

Record also showed zero qualifying trips for Appellants in 2004 and 2005. Since the Charter Halibut Limited Access Program (CHLAP) regulations require proof of participation in both 2004 or 2005 and 2008, Appellants were not eligible for a permit. (The regulatory requirements are more fully explained in this Decision in the sections on Principles of Law and Analysis.) In the IAD RAM also noted that it was not making a decision about Appellants' unavoidable circumstance claim, since under the CHLAP regulations those claims had to be adjudicated by OAA.

On January 24, 2011, Appellants timely filed their appeal with OAA.⁴ In their appeal, Appellants argue they experienced an unavoidable circumstance in 2004 and 2005 in the form of repeated breakdowns and problems repairing their charter boat. The details of Appellants' appeal are more fully explored in the Analysis section of this Decision.

By written Notice of Scheduling Hearing, on June 1, 2011, the spouse (Spouse) of one of the individual Appellants appeared to testify and present Appellants' case. Following the hearing, I left the record open to provide Appellants an opportunity to supplement the record. On June 22, 2011, Appellants submitted six pages of documents which I have added to the record.⁵ I have reviewed Appellants' appeal and the case record and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision.⁶

ISSUES

At issue in this appeal is whether Appellants should receive a CHP. To resolve this issue, I must evaluate the following:

1. Did Appellants establish by a preponderance of the evidence that they meet the minimum participation requirements to qualify for a CHP, i.e., they reported at least five logbook fishing trips in 2004 or 2005, and 2008?
2. If the answer to Question 1 is "no," I must evaluate the applicability of the unavoidable circumstance provisions of the CHLAP regulations. That is, I must consider whether Appellants proved by a preponderance of the evidence the following elements of an unavoidable circumstances claim: they reported at least five logbook fishing trips in 2008; they specifically intended to operate a charter halibut fishing business in 2004; they experienced an actual, unavoidable, reasonably unforeseeable and unique circumstance in 2004, and; they took all reasonable steps to overcome the unavoidable circumstance.

⁴ Pleadings Tab, appeal letter dated January 18, 2011.

⁵ The new evidence is under the Evidence tab of the case record.

⁶ See 50 C.F.R. § 679.43(g)(2) and (k).

3. If the answer to the inquiries in Question 2 are all “yes,” then I must determine the number and type (transferable or nontransferable) of permit for which Appellant is eligible and the angler endorsement on the permit by answering the following:

- a. Did Appellants prove they would have taken at least fifteen logbook trips in 2004 and therefore are eligible for a transferable permit?
- b. Did Appellants prove they would have likely taken four anglers on logbook fishing trips in 2004 but for the unavoidable circumstances, and therefore their transferable permit should be endorsed for four anglers?

FINDINGS OF FACT

1. For 2004, Appellants reported no logbook fishing trips to ADF&G.⁷
2. In January 2004, Appellants purchased a property suitable for lodging (Lodge) and operating charter fishing trips.⁸
3. Included in the sale of Lodge was a 24-foot vessel (Vessel) which Appellants understood was seaworthy.⁹ The marine (Marine) that had serviced Vessel told Appellants Vessel was a good boat.¹⁰
4. Vessel held four anglers for charter fishing.¹¹
5. Upon taking possession of Lodge in or around May 2004, Appellants inspected the Vessel and were surprised to see that it needed extensive work. Appellants took Vessel to Marine for repair. Marine told Appellants the repairs would take at least six to eight weeks.¹²
6. Appellants chose Marine to fix Vessel because Marine repaired/maintained Vessel for the former owners, and given Appellants’ location, there were few, if any, viable alternatives for repair.¹³
7. For the summer of 2004, Appellants had clients who wanted charter fishing experiences.¹⁴ The first charter was scheduled for the third week of July.¹⁵ In total, Appellants had fifteen charters lined up for the summer of 2004.¹⁶

⁷ Original File tab, Print Summary dated January 26, 2010.

⁸ Pleadings tab, Appellants’ appeal dated January 18 2011.

⁹ Pleadings tab, Appellants’ appeal dated January 18 2011; Spouse’s hearing testimony.

¹⁰ Spouse’s hearing testimony.

¹¹ Spouse’s hearing testimony.

¹² Pleadings tab, Appellants’ appeal dated January 18 2011; Original file tab, Marine receipt dated May 19, 2004; Original file tab, Marine receipt dated June 4, 2004; Original file tab, Marine receipts (two) dated July 7, 2004; Original file tab, Marine receipt dated September 13, 2004; Original file tab, handwritten list on needed repairs.

¹³ Spouse’s hearing testimony.

8. Appellants did not lease a charter vessel because there was no place in reasonable proximity to lease a boat appropriate for charter fishing.

9. Due to the time needed to make repairs, in the summer of 2004 Appellants referred their clients to other operators for charter trips.¹⁷ The other operators took four fishing charters out for Appellants: one with two anglers for five days, a second with four anglers for five days, a third for an unidentified number of anglers for five days, and a fourth with one angler for three days.¹⁸

10. Because of the time needed for repairs, and because their best solution for providing charters to their clients was to refer them out, Appellants left Vessel at Marine for repairs and storage, expecting to pick it up ready for chartering in June 2005.¹⁹ The needed parts arrived in the Fall of 2004.²⁰

11. In 2004, Appellants called Marine on a weekly basis in an effort to get Vessel repaired.²¹

12. In late-May/early June 2005, Appellants returned to Lodge and retrieved Vessel from Marine. Before reaching Lodge, Vessel broke down, necessitating a tow back to Marine.²²

13. For the summer of 2005, Appellants had ten to fifteen charter halibut fishing trips lined up, including some multi-day trips.²³

14. Because of the condition of Vessel, Appellants referred their clients to other operators to provide charter fishing trips.²⁴

15. During the summer of 2005, Vessel was not repaired, in large part due to delays in Marine obtaining parts and otherwise repairing the boat.²⁵

16. In or around early July 2005, Appellants decided vessel was irreparable for their purposes and decided to dispose of Vessel and buy another charter boat.²⁶

¹⁴ Spouse's hearing testimony.

¹⁵ Spouse's hearing testimony.

¹⁶ Spouse's hearing testimony.

¹⁷ Pleadings tab, Appellants' appeal dated January 18 2011.

¹⁸ Original file tab, Operator receipts dated August 30, 2004 and September 24, 2004; Original file tab, Registration Card dated July 14, 2004.

¹⁹ Pleadings tab, Appellants' appeal dated January 18 2011; Spouse's hearing testimony.

²⁰ Spouse's hearing testimony.

²¹ Spouse's hearing testimony.

²² Pleadings tab, Appellants' appeal dated January 18 2011; Spouse's hearing testimony; Marine statement of account dated June 30, 2005; Marine Statements of Account (two) dated July 14, 2005.

²³ Spouse's hearing testimony.

²⁴ Pleadings tab, Appellants' appeal dated January 18 2011.

²⁵ Original file, Appellants' letter dated April 1, 2010; Marine Statement of Account dated June 30, 2005; Marine Statements of Account (two) dated July 14, 2005.

²⁶ Marine Statement of Account dated July 2, 2005.

17. In September 2005, Appellants sold Vessel for scrap.²⁷
18. For 2005, Appellants reported no logbook fishing trips to ADF&G.²⁸
19. For 2008, Appellants properly reported eighteen logbook fishing trips to ADF&G.²⁹ The logbook trips were taken in Regulatory Area 2C.³⁰

PRINCIPLES OF LAW

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.³¹

“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.”³²

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).³³

A logbook fishing trip is either a bottomish logbook trip or a halibut logbook fishing trip that meet certain criteria. That criteria is that the trip was reported to ADF&G as a trip within state time limits. For a multi-day trip, the number of trips equals the number of days of that trip; for example, a two-day trip counts as two trips.³⁴

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.³⁵

²⁷ Spouse’s hearing testimony.

²⁸ Original File tab, Print Summary dated January 26, 2010.

²⁹ Original File tab, Print Summary dated January 26, 2010.

³⁰ Original File tab, Print Summary dated January 26, 2010.

³¹ See 50 C.F.R. § 300.67(f)(5); 75 Fed. Reg. 554, 556 (January 5, 2010).

³² 50 C.F.R. § 300.67(f)(1).

³³ 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

³⁴ See 50 C.F.R. § 300.67(f)(5).

³⁵ 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 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.³⁶

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.³⁷

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.³⁸ The number of permits Appellant will receive depends on the number of vessels Appellant would have operated in the applicant year, in this case, 2004.³⁹ Whether the CHP is designated as transferable depends on how many logbook fishing trips the Appellant proves he would have taken in 2004 but for the unavoidable circumstance.⁴⁰ If the applicant proves he took fifteen or more trips during both the qualifying year and participation year, then his permit will be transferable.⁴¹ Further, the number of anglers for which the permit will be endorsed depends on the highest number of anglers that would have been on the trips Appellant would have taken in 2004 but for the unavoidable circumstance.⁴²

ANALYSIS

Did Appellants establish by a preponderance of the evidence that they meet the minimum participation requirements to qualify for a CHP, i.e., they reported at least five logbook fishing trips in 2004 or 2005, and 2008?

Appellants did not prove they can qualify for a CHP based on the basic eligibility requirements, i.e., at least five logbook fishing trips in 2004 or 2005, and 2008.

³⁶ See 50 C.F.R. § 300.67(g)(2).

³⁷ See 50 C.F.R. § 300.67(g)(2).

³⁸ 50 C.F.R. § 300.67(g)(2)(v).

³⁹ See 50 C.F.R. § 300.67(c) and (g)(2)(v)(B). See also 74 Fed. Reg. 18178, 18187 (April 21, 2009).

⁴⁰ See 50 C.F.R. § 300.67(g)(2)(v)(B).

⁴¹ See 50 C.F.R. § 300.67(d).

⁴² See 50 C.F.R. § 300.67(e)(1) and (g)(2)(v)(B). See also 74 Fed. Reg. 18178, 18187 (April 21, 2009).

Appellants do not dispute they did not report logbook trips to ADF&G in 2004 and 2005. The record does show, however, that Appellants reported eighteen logbook trips in 2008. Since Appellants met the participation requirements in one period, namely the recent participation period in 2008, but not in both periods, namely the qualifying period in 2004 or 2005, Appellants may pursue a claim for a CHP based on the unavoidable circumstances provisions of the CHLAP regulations.

Did Appellants specifically intend to operate a charter halibut fishing business in 2004?

Appellants have met their burden of proving they specifically intended to provide charter halibut fishing in 2004. Their specific intent is established by evidence of record, including Spouse's credible testimony at the hearing that Appellants bought the Lodge intending to provide charter fishing experiences. Also, the record shows in both credible testimony and documentary evidence that early in the 2004 season, Appellants inspected Vessel with the expectation that it would be used that summer for chartering. Credible hearing testimony and documentary evidence is proof that Appellants had to refer their charter clients to other operators. Based on the totality of circumstances in this record, I find Appellants held the specific intent to operate a charter halibut fishing business in 2004.

Did Appellants experience an actual, unavoidable, reasonably unforeseeable and unique circumstance in 2004?

Appellants claim that the unavoidable circumstance was the unexpected condition of Vessel in the summer of 2004 and the untoward delay in obtaining parts, repairing Vessel, and continuing breakdown of Vessel. Taken as a whole, I conclude Appellants experienced a continuing series of breakdowns and delays in repairs. I further find that Appellants took reasonable and responsible steps to have Vessel fixed, yet ultimately the most viable option was to sell Vessel and replace it with a seaworthy charter boat. The breakdown and repair of a vessel is generally seen as unforeseen and I so find in this appeal. There is no doubt the circumstance actually occurred, as reflected in the findings of fact. The circumstance was reasonably unforeseeable, as I doubt anyone would think a vessel could experience as many problems as did Vessel. And, the circumstance was unique inasmuch as it only happened to Appellants.

Did Appellants take all reasonable steps to overcome the unavoidable circumstance?

When they arrived at Lodge in the beginning of the summer of 2004, Appellants were surprised at the condition of the boat. They had been advised, at or around the time of purchase, that Vessel was a good boat. It was not. They acted reasonably by using Marine, familiar with Vessel and a local repair business, to make the necessary repairs. However, Vessel was not seaworthy after Marine first worked on it in the summer of 2004, then once returned to Marine, did not get repaired due to no fault of Appellants. Appellants took the most logical step to mitigate their loss: they had other operators

take their clients on charter fishing trips. Leasing a charter vessel was not a viable alternative. A similar scenario occurred in 2005. Appellants continued to experience delays in repairs, and took the logical step of referring their clients to other operators. Given the totality of the circumstances and based on the record before me in this appeal, I find Appellants took all reasonable steps to overcome the unavoidable circumstance.

Did Appellants prove they would have taken at least fifteen logbook trips in 2004 and therefore are eligible for a transferable permit?

Spouse testified that she had lined up ten to fifteen charter trips, some of which were multi-day trips. Appellants produced receipts for three five-day and one three-day charters. Since under the CHLAP regulations multi-day trips count as one trip for one day,⁴³ Appellants' receipts reflect eighteen charter trips. Further, in 2008, Appellants reported eighteen logbook trips. Given the totality of the circumstances and based on the record before me, I find but for the unavoidable circumstance, Appellants would have likely operated at least fifteen logbook trips in 2004.

Did Appellants prove they would have likely taken four anglers on logbook fishing trips in 2004 but for the unavoidable circumstances, and therefore their transferable permit should be endorsed for four anglers?

Spouse testified that Vessel was able to carry four anglers. Further, of the trips for which Appellants had to use another operator, no trip exceeded four anglers (finding of fact 8). Based on the evidence of record, I find that but for the unavoidable circumstance in 2004, Appellants would likely have taken four anglers on their charter logbook fishing trips.

CONCLUSIONS OF LAW

Appellants did not establish by a preponderance of the evidence that they meet the minimum participation requirements to qualify for a CHP, i.e., they reported at least five logbook fishing trips in 2004 or 2005, and 2008.

Appellants did establish they reported eighteen logbook fishing trips to ADF&G in 2008.

Appellants specifically intended to operate a charter halibut fishing business in 2004.

Appellants experienced an actual, unavoidable, reasonably unforeseeable and unique circumstance in 2004.

Appellants took all reasonable steps to overcome the unavoidable circumstance.

⁴³ See 50 C.F.R. § 300.67(f)(5).

Appellants proved they would have likely taken at least fifteen logbook trips in 2004 and therefore are eligible for a transferable permit.

Appellants proved they would have likely taken four anglers on logbook fishing trips in 2004 but for the unavoidable circumstances, and therefore their transferable permit shall be endorsed for four anglers.

ORDER

The IAD dated November 23, 2010 is vacated. RAM is directed to issue Appellant a transferable CHP for Area 2C with an angler endorsement number of four. This decision takes effect thirty (30) days from the dated issued, December 29, 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).

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 December 9, 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 29, 2011