

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

In re Application of )  
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 ) Appeal No. 10-0115  
 )  
 ) DECISION  
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 )  
 Appellant )

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STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD 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 are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.<sup>1</sup>

The appeal under review was filed by [REDACTED], dba [REDACTED] (collectively referred to herein as Appellant). Appellant is appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (permit or CHP).

On April 5, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup> The application was filed with RAM, who is responsible for reviewing and determining whether an applicant will receive a permit or permits.

In response to Appellant's application, on June 17, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>3</sup> In the Notice, RAM noted Appellant's claim that he was eligible for a permit under the unavoidable circumstances provision of the CHLAP regulations (quoted in the letter). RAM set a July 16, 2010 deadline for Appellant to submit evidence to support his unavoidable circumstances claim. On July 16, 2010, Appellant responded to the Notice with two letters and copy of his "Boater's

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<sup>1</sup> See 50 C.F.R. § 679.43.

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

<sup>3</sup> Original File Tab, Notice of Opportunity to Submit Evidence dated June 17, 2010.

Log Book & Journal” (Journal).<sup>4</sup> The Journal pages record fishing trips he provided to friends, church groups and charities on: June 3, 2005; June 10, 2005; June 13, 2005; June 14, 2005; June 15, 2005; June 21, 2005; June 23, 2005; July 2, 2005; July 5, 2005; July 18, 2005; July 20, 2005; June 28, 2006; July 3, 2006; July 4, 2006; July 8, 2006; July 17, 2006; July 27, 2006; July 28 and 29, 2006; August 8, 2006; September 2, 2006, and; September 25, 2006. Notes in the journal indicate halibut fishing on at least six trips in 2005 and on at least eight trips in 2006.<sup>5</sup>

On October 22, 2010, RAM sent Appellant the IAD which is the subject of this appeal. In the IAD RAM denied Appellant a CHP. RAM first noted that Appellant did meet the participation requirements for 2008. However, RAM also stated Appellant did not meet one of the basic participation requirements for a CHP, namely five or more qualifying charter trips in 2004 or 2005.<sup>6</sup> RAM acknowledged Appellant’s claim that unavoidable circumstances provided a basis for him to receive a permit; however, RAM notified Appellant that pursuant to CHLAP regulations, to pursue an unavoidable circumstances claim Appellant had to appeal to OAA.

On December 20, 2010, Appellant timely filed his appeal of the IAD with OAA.<sup>7</sup> In his appeal, Appellant does not dispute that he does not meet the basic or general participation requirements for 2004 or 2005. Rather, on appeal Appellant argues he intended to operate a charter halibut business since he served his country and went on medical retirement in 1991.<sup>8</sup> Appellant emphasizes that without a permit he will be directly and adversely affected. Appellant explains that without a CHP he will lose his boat and face bankruptcy. Appellant questions the benefits of not extending a permit to someone who has charter fished for four consecutive years, has reservations for 2011, and provides charter fishing experiences to or for charities. Appellant requests an administrative hearing.

I have reviewed Appellant’s appeal and the case record and I have determined that the record contains sufficient information on which to reach final judgment. I have considered Appellant’s request for a hearing. Appellant has not stated why he thinks an oral hearing is necessary for him to present his case. Under applicable regulations, I have the discretion to order an oral hearing if Appellant’s appeal documentation shows an adjudicative fact or a factual issue that needs to be resolved by an oral hearing.<sup>9</sup> Even if I accept all the evidence provided by Appellant as accurate and true, as

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<sup>4</sup> Original File Tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, stamped received by RAM on July 16, 2010.

<sup>5</sup> Original File Tab, Journal pages attached to Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, stamped received by RAM on July 16, 2010.

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

<sup>7</sup> Pleadings Tab, letter dated December 18, 2010.

<sup>8</sup> Pleadings Tab, letter dated December 18, 2010; Original File Tab, Letter from Appellant to RAM received July 16, 2010.

<sup>9</sup> See *generally* 50 C.F.R. § 679.43(g).

explained in the Analysis section of this decision, Appellant cannot prevail in this appeal. I have therefore determined that the information in the record is sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(g)(2)&(k). I therefore close the record and render this decision.<sup>10</sup>

## ISSUES

There is no factual or legal dispute in this appeal except for the unavoidable circumstance claim. There are a number of requirements to an unavoidable circumstance claim, including one of the most basic, that an applicant experienced an unavoidable circumstance in 2004 or 2005. That requirement is the first level of inquiry in this Decision:

Has Appellant proven by a preponderance of the evidence that in 2004 or 2005 he suffered a unique, unforeseen, and reasonably unforeseeable “unavoidable circumstance” that “actually occurred?”

## FINDINGS OF FACT

1. In 2004 and 2005, Appellant held a State of Alaska business license.<sup>11</sup>
2. In 2004, Appellant did not report to Alaska Department of Fish and Game (ADF&G) qualifying logbook fishing trips.<sup>12</sup>
3. In the summer of 2004, Appellant captained his boat and took at least four charter fishing trips.<sup>13</sup>
4. In the summer of 2005, Appellant operated his boat and provided at least eleven charter fishing trips to friends, church groups, and charities. On at least six of those trips, anglers fished for halibut.<sup>14</sup>

<sup>10</sup> See 50 C.F.R. § 679.43(g)(2) and (k).

<sup>11</sup> Original File Tab, IAD dated October 22, 2010. I also base this finding of fact on the lack of affirmative evidence showing Appellant did hold an Alaska Business License in 2004 or 2005.

<sup>12</sup> Original File Tab, Print Summary created on January 27, 2010. I also base this finding of fact on the lack of affirmative evidence to support a contrary finding.

<sup>13</sup> Original File Tab, letter dated March 29, 2010, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>14</sup> Original File Tab, Journal pages attached to Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, stamped received by RAM on July 16, 2010; Appellant’s letter attached to Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, stamped received by RAM on July 16, 2010.

5. In 2005, Appellant did not report to Alaska Department of Fish and Game (ADF&G) qualifying logbook fishing trips.<sup>15</sup>
5. On April 5, 2010, Appellant applied for a CHP.<sup>16</sup>
6. On his application, Appellant checked a box indicating 2005 as his “Applicant Selected Year,” and also indicated he operated a charter fishing non-profit business in 2005, but not 2004.<sup>17</sup>
7. On Appellant’s application and attachments, he indicated he wanted to pursue a claim based on unavoidable circumstances, but did not indicate whether the alleged unavoidable circumstance occurred in 2004 or 2005.<sup>18</sup>
8. For 2008, Appellant reported twenty-eight logbook fishing trips to ADF&G.<sup>19</sup>

#### 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.<sup>20</sup>

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).<sup>21</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>22</sup>

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<sup>15</sup> Original File Tab, Print Summary created on January 27, 2010. I also base this finding of fact on the lack of affirmative evidence to support a contrary finding.

<sup>16</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with three page attachment.

<sup>17</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>18</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A with three page attachment.

<sup>19</sup> Original File Tab, Print Summary created January 27, 2010; Original File Tab, IAD.

<sup>20</sup> See 50 C.F.R. § 300.67(f)(5); 75 Fed.Reg. 554, 556 (2010).

<sup>21</sup> 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

<sup>22</sup> 50 C.F.R. § 300.67(b)(1)(ii) (A)-(B); 50 C.F.R. § 300.67(f)(6)-(7).

“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.”<sup>23</sup>

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2004 or 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.<sup>24</sup> 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 2004 or 2005;
- (2) he specifically intended to operate a charter halibut fishing business in 2004 or 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.<sup>25</sup>

## ANALYSIS

In analyzing this case, I considered the entire record, including 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 will address the only issue raised in this appeal, Appellant’s unavoidable circumstance claim.

**Did Appellant prove by a preponderance of the evidence that in 2004 or 2005 he suffered a unique, unforeseen, and reasonably unforeseeable “unavoidable circumstance” that “actually occurred?”**

At the heart of an unavoidable circumstance claim, is proof that an unavoidable circumstance actually occurred in 2004 or 2005. Appellant bears the burden of proving that fact by a preponderance of the evidence. In his appeal, Appellant does not specify the year or type of unavoidable circumstance he experienced which caused him to not be able to provide charters in 2004 or 2005.

<sup>23</sup> 50 C.F.R. § 300.67(f)(1).

<sup>24</sup> See 50 C.F.R. § 300.67(g)(2).

<sup>25</sup> See 50 C.F.R. § 300.67(g)(2).

The evidence of record shows that in both 2004 and 2005, Appellant had a charter fishing operation. I have no reason to doubt Appellant's statements in the record that the trips in 2004 and 2005 were for friends or charity and not for profit. However, since Appellant was able to provide charter fishing trips in 2004 and 2005, I cannot find that he suffered from an unavoidable circumstance that "thwarted" (prevented) operating a charter business. Indeed, Appellant was operating a charter operation in 2004 and 2005; in fact, the record shows he completed at least four charter fishing trips in 2004 and five such trips in 2005. Thus, it would be illogical for me to find that Appellant suffered an unavoidable circumstance in 2004 or 2005 that prevented him from chartering.

In reaching my decision, I am cognizant of the potential ramifications of Appellant being ineligible for a permit. I commend Appellant's service to his country. As I understand Appellant's appeal, he believes he should receive a permit based on his interest in the industry, stake in Alaska, potential adverse financial affects of not receiving a permit from NMFS, and service to others. I have no reason to doubt Appellant's statements. However, to award a permit based on the above would not be consistent with the CHLAP regulations but based on authority NAO does not have, one lying in equity. I am bound to follow the regulations as written and Appellant has not proven that he meets the requirements of an unavoidable circumstance claim. Further, he has not argued nor does the record support a finding that he meets the basic eligibility requirements for a permit.<sup>26</sup>

### CONCLUSIONS OF LAW

Appellant did not properly report at least five bottomfish logbook trips to ADF&G in 2004 or 2005; therefore, Appellant is not eligible for a CHP under the basic provisions of the CHLAP regulations.

Appellant did not prove by a preponderance of the evidence that in 2004 or 2005 he suffered a unique, unforeseen, and reasonably unforeseeable "unavoidable circumstance" that "actually occurred;" therefore, Appellant cannot prevail under a claim of unavoidable circumstances.

The IAD is consistent with CHLAP regulations.

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<sup>26</sup> The basic or 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). 50 C.F.R. § 300.67(b)(1)(ii) (A)-(B) and (f)(6)-(7).

ORDER

The IAD dated October 22, 2010 is upheld. This decision takes effect thirty (30) days from the date issued, November 18, 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 Standard Time, on the tenth day after the date of this Decision, October 31, 2011. 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.



Eileen G. Jones  
Chief Administrative Judge

Date Issued: October 19, 2011