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

In re Application of [redacted] Appellant	)))))))	Appeal No. 11-0014 DECISION (Corrected)

STATEMENT OF THE CASE

This corrected decision is being issued to correct page numbering and header content only. The remainder of the decision remains unchanged.

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.[1]

The appeal under review was filed by [redacted] doing business as [redacted] (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 1, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).[2] 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 July 13, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).[3] In the Notice, RAM noted Appellant claimed eligibility for a CHP based on an unavoidable circumstance for the recent participation year of 2008, but indicated Appellant met the minimum participation requirements for that year. RAM indicated Appellant had until August 12, 2010, to submit additional

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[1] 50 C.F.R. § 679.43.
[2] Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, signed March 31, 2010, received April 1, 2010.
[3] Original File Tab, Notice of Opportunity to Submit Evidence, dated July 13, 2010.

evidence in support of his claim. On August 4, 2010, Appellant responded to the Notice by waiving the opportunity to submit additional evidence.[4]
On December 2, 2010, RAM sent Appellant a revised IAD at issue in this case.[5] In its IAD, RAM denied Appellant a permit because he lacked the requisite logbook trips. Specifically, RAM stated that in order to receive a CHP, the State of Alaska Department of Fish and Game (ADF&G) must have issued a person seeking to apply for such a permit an ADF&G Business Owner License authorizing logbook fishing trips meeting the minimum participation requirements of reporting five or more bottomfish logbook fishing trips during one year of the qualifying period (2004 or 2005); and five or more halibut logbook fishing trips during the recent participation period (2008). RAM stated Appellant was not such a person. RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by January 31, 2011. On January 21, 2011, Appellant appealed the IAD.[6] On April 21, 2011, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by May 23, 2011.[7] NAO did not receive any additional evidence from Appellant by May 23, 2011.

On October 24, 2011, a scheduled hearing was held. During the hearing, Appellant testified he operated a charter vessel business in 2004, and fished for halibut that year, that he operated such a business in 2005, and fished for halibut approximately twenty-two times that year, and that he operated such a business in 2008, and fished for halibut nine times that year.[8] Appellant further testified he could not give his charter halibut clients the best opportunity for bottom fishing due his physical limitations [redacted]. Appellant presented two witnesses during his hearing corroborating his physical injuries and fishing limitations.

I have determined that the information in the record is sufficient to render a decision.[9] I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

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 2004 or 2005?

[4] Original File tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence, signed August 2, 2010, received May 26, 2010.
[5] Original File Tab, revised IAD dated December 2, 2010.
[6] Pleadings Tab, type-written letter dated January 17, 2011, received January 21, 2011.
[7] Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.
[8] Audio recording of October 24, 2010, hearing.
[9] 50 C.F.R. § 679.43(g) (2).

2. If the answer to Question 1 is "yes," did Appellant prove by a preponderance of the evidence that in 2004 or 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 "no," Appellant is not eligible for a permit, and I must uphold the IAD.

FINDINGS OF FACT

1. In 2008, Appellant timely and properly reported nine halibut logbook fishing trips to ADF&G.[10]

2. In 2004, Appellant operated a charter vessel business and fished for halibut, but did not properly and timely report this information to ADF&G.[11]

3. In 2005, Appellant operated a charter vessel business and fished for halibut approximately twenty-two times, but did not properly and timely report this information to ADF&G. [12]

4. Appellant has [redacted].[13]

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS is only authorized to issue a CHP to the individual or entity to which ADF&G issued the ADF&G Business Owner License.[14] This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.[15]

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, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent publication period, namely 2008.[16]

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[10] Original File Tab, printed summary.
[11] Original File tab, audio recording of October 24, 2010, hearing.
[12] Original File tab, Appellant's type-written letter, dated March 30, 2010, received April 1, 2010; audio recording of October 24, 2010, hearing.
[13] Audio recording of October 24, 2010, hearing; Pleadings Tab, Multiple medical documents.
[14] An ADF&G Business Owner License includes a business registration, a sport fish business owner license, a sport fish business license, and an ADF&G business license. 50 C.F.R. § 300.67(b)(3).
[15] 50 C.F.R. § 300.67(b)(1)(ii).
[16] 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.[17] The time limit to submit data about logbook fishing trips was eight to fourteen days, as delineated in the logbooks.[18]

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.[19]

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to the State of Alaska 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.[20]

“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 non transferable permits.[21]

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.[22]

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. These threshold criteria may be referred to as the participation requirements.[23]

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the recent participation period of 2008, but does meet the participation requirements for the qualifying period, 2004 or 2005, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule.[24]

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[17] 50 C.F.R. § 300.67(f)(4).
[18] Available at: http://alaskafisheries.noaa.gov/appeals/default.htm.
[19] 50 C.F.R. § 300.67(f)(2).
[20] 50 C.F.R § 300.67(f)(3).
[21] 50 C.F.R. § 300.67(f)(1).
[22] 50 C.F.R. § 300.67(f)(5).
[23] *See* 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed. Reg. 554, 554-555 (January 5, 2010).
[24] *See* 50 C.F.R. § 300.67(g)(1).

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 2004 or 2005, but not for 2008;
>
> (2) he specifically intended to operate a charter halibut fishing business in 2008;
>
> (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.

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.[25]

ANALYSIS

Appellant's argument on appeal is that he is eligible for a permit under the unavoidable circumstance provision of the CHLAP regulations. As Appellant achieved the minimum participation requirements for 2008, I will only analyze the unavoidable circumstance provisions of the CHLAP regulations regarding the qualifying period of 2004 or 2005. I 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 2004 or 2005?

Appellant demonstrated his specific intent to operate his charter halibut fishing business in 2004 and 2005. Appellant operated such a business during both these years, thus demonstrating such an intent during this time period.

Did Appellant prove by a preponderance of the evidence that in 2004 or 2005, he experienced an "unavoidable circumstance" that "actually occurred?"

Appellant provided multiple medical reports and evaluations evidencing [redacted] existing prior to the qualifying period (2004 or 2005), and continuing [redacted] effect through this period. Appellants' witnesses' testimony was credible and corroborating. Appellants, therefore, experienced circumstances that actually occurred.

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

[25] 50 C.F.R. § 300.67(g)(1)(v).

Although Appellant credibly established his injuries affected his charter vessel business, he testified he nonetheless operated his charter vessel business in 2004, 2005, and 2008, fishing for halibut approximately twenty-two times in 2005, and nine times in 2008. It is not reasonable to conclude, therefore, Appellant's specific intent to operate a charter halibut business in 2004 ore 2005 was thwarted by his physical injuries. Although Appellant testified his injuries resulted in his inability to provide his clients the best bottom fishing opportunity that he would have liked to provide to them, this does not establish Appellant's specific intent to operate his charter vessel business was thwarted by his injuries. Appellant did not establish by a preponderance of the evidence that his specific intent to operate his charter halibut business in 2004 or 2005 was thwarted by an unavoidable circumstance.

CONCLUSIONS OF LAW

RAM correctly denied Appellant's application for a CHP. Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004 or 2005. Appellant does not qualify under the unavoidable circumstance provisions of the CHLAP regulations to receive a CHP. Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(2)(i)-(iv).

ORDER

The IAD dated December 2, 2010, is upheld. This decision takes effect thirty days from the dated issued, December 23, 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 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 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.

[redacted]

Steven Goodman
Administrative Judge

Date Issued: January 4, 2012