

claim. RAM advised Appellant he had until May 28, 2010 to submit any additional evidence in support of his claim. On May 12, 2010, Appellant submitted a document to RAM indicating that he had a mutual agreement with Lodge Owner.⁴

On August 26, 2010, RAM issued the IAD at issue in this appeal.⁵ In the IAD, RAM denied Appellant's application for the reasons indicated in the Notice. RAM specified "The Official Record shows no halibut logbook fishing trips reported in an ADF&G Saltwater Charter Vessel Logbook issued to Appellant in 2008."

On October 26, 2010, Appellant timely appealed the IAD to OAA.⁶ On November 3, 2011, NAO conducted a hearing on this appeal.⁷ On November 18, 2010, NAO acknowledged receipt of Appellant's appeal and provided Appellant until December 8, 2010, to supplement the record.⁸ On November 23, 2010, Appellant requested additional time to submit additional materials to supplement the record.⁹ On December 29, 2010, Appellant submitted additional materials to NAO in support of his appeal, including copies of ADF&G 2008 Saltwater Charter Logbook [REDACTED] and ADF&G Sport Fish Business Owner/Guide License [REDACTED].

I have determined that the information in the record is sufficient to render a decision.¹¹ 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

The broad issue in this case is whether Appellant is eligible for a permit under the CHLAP rules. To resolve that issue, I must answer the following:

Did Appellant prove by preponderance of the evidence that he timely reported to ADF&G at least five bottomfish logbook fishing trips during the recent participation period (2008)?

If the answer to the question is "no," I must evaluate Appellant's unavoidable circumstance claim. In this case, the unavoidable circumstance claim involves the following 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 2008?

⁴ Original File Tab, Letter from Appellant dated May 12, 2010.

⁵ Original File Tab, IAD.

⁶ Pleadings File Tab, Appellant's appeal received on October 26, 2010.

⁷ Pleadings Tab, Order Providing for Hearing dated November 2, 2010.

⁸ Appeals Correspondence Tab, NAO letter dated November 18, 2010.

⁹ Pleadings Tab, Letter received November 23, 2010.

¹⁰ Pleadings Tab, supplemental materials received December 29, 2010.

¹¹ 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 2008, he suffered an unavoidable circumstance that thwarted his specific intent to operate his charter halibut fishing business.
3. If the answer to Question 2 is “no,” Appellant is not eligible for a permit, and I must uphold the IAD.

FINDINGS OF FACT

1. In 2005, Appellant reported five bottomfish logbook trips to ADF&G under an ADF&G Business Owner License issued to Appellant.¹²
2. At the beginning of the 2008 fishing season, an ADF&G employee informed Appellant that he and Lodge Owner could not use two logbooks for the same vessel.¹³
3. In 2008, Appellant reported all his charter trips in a logbook issued by ADF&G to Lodge Owner.¹⁴
4. In 2008, Appellant reported no halibut logbook trips to ADF&G.¹⁵
5. Appellant had an agreement with Lodge Owner by which their respective charters would be conducted on a vessel owned by Lodge Owner, but as separate businesses.¹⁶
6. Appellant operated at least five charter halibut logbook fishing trips in 2008.¹⁷

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.¹⁸ This license authorized the logbook fishing trips that are used to meet the minimum participation requirements to qualify for a CHP.¹⁹

¹² Original File Tab, Charter Halibut Summary dated October 20, 2011.

¹³ Pleadings Tab, Statement by Appellant dated March 20, 2010; Audio Recording of testimony of Appellant recorded November 3, 2011.

¹⁴ Pleadings Tab, Statement by Appellant dated March 16, 2010; Audio Recording of testimony of Appellant recorded November 3, 2011.

¹⁵ Original File Tab, Charter Halibut Summary dated October 20, 2011.

¹⁶ Original File Tab, Business Relationship document dated May 12, 2010, received May 17, 2010.

¹⁷ Audio Recording of testimony of Appellant recorded November 3, 2011.

¹⁸ 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).

¹⁹ 50 C.F.R. § 300.67(b)(1)(ii).

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 2008.²⁰

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.²¹

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to ADF&G 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.²²

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to ADF&G 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.²³

Logbooks trips are reported in ADF&G issued logbooks to persons who hold an ADF&G Business Owner License.²⁴

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A. NMFS used the Official Record to implement the CHLAP, including evaluating applications for charter halibut permits.²⁵

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.²⁶

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;

²⁰ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

²¹ See 50 C.F.R. § 300.67(f)(4).

²² See 50 C.F.R. § 300.67(f)(2).

²³ See 50 C.F.R. § 300.67(f)(3).

²⁴ See 50 C.F.R. § 300.67(b)(1)(ii) and (b)(3).

²⁵ See 50 C.F.R. § 300.67(f)(5).

²⁶ See 50 C.F.R. § 300.67(g)(1).

- (2) he specifically intended to operate a charter halibut fishing business in 2008;
- (3) his intent to operate a charter halibut fishing business was thwarted by an unavoidable circumstance;
- (4) that this circumstance was a unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred, and;
- (5) he took all reasonable steps to overcome the circumstance.

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.²⁷

ANALYSIS

The issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to be eligible for a CHP. Under CHLAP regulations, minimum participation requirements for a CHP are five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and five or more halibut logbook fishing trips during the recent participation period, namely 2008.²⁸

Appellant properly reported five halibut logbook fishing trips to ADF&G for 2005. Thus, Appellant meets minimum participation requirements for the qualifying period. However, Appellant reported no trips to ADF&G in 2008. Since the CHLAP regulations require minimum participation in both 2004 or 2005, and 2008, Appellant does not meet the minimum participation requirements for a CHP.

On appeal, Appellant argues he had an agreement with Lodge Owner by which their respective charters would be conducted on Lodge Owner's vessel, but as separate businesses. Although Appellant had such an agreement, this agreement does not relieve him from complying with the CHLAP regulations.

Appellant stated he initially attempted to register this vessel on both his logbook and the logbook belonging to Lodge Owner, but an ADF&G official informed him that two logbooks could not be used on one vessel. After due consideration of comments received on the Proposed Rule, NMFS stated:

Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.²⁹

²⁷ 50 C.F.R. § 300.67(g)(1)(v).

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

²⁹ Final Rule, 75 Fed. Reg. 554, 592 (January 5, 2010).

Appellant argues his 2008 logbook fishing trips were reported to ADF&G in “a” Saltwater Charter Logbook within the meaning of 50 C.F.R. Section 300.67(f)(3). By placing “a” in quotes, I construe Appellant’s argument to be that the word “a”, in the context of the regulation, should be interpreted as “any” logbook, whether belonging to him or someone else. Neither 50 C.F.R. Section 300.67(b)(1)(ii) nor the definition section of the regulation specifically addresses the issue of logbook reporting at issue in this case, *i.e.* the regulation does not specifically state whether or not the person issued an ADF&G Business Owner License must report trips in a Saltwater Charter Logbook issued to him or her. Since the regulation is ambiguous regarding this issue, the next question to ask is whether RAM’s interpretation of the regulation is reasonable.

RAM found Appellant cannot be credited with fishing trips he took in 2008 because the official record did not show he reported halibut logbook fishing trips that year in an ADF&G Saltwater Charter Vessel Logbook issued to him. There is no reason to believe this interpretation of the regulation is unreasonable. The proposed rule (Proposed Rule, 74 Fed. Reg. at 18, 186.) indicates the general rule is that in constructing the official record, NMFS “would link each logbook fishing trip to an ADF&G business owner license and to the person-individual, corporation, partnership or other entity that obtained the license.” It is reasonable to construe this proposed rule as supporting the proposition that in order to be credited for a trip under the CHALP regulations ADF&G logbooks and Business Owners Licenses must be linked to the same person.

Appellant argues on appeal he is eligible for a CHP under the unavoidable circumstance provision of the CHLAP regulations. As Appellant achieved the minimum participation requirements for the qualifying period, I will analyze the unavoidable circumstance provisions of the CHLAP regulations regarding the recent participation period of 2008.

Appellant demonstrated his specific intent to operate his charter halibut fishing business in 2008. Although he did not properly report any charter halibut vessel trips that year to ADF&G, he did operate such a business at that time, demonstrating his specific intent.

Appellant’s specific intent to operate his charter halibut fishing business, however, was not thwarted by an unavoidable circumstance. Appellant operated a charter vessel business in the recent participation period. In fact, based on the evidence, it is reasonable to conclude Appellant operated at least five halibut logbook fishing trips in 2008. It is also reasonable to conclude, therefore, that Appellant’s specific intent to operate his charter vessel business was not thwarted by an unavoidable circumstance. The CHLAP clearly states it is an applicant’s specific intent *to operate* a charter halibut fishing must that must be thwarted in order to qualify for the unavoidable circumstance regulation exception to the participation requirements.³⁰ Since Appellant operated his charter halibut fishing business in 2008, he was not thwarted from operating this business that year.

³⁰ See 50 C.F.R. § 300.67(g)(1).

Even if Appellant's specific intent to operate his charter business was thwarted by an unavoidable circumstance, Appellant did not take all reasonable steps to overcome the circumstance. Although ADF&G informed Appellant that he could not use two log books on the same vessel, it is Appellant who chose to report both his and Lodge Owner's charter vessel trips in the same log book. Appellant's business relationship with Lodge Owner was an optional agreement entered into by Appellant.

In reaching my decision, I have carefully reviewed the entire record. I recognize Appellant's interest in continuing to fish for halibut. However, I am bound to follow the CHLAP regulations, and as such, Appellant does not qualify for a permit.

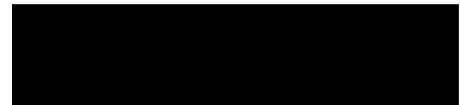
CONCLUSIONS OF LAW

Appellant is not eligible for a permit under the CHLAP rules as he did not prove by a preponderance of the evidence that he reported at least five bottomfish logbook fishing trips during 2008. Appellant is not eligible for a permit under the CHLAP unavoidable circumstance rules. Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim. The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated August 26, 2010 is upheld. This decision takes effect thirty days from the date issued, August 13, 2012,³¹ 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, modify, or remand this decision pursuant to 50 C.F.R. § 679.43(k) and (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 the tenth day after the date of this Decision, July 23, 2012. 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.


Steven Goodman
Administrative Judge

Date Issued: July 13, 2012

³¹ 50 C.F.R. § 679.43(k) and (o).