.[19]

13. Appellant also sought a vessel to lease for the summer. However, his efforts to find a suitable vessel to lease, were not successful.[20]

14. Appellant did not operate his charter halibut fishing business in 2005 and did not report any bottomfish logbook fishing trips to ADF&G.[21]

---

captain (May 1, 2005).

[11] Letters submitted by Appellant with statements to NMFS, including sixteen submitted on February 25, 2010) and another nine submitted on August 20, 2010; Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[12] Statement of Appellant in his communications with NMFS (February 25 and August 20, 2010).

[13] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[14] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[15] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[16] Estimate dated May 2, 2005, attached to Appellant's appeal letter dated August 20, 2010.

[17] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[18] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[19] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[20] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

[21] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

15. Work on the repairs to the fiberglass hull began in the fall of 2005; in early January 2006, the work was complete.[22]

16. Appellant started his charter halibut fishing business in 2006, and has operated it every year since then.[23]

17. In 2007, the highest number of anglers that were on Appellant's charter trips was six.[24]

18. In 2008, Appellant reported fifty-eight halibut logbook fishing trips to ADF&G.[25] The highest number of anglers on these trips was six.[26]

19. Appellant has operated his charter halibut fishing business in International Pacific Halibut Commission (IPHC) administrative area 3A.[27]

PRINCIPLES of LAW

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).[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]

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

---

[22] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.
[23] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.
[24] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.
[25] Official Charter Halibut Record [50 C.F.R. 300.67(f)(5):
[26] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010; Evidence Tab, ADF&G data summary for Appellant's vessel in 2006, attached to email message dated October 7, 2010.
[27] Evidence Tab, Print Summary created January 26, 2010.
[28] 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).
[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).

2C or 3A) for which the applicant seeks the permit. These threshold criteria may be referred to as the participation requirements.[31]

Minimum participation requirements to qualify for a transferable CHP are: at least fifteen bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and at least fifteen halibut logbook fishing trips during the recent participation period, namely 2008.[32]

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, 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the "unavoidable circumstances" rule.[33]

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 2005;

(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.[34]

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.[35] Whether the CHP is designated as transferable depends on how many logbook fishing trips Appellant proves he would likely have taken in 2005 but for the unavoidable circumstance.[36] 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.[37] Further, the number of anglers for which the permit will be endorsed depends on the highest number of anglers that would likely have been on the trips Appellant would have taken in 2005 but for the unavoidable circumstance.[38]

---

[31] *See* 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed.Reg. 554, 554-555 (2010).

[32] *See* 50 C.F.R. § 300.67(d); 50 C.F.R. § 300.67(f)(6) and (7); and 50 C.F.R. § 300.67(d)(1).

[33] *See* 50 C.F.R. § 300.67(g)(2).

[34] *See* 50 C.F.R. § 300.67(g)(2).

[35] 50 C.F.R. § 300.67(g)(2)(v).

[36] *See* 50 C.F.R. § 300.67(g)(2)(v)(B).

[37] *See* 50 C.F.R. § 300.67(d).

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

ANALYSIS

According to the Official Record, Appellant reported fifty-eight halibut logbook fishing trips in 2008. Appellant therefore meets the participation requirements in the recent participation period. However, he did not participate in the halibut charter fishing business during the qualifying period (2004, 2005). Therefore, Appellant meets the first requirement of proving an unavoidable circumstance claim, namely that he participated in one participation period but not in the other. I turn, then, Appellant's unavoidable circumstances claim.

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 intended to operate a charter halibut fishing business in 2005, as evidenced by:

- Ownership of a charter vessel;
- Proper licensure, including a 2005 Saltwater Charter Logbook issued by the Alaska Department of Fish and Game (ADF&G);[39]
- A contract with a licensed captain to run Appellant's vessel during the 2005 season;[40]
- Twenty-five letters from clients, each of whom attests to the client's intent to charter with Appellant in 2005;[41]
- Appellant's membership in a professional association of charter operators.[42]

From these facts, I conclude Appellant held a specific intent to operate a charter halibut fishing business in 2005.

Did Appellant prove by a preponderance of the evidence that in 2005 he suffered an "unavoidable circumstance" that "actually occurred?"

The circumstance that Appellant alleges prevented him from chartering in 2005 was the failure of his vessel's fiberglass hull. Appellant had used the vessel extensively in 2004, and had not experienced any problems.[43] Appellant therefore had no reason to believe

---

[39] ADF&G Saltwater Charter Vessel Logbook No. [redacted]

[40] [redacted] (Vessel) for (Appellant) for the Summer of 2005," signed by Appellant and licensed captain (May 1, 2005).

[41] Letters submitted by Appellant with statements to NMFS, including sixteen submitted on February 25, 2010) and another nine submitted on August 20, 2010.

[42] Membership Application, "Alaska Charter Association" (Application is undated by cancelled check for dues is dated July 6, 2005).

[43] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010.

that the fiberglass had softened, or that the hull would fail when the vessel was launched. When sea water infiltrated the vessel's bilge, the problem was found. Generally, the breakdown of one's vessel is has been considered an unavoidable circumstance and I so find here.

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

Further, the problem was unforeseen, as Appellant used the vessel in 2004 and noticed no problems with it. Likewise, it was reasonably unforeseeable, insofar as neither Appellant nor a reasonable person could not have foreseen the problem developing in the way it did. The problem was unique to Appellant (i.e., to Appellant's vessel). In consideration of the evidence in this case, I conclude Appellant's intent to operate his charter halibut fishing business in 2005 was thwarted by a circumstance that was unique to Appellant, unavoidable, unforeseen and reasonably unforeseeable

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

Upon discovering the problem with his vessel's hull, Appellant immediately commenced a search for a firm that could repair it. After contacting two businesses that could not do the work, Appellant found a shop that was willing to do the repairs, but the shop could not commit to doing the work until the fall of 2005 (after the heart of the charter halibut season). Appellant tried to incentivize the start of repairs by offering extra monies, but the shop declined.

Appellant attempted to find other repair shops, but could not find one that was ready and able to take on the task. Appellant also searched for a vessel to lease, but to no avail.

In the fall of 2005 work on the vessel commenced and, in January 2006, the repairs were completed. Appellant put the vessel in service in 2006.

From this record, I conclude Appellant took all reasonable steps to overcome the circumstance that thwarted his intent to operate his charter halibut fishing business in 2005.

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

The evidence of record (twenty-five letters from clients who had booked trips with Appellant in 2005) is sufficient for me to conclude that, but for the unavoidable circumstance, Appellant would likely have operated his business in 2005 and would have reported, at a minimum, fifteen bottomfish logbook fishing trips to ADF&G in that year. This conclusion, considered in combination with the fact that Appellant reported

fifty-eight halibut logbook fishing trips in 2008, leads to the further conclusion that Appellant's permit should be 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 transferable permit should be endorsed for six anglers?

With respect to angler endorsement[44] on the permit, Appellant stated as follows:

> I also feel that my history proves that I would have chartered 6 anglers more than 15 days for halibut during 2005. My history shows that I chartered 55 days in 2006, of which 38 were 6 passengers; 77 days in 2007 of which 50 were 6 passengers; 61 days in 2008, of which 42 were 6 passenger days.[45]

Other evidence of record also shows that in 2007, the highest number of anglers Appellant serviced was six. Based on the record, I conclude the highest number of anglers Appellant would have likely reported on his bottomfish logbook fishing trip reports during 2005, but for the intervening unavoidable circumstance, would have been six.

CONCLUSIONS OF LAW

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

Appellant proved by a preponderance of the evidence that in 2005 he suffered an "unavoidable circumstance" that "actually occurred."

Appellant proved by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance.

Appellant proved by a preponderance of the evidence that he took all reasonable steps to overcome the unavoidable circumstance.

Appellant proved he would have taken at least fifteen logbook trips in 2005 and did in fact take at least fifteen logbook trips in 2008 and therefore is eligible for a transferable permit.

---

[44] 50 C.F.R § 300.67(e).
[45] Pleadings Tab, Appellant's Statement in Support of My Appeal dated August 20, 2010, pages 7-8.

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

ORDER

The IAD dated September 30, 2010 is vacated. RAM is directed to issue Appellants a transferable CHP for Area 2C with an angler endorsement of five. This decision takes effect thirty days from the date issued, December 23, 2011.[46] 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 remand, reverse, 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.

_____
Eileen G. Jones
Chief Administrative Judge

Date Issued: November 23, 2011

[46] 50 C.F.R. § 679.43(k) and (o).