

On August 12, 2010, NAO received Appellant's timely appeal of the IAD. In his appeal, Appellant contends that, but for an unavoidable circumstance, he would have operated a charter halibut fishing business in Alaska in 2005. The unavoidable circumstance was an unanticipated delay in construction of his vessel.

On October 6, 2010, Contractor conducted a recorded scheduling conference with Appellant. During the course of the scheduling conference, Contractor informed Appellant that he did not believe a formal administrative hearing was required. I have concluded that the record contains sufficient information on which to render a decision. I therefore close the record and issue this decision.

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."
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, Appellant decided to open and operate a fishing lodge in Alaska, and intended to offer charter halibut fishing as an attraction. To that end, he began looking for a boat builder who could deliver a new vessel to him by June 2005.⁴
2. By November 2004, Appellant had located a builder who offered to construct a new thirty-five foot (length over-all) charter vessel.⁵
3. In December 2004, Appellant obtained insurance for his business and has held it continuously since.⁶
4. In January 2005, Appellant made a \$10,000 down payment on the vessel construction contract.⁷
5. In February 2005, Appellant ordered a sign for his charter and lodge business.⁸
6. In March, April, and May of 2005, Appellant made additional payments to the vessel construction company, in the amounts of \$15,500.00, \$32,500.00, and \$30,000.00 respectively.⁹
7. On April 25, 2005, Appellant and vessel construction company (also referred to as builder) both signed a "Vessel Construction Agreement" (Contract).
8. Under the terms of the Contract, the delivery date for the new vessel was June 2005.¹⁰ The vessel builder had an excellent reputation and seventeen-year track record in delivering boats.¹¹
9. Appellant ordered two signs for his business from a sign company, the purposes of which were to advertise his lodge and charter fishing business.¹²
10. Appellant had arranged for clients to fish with him for a minimum of seven days in 2005, but was forced to cancel the bookings when his vessel was not completed.¹³

⁴ Photocopy of electronic mail message from boat builder to Appellant (November 17, 2010).

⁵ Photocopy of electronic mail message from boat builder to Appellant (November 17, 2010).

⁶ Letter from Insurance Company "To Whom it May Concern" (February 25, 2010).

⁷ Photocopy of cancelled check (both sides), made out to vessel construction company, and co-signed by Appellant and his spouse (January 28, 2005).

⁸ Receipt marked paid on February 12, 2005.

⁹ Photocopies of cancelled checks, #'s 1002, 1003, and 1004, made out to vessel construction company and co-signed by Appellant and his spouse (March 23, 2005, April 6, 2005, and May 5, 2005).

¹⁰ "Supporting Documents for Unavoidable Circumstances," page 2 (received by NMFS April 1, 2010).

¹¹ "Supporting Documents for Unavoidable Circumstances," page 3 (received by NMFS April 1, 2010).

¹² Invoice from sign company (February 5, 2005).

¹³ "Supporting Documents for Unavoidable Circumstances," page 2 (received by NMFS/RAM April 1, 2010); Letter from 2005 Client "To Whom it May Concern," explaining that he had booked lodging and 3

11. A local charter broker had also arranged approximately sixty-five customers to take charters with Appellant in 2005.¹⁴
12. Construction of the vessel was delayed beyond the June 2005 delivery date provided for in the contract.¹⁵ The delay was an unexpected temporary shortage of specialized welders.¹⁶
13. Builder had his employees work weekends and outside regular hours in an attempt to complete Appellant's vessel for use in the summer of 2005.¹⁷
14. Appellant offered to assist builder to get the vessel finished for the 2005 fishing season.¹⁸ Builder could not accept their help due to insurance restrictions.¹⁹
15. Appellant responded to a lease offer from the owner of a twenty-eight foot vessel; however, upon inspection by Appellant and his captain, it was determined that the vessel was unsuitable for use in the Gulf of Alaska.²⁰
16. Appellant considered suing the boat builder but decided not to because he thought all parties were doing the best they could under the circumstances.²¹
17. Appellant's vessel was not delivered until after the 2005 fishing season.²²
18. Appellant began his charter halibut fishing business in 2006; in that year, he reported twenty-two halibut logbook fishing trips to ADF&G.²³
19. In 2007, Appellant reported twenty-two halibut logbook fishing trips to ADF&G; in 2008, he reported fifty such trips.²⁴

days of fishing with Appellant, scheduled for July 2005, but that Appellant contacted him and agreed to find them another vessel upon which to fish (received by NMFS/RAM on April 1, 2010); Letter from another client to "Dear Sirs," explaining that he had booked Appellant's vessel for four days in August 2005, but that he used another vessel when Appellant explained that the construction of his vessel was not completed (received by NMFS/RAM on April 1, 2010); .

¹⁴ Letter from Manager of local charter broker to NMFS (March 23, 2010).

¹⁵ Letter from President of the boat building company, "To Whom it May Concern" (March 19, 2010).

¹⁶ Supporting Documents for Unavoidable Circumstances," page 3 (received by NMFS April 1, 2010);

Letter from President of the boat building company, "To Whom it May Concern" (March 19, 2010);

¹⁷ Letter from President of the boat building company, "To Whom it May Concern" (March 19, 2010).

¹⁸ "Supporting Documents for Unavoidable Circumstances," page 3 (received by NMFS April 1, 2010).

¹⁹ Letter from President of the boat building company, "To Whom it May Concern" (March 19, 2010).

²⁰ "Supporting Documents for Unavoidable Circumstances," page 3 (received by NMFS April 1, 2010);

Letter from vessel owner "To Whom it May Concern" (received by NMFS on April 1, 2010).

²¹ "Supporting Documents for Unavoidable Circumstances," page 4 (received by NMFS April 1, 2010).

²² "Supporting Documents for Unavoidable Circumstances," page 4 (received by NMFS April 1, 2010).

²³ "Supporting Documents for Unavoidable Circumstances," page 3 (received by NMFS April 1, 2010).

²⁴ 50 C.F.R. 300.67(f)(5): "*Official charter halibut record* means the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the

20. In 2007, the highest number of clients on any given trip that Appellant reported to ADF&G was six; likewise, in 2008, the highest number of clients reported on any given trip was six.²⁵
21. Appellant operates his charter halibut fishing business in International Pacific Halibut Commission (IPHC) Regulatory Area 3A.²⁶

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).²⁷

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.²⁸

“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.”²⁹

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.³⁰

Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.”; Email from NMFS/Information Services (May 13, 2011).

²⁵ 50 C.F.R. 300.67(f)(5): “*Official charter halibut record* means the information prepared by 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.”; Email from NMFS/Information Services (May 13, 2011).

²⁶ 50 C.F.R. § 300.61 provides: “*Area 3A* means all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41’15” N. latitude, 155°35’00” W. longitude) to Cape Ikolik (57°17’17” N. latitude, 154°47’18” W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44’50” N. latitude, 154°08’44” W. longitude), then 140° true.”

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

²⁸ See 50 C.F.R. § 300.67(f)(5); 75 Fed. Reg. 554, 556 (January 5, 2010).

²⁹ 50 C.F.R. § 300.67(f)(1).

³⁰ 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.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 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.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 Appellant 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 highest number of anglers that would have been on the trips Appellant would have taken in 2005 but for the unavoidable circumstance.³⁶

A logbook fishing trip is either a bottomfish 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.³⁷

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).

³⁶ See 50 C.F.R. § 300.67(e)(1) and (g)(2)(v)(B).

³⁷ See 50 C.F.R. § 300.67(f)(5).

ANALYSIS

Appellant only argues on appeal that he is eligible for a permit under the unavoidable circumstance provision of the CHLAP regulations. I therefore address the requirements of that claim below.

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 demonstrated his specific intent to operate his charter halibut fishing business in 2005 by taking the necessary preparatory steps. He arranged for the construction of a charter vessel and paid considerable sums to the builder in the months before the season was to commence. He booked clients and arranged for a charter broker to refer other clients to him. One broker had arranged for about sixty-five anglers to charter with Appellant. Appellant also had a sign made for his business.

In consideration of the above, I conclude that 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 experienced an “unavoidable circumstance” that “actually occurred?”

The failure of the vessel construction company to complete the vessel within the contract time (June 2005) was an actual, unavoidable circumstance. Although the boat builder had a solid, seventeen year track record, an unforeseen staffing shortage delayed construction of Appellant’s vessel.

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

The construction delay prevented Appellant from operating his charter halibut fishing business in 2005. Appellant had proceeded in good faith to uphold his part of the construction contract (by making payments totaling \$88,000 before the season). In spite of his good faith, and the efforts of the vessel construction company, the vessel was not complete in time to put it into service during the 2005 sport halibut fishing season.

The circumstance was unique inasmuch as Appellant was the only one to experience this particular delay. It was unforeseeable since the contract called for a June 2005 delivery from a reputable builder. For similar reasons, the circumstance was reasonably unforeseeable. By an objective standard of the “reasonable person,” one would think that if a builder with a longstanding and good reputation promised delivery by a certain date, in all likelihood it would in fact be delivered then. Under the facts of this case, I find Appellant’s intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance.

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

Appellant offered his services to assist with vessel construction. Appellant also sought another vessel to lease, and actually examined another that might have worked. However, Appellant concluded that the vessel was not appropriate for fishing in the Gulf of Alaska. Appellant considered suing the vessel builder but did not because he did not feel builder was at fault for the delay.

Under the circumstances of this case, I conclude that Appellant took all reasonable steps to overcome the circumstance that had thwarted his intent to operate a 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?

To qualify for a transferable CHP, among the requirements is that the applicant prove he would likely have taken fifteen or more qualifying trips during both the qualifying year (2005) and did in fact take fifteen such trips in the participation year (2008).³⁸ RAM and Appellant are in agreement that in 2008 Appellant recorded fifty halibut logbook trips. Therefore, I find he exceeds the number of trips needed in 2008 to qualify for a transferable permit (FOF 21). I turn then to the number of trips Appellant would likely have taken in 2005.

In 2005, the local charter broker stated that she had arranged for at least sixty-five customers to take fishing trips with Appellant's charter business. Appellant stated that in 2006, the first year in which he operated his charter halibut fishing business, he reported twenty-two bottomfish logbook fishing trips. The Official record shows that in 2007 and 2008, he reported twenty-two and fifty such trips, respectively. In consideration of these facts, I conclude that it is more likely than not that Appellant would have reported a minimum of fifteen bottomfish logbook fishing trips in 2005. Therefore, his permit should be designated as transferable.

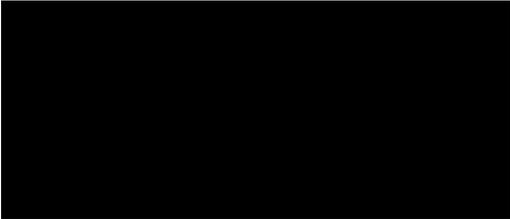
Did Appellant prove that the largest number of anglers he would likely have taken on charter fishing trips in 2005 was six, and therefore his transferable permit should be endorsed for six anglers?

Appellant geared his business to taking up to six client anglers on his halibut fishing charters. In 2007, the highest number of anglers that Appellant took on a halibut logbook fishing trip was six. In 2008, the highest number of anglers that Appellant took on a halibut logbook fishing trip was six.

³⁸ See 50 C.F.R. § 300.67(d) and (g)(2).



Appeal 10-0032



Eileen G. Jones
Chief Administrative Judge

Date Issued: October 21, 2011