

Appellant did not resume providing charter fishing trips for direct payment because he was unfamiliar with *Vessel II* and because he lacked money to insure it.²¹ Instead, Appellant testified he took clients out on leisure trips to “break in” *Vessel II* and did not record or report these trips.²² Appellant testified he failed to report the trips because he had not charged for them.²³ At the conclusion of the hearing, Contractor closed the record.

ISSUES

Appellant concedes he does not meet the minimum participation requirements for eligibility for a CHP. Appellant met the minimum participation requirements for 2005, but he did not meet the minimum participation requirements for 2008. Thus, the only issue on appeal is Appellant’s unavoidable circumstance claim.

To prevail in this appeal, Appellant must show by a preponderance of the evidence that he meets the criterion of an unavoidable circumstances claim. Unavoidable circumstance claims do not lie in equity, but rather have specific regulatory requirements.

Among the regulatory requirements is an applicant must have had the specific intent to operate his charter halibut business in 2008 and an unavoidable circumstance thwarted his intent to operate a charter halibut business.

If Appellant has not demonstrated he held the specific intent to operate his charter halibut business in 2008 and that his operations were thwarted by the unavoidable circumstances, Appellant cannot establish his eligibility for a CHP under the unavoidable circumstance provision.

FINDINGS OF FACT

1. In 2005, Appellant reported twenty-two bottomfish logbook fishing trips to the State of Alaska Department of Fish and Game (ADF&G) taken by *Vessel I*.²⁴
2. In the summer of 2007, *Vessel I*’s engine overheated. Appellant received an estimate that it would cost \$14,000 to repair.²⁵
3. Appellant decided not to repair *Vessel I* and sold it.²⁶

²¹ Testimony of Appellant at Oral Hearing (February 10, 2011).

²² Testimony of Appellant at Oral Hearing (February 10, 2011).

²³ Testimony of Appellant at Oral Hearing (February 10, 2011).

²⁴ Official Charter Halibut Record [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.

²⁵ Testimony of Appellant at Oral Hearing (February 10, 2011).

4. Following the 2007 season, Client offered to purchase another vessel (*Vessel II*) for Appellant to use in his charter business.²⁷
5. In early 2008, Appellant referred clients to Captain who reported four halibut logbook fishing trips to ADF&G in Appellant's logbook.²⁸ Appellant and Captain described their arrangement as a "gentlemen's agreement."²⁹
6. After the four trips, Captain began recording the remainder of the logbook fishing trips in his own ADF&G issued logbook, although Captain took about ten charter trips that were referred by Appellant.³⁰
7. On July 21, 2008, Client purchased *Vessel II* for Appellant.³¹
7. In mid-August 2008, *Vessel II* was transported from Oregon to Alaska.³²
8. Appellant did not immediately use *Vessel II* to carry clients because he needed to familiarize himself with its handling characteristics and its electronics (fish-finding equipment and aids to navigation) before doing so.³³
9. To break-in *Vessel II*, Appellant took several trips with friends to catch halibut.³⁴ However, Appellant decided not to report those trips to ADF&G because Appellant believed he did not receive compensation for the trips.
10. In 2008, Appellant provided charter trips in exchange for promotion of his charter business and also for advertising.³⁵
11. In 2008, Appellant reported no additional halibut logbook fishing trips to ADF&G on *Vessel II*.³⁶
12. In 2009, Appellant fully resumed charter fishing.³⁷

²⁶ Testimony of Appellant at Oral Hearing (February 10, 2011).

²⁷ Testimony of Appellant at Oral Hearing (February 10, 2011).

²⁸ Testimony of Appellant and Captain at Oral Hearing (February 10, 2011); Appeals Correspondence Tab, attachment to email dated October 14, 2011; Evidence Tab, Captain's letter dated September 9, 2010; Original File Tab, Print Summary, created January 26, 2010.

²⁹ Testimony of Appellant and Captain at Oral Hearing (February 10, 2011);

³⁰ Testimony of Captain at Oral Hearing (February 10, 2011).

³¹ Testimony of Appellant and Client at Oral Hearing (February 10, 2011).

³² Testimony of Appellant at Oral Hearing (February 10, 2011).

³³ Testimony of Appellant at Oral Hearing (February 10, 2011).

³⁴ Letters dated February 19, 2010, and February 25, 2010, and March 3, 2010.

³⁵ Pleadings Tab, Appellant's letter dated June 24, 2010; Original File Tab, Letter dated February 19, 2010.

³⁶ Testimony of Appellant at Oral Hearing (February 10, 2011).

³⁷ Testimony of Appellant at Oral Hearing (February 10, 2011).

PRINCIPLES OF LAW

In general, NMFS is only authorized to issue a CHP to an individual or entity that has been issued an ADF&G Business Owner License. These licenses can include business registration, sport fishing business owner license, sport fish business license, or ADF&G business license. With this license one is then authorized to take qualifying logbook fishing trips.³⁸

To establish one's history of bottomfish logbook fishing trips, one must record qualifying trips in a state-issued logbook. ADF&G issues logbooks to those who hold an ADF&G Business Owner License.³⁹

To be eligible for a permit, an applicant must also have reported a minimum of five bottomfish logbook fishing trips during one year of the qualifying period, either 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the 2008 recent participation period.⁴⁰ A "logbook fishing trip" means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.⁴¹

A "halibut logbook fishing trip" means a logbook fishing trip in the recent participation period that was reported to ADF&G in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.⁴²

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits.⁴³

ANALYSIS

In analyzing this case, I considered the entire record, including hearing testimony and 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 2008 to qualify for a CHP, I will address the only issue raised in this appeal, namely Appellant's unavoidable circumstance claim. The criterion I consider is whether Appellant held the specific intent to operate a charter

³⁸ See 50 C.F.R. § 300.67(b)(1)(ii) and (3).

³⁹ 50 C.F.R. § 300.67(b)(1)(ii).

⁴⁰ 50 C.F.R. § 300.67 (b)(1)(i) and (ii)(A) and (B); 50 C.F.R. § 300.67 (f)(6) and (7).

⁴¹ 50 C.F.R. § 300.67(f)(4).

⁴² 50 C.F.R. § 300.67(f)(3).

⁴³ 50 C.F.R. § 300.67(f)(5).

halibut business in 2008 and whether his not operating his business fully in 2008 was thwarted by an unavoidable circumstance.

Although Appellant did come into possession of *Vessel II* in 2008 and did attempt to contract out his clients prior to August 2008, his subsequent actions after receiving *Vessel II* are contrary to someone who holds the specific intent to operate a charter fishing business. *Vessel II* was purchased for Appellant in July 2008 and delivered to his place of business by mid-August. Appellant testified that upon delivery he had no money to insure *Vessel II*. For reasons unknown, Appellant did not attempt to raise money to insure *Vessel II* so that he could resume his business.

Appellant's testimony is also contradictory. On one hand, he stated at the hearing that he did not have enough money for a logbook and insurance to run charters once *Vessel II* arrived, on the other hand, he stated that he felt once *Vessel II* arrived it was too late to charter. I notice, also, despite Appellant's alleged limited finances, he fueled and operated *Vessel II* in August and October 2008 (still within the official halibut fishing season).⁴⁴ Since he was able to fuel and operate *Vessel II* for complimentary trips, I see no reason he could not do so for paying clients.

Moreover, Appellant testified he also did not schedule any trips because he was unfamiliar with his new vessel. Even if this was the case, Appellant was still able to take out *Vessel II* for chartering, albeit without being paid money for the service. Taking several weeks to familiarize with *Vessel II* appears to have been long enough since his vessel was in the water and persons on his boat were fishing. Instead of running his charter business fully, however, Appellant referred his clients to other businesses, took them out for free, or took them out in exchange for advertising or for promoting his business.

The record also does not show that Appellant made an effort to lease a charter vessel for the 2007 or 2008 summer season until *Vessel II* arrived. Additionally, the record does not show Appellant made appropriate arrangements with Captain to ensure that Appellant was credited with more logbook trips. That is, the record does not show evidence that Appellant attempted to extend their "gentlemen's agreement" so that Appellant would be credited with another halibut charter logbook trip.

After taking into consideration the totality of the circumstances, based on the record before me I find Appellant did not hold the specific intent to operate a charter halibut fishing business in 2008. Since Appellant cannot prove that he specifically intended to operate his charter halibut business in 2008, he cannot establish an unavoidable circumstances claim.

I also note that what caused Appellant to not report at least five halibut logbook fishing trips in 2008 was not the break-down of *Vessel I* in 2007, but rather Appellant's delay in not making arrangements to be able to report at least five halibut logbook fishing trips. In fact, Appellant only had to report one more halibut logbook fishing trip in order to

⁴⁴ Original File Tab, letter dated March 3, 2010 attached to Appellant's Application.

meet minimum requirements for a CHP. Appellant had several options, none of which he exercised, including repairing *Vessel I*; leasing or purchasing a vessel before or at the beginning of the summer of 2008; reporting the trips he provided in exchange for advertising services; having adequate safeguards in place or an arrangement with Captain by which logbook trips Appellant could legally receive credit for were in fact credited to him, and; taking and reporting at least one (since he had four already) logbook fishing trip between August and December 2008, even if that required hiring an experienced captain to take that trip. In short, the circumstance of the break-down of *Vessel I* did not thwart Appellant's ability to operate a charter halibut business in 2008. Rather, because of Appellant's choices or inaction, he did not report the minimum of five halibut logbook fishing trips for 2008.

In reaching my Decision, I have carefully considered Appellant's circumstances. I acknowledge the challenges Appellant faced in the last few years. I also understand his general desire to reenter the charter halibut industry. Yet, unfortunately under the evidence presented, Appellant does not qualify for a permit under the CHLAP regulations.

CONCLUSIONS OF LAW

Appellant is not eligible for a CHP under the basic requirements because he did not meet the minimum participation requirements in 2008.

Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because he did not have the specific intent to operate a charter halibut business in 2008.

Appellant is not eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations because his ability to operate his charter halibut business fully in 2008 was not thwarted by an unavoidable circumstance.

The IAD is consistent with the CHLAP regulations.

ORDER

The NAO decision dated November 23, 2011 is vacated.

The IAD dated May 27, 2010 is upheld. This decision on reconsideration takes effect thirty days from the dated issued, May 3, 2012, 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 reverse, remand, or modify this decision pursuant to 50 C.F.R. § 679.43(k), (o).

