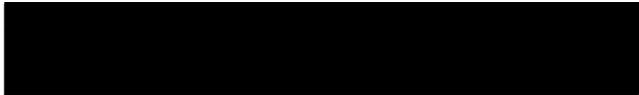


NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In Re Application of



Appellant

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Appeal No. 10-0056

DECISION

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) 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, Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

The underlying facts of this case begin with [REDACTED] (Appellant's) application for a Charter Halibut Permit (permit) pursuant to the Charter Halibut Limited Access Program (CHLAP) administered by NMFS's Restricted Access Management (RAM) program. On March 31, 2010, Appellant applied for a permit.¹ The application was for a permit to operate charter halibut trips in regulatory area 2C. On his application, Appellant alleged he operated charter halibut trips in 2004 and 2008.² Appellant thought he took thirty-two trips in 2004 and thirty trips in 2008.³ RAM disagreed. By notice dated May 10, 2010, RAM provided Appellant with its preliminary opinion about Appellant's application. In the notice, RAM stated that it appeared Appellant did not meet the basic participation requirements for a permit. RAM explained that for 2004 and 2005, there were no recorded trips that met the regulatory requirements; that for 2008, there were only two trips that met the requirements, but five was the minimum requirement.⁴ In the May 10, 2010 notice, RAM also provided Appellant with thirty days to submit additional evidence in support of his application.

On May 21, 2010, Appellant replied in writing to RAM. He stated he would not be submitting additional evidence, and instead wanted to receive a decision from RAM

¹ Original File, Permit Application, 15th-23rd Pages.

² Original File, Permit Application, 17th Page.

³ Original File, Permit Application, 17th Page.

⁴ Original File, Notice of Opportunity to Submit Evidence, Page 12a.

which he could then appeal.⁵ On July 23, 2010, RAM issued Appellant a written Initial Administrative Determination (IAD) which is the subject of this appeal.⁶ The July 23, 2010 IAD was re-dated and re-sent on July 29, 2010. The July 29, 2010 IAD is not substantively different from the July 23, 2010 IAD. In this decision the term "IAD" encompasses both the July 23, 2010 IAD and July 29, 2010 IAD. In the IAD RAM denied Appellant's application for a permit. RAM stated that under 50 C.F.R. § 300.67(b)(1)(ii),⁷ one of the fundamental requirements for eligibility for a permit is meeting logbook requirements. Those logbook requirements are five or more bottomfish logbook fishing trips during 2004 or 2005, and; five or more halibut logbook fishing trips in 2008. The record shows Appellant took no bottomfish logbook trips in 2004 and 2005 and two halibut logbook fishing trips in 2008.⁸

The regulations define both "bottomfish logbook fishing trip" and "halibut logbook fishing trip." See 50 C.F.R. § 300.67(b)(1)(ii) and (f). A "bottomfish logbook fishing trip" is one:

1. Made during the *qualifying period* in 2004 or 2005;
2. Timely reported to the State of Alaska Department of Fish and Game (ADF&G);
3. In a Saltwater Charter Logbook;
4. With one of the following pieces of information: the statistical area where bottomfishing occurred; the boat hours the vessel engaged in bottomfish fishing, or; the number of rods used from the vessel in bottomfish fishing.

50 C.F.R. § 679.67(f)(2)&(4).

The definition of "halibut logbook fishing trips" is fairly similar. A "halibut logbook fishing trip" is one:

1. Made during the *recent participation period* of 2008;
2. Timely reported to the ADF&G;
3. In a Saltwater Charter Logbook;
4. With one of the following pieces of information: the number of halibut kept; the statistical area where bottomfish fishing occurred, or; the boat hours that the vessel engaged in bottomfish fishing.

⁵ Original File, Notice signed May 21, 2010, Ninth Page.

⁶ Original File, IAD, dated July 23, 2010, Sixth Page. A handwritten notation on the July 23, 2010 IAD indicates it was re-sent to Appellant on July 29, 2010 because the original copy was missing page 2.

⁷ The CHLAP regulations became effective in 2010 and will be codified at 50 C.F.R. § 300.67. At present, the regulations can be obtained by accessing the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition of the C.F.R. Citations to the CHLAP are to the e-CFR, unless otherwise noted.

⁸ Original File, Print Summary, 14th Page; Original File, Notice signed May 21, 2010, Page 12a.

50 C.F.R. 679.67(f)(3)&(4).⁹

In addition to denying Appellant a permit for lack of appropriate logbook records, RAM also commented that Appellant would not qualify for a permit under what is commonly referred to as the "unavoidable circumstances" rule.¹⁰ RAM summarized the regulation outlining the unavoidable circumstances rule as one requiring an applicant to demonstrate that he "participated during the qualifying period [2004 or 2005]...;" had "a specific intent to participate in the period...[actually] missed;" the "circumstance that thwarted the intended participation was (a) unavoidable, (b) unique to the applicant, [and] (c) unforeseen and unforeseeable, [and]; [t]he applicant took all reasonable steps to overcome the problem."¹¹ However, RAM noted that "unavoidable circumstance" claims had to be adjudicated through the Office of Administrative Appeals (succeeded by NAO).¹² RAM advised Appellant that he could file an appeal on or before September 27, 2010.¹³

On September 14, 2010, Appellant timely filed this appeal.¹⁴ See 50 C.F.R. § 679.43(d). In his appeal, Appellant argues that he did not log any bottomfish fishing trips in 2004 because he did not fish for the type of fish listed in the 2004 logbooks, namely Pelagic Rockfish, Other Rockfish, Lingcod, or Salmon Shark. However, Appellant states he did charter halibut trips in 2004, as reflected in his personal logbook.¹⁵ Appellant explains that he did not report his trips to ADF&G because state authorities told him he was not required to do so, and because there was not a place in the official logbook to record charter halibut trips.¹⁶

Further, Appellant contends that he had an unavoidable circumstance in 2008, and because of the unavoidable circumstance he should qualify for a permit. Appellant explains that in or around June 2008 the heat exchangers on his vessel failed at the same time. He ordered replacements three times before he received the correct ones.¹⁷ Instead of taking clients out on halibut trips, Appellant took them on salmon trips because he did not want to risk a breakdown in the farther-out, halibut-rich waters.¹⁸

⁹ A multi-day trip constituted one trip for each day. For example, if a trip was two-days long, the applicant got credit for two trips, not one. See 7 C.F.R. § 679.67(f)(4).

¹⁰ Original File, IAD, July 23, 2010, 7th Page.

¹¹ Original File, IAD, July 29, 2010, Page.

¹² Original File, IAD, July 23, 2010, 7th Page.

¹³ Original File, IAD, July 23, 2010, 8th Page.

¹⁴ Pleadings, Appeal, September 14, 2010, 38th Page.

¹⁵ Pleadings, Appeal, September 14, 2010, 38th Page.

¹⁶ Pleadings, Appeal, September 14, 2010, 38th Page.

¹⁷ Pleadings, Appeal, September 14, 2010, 39th Page.

¹⁸ Pleadings, Appeal, September 14, 2010, 39th Page.

Toward the end of the fishing season in August 2008, Appellant got the heat exchangers fixed.¹⁹

Appellant also states that he focuses on salmon fishing, but would like to be able to occasionally take clients halibut fishing. In his own words he explains: "if I am not allowed to retain halibut caught incidentally during salmon fishing or... able to occasionally target halibut at a customers request, it would give competing businesses an unfair advantage."²⁰

After receipt of Appellant's appeal, I sent him a letter in which I set a deadline of December 10, 2010 to produce any additional evidence. Appellant did not respond. I have 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). I therefore close the record and render this decision.

ISSUES

My function in reviewing this case is to decide whether Appellant should be issued a permit.

1. To resolve that issue, I must answer the following:

1. Did Appellant show by a preponderance of the evidence that he timely provided the state with his Saltwater Charter Logbook for 2004 or 2005 and the logbook had information about the statistical area(a) where bottomfishing occurred, the boat hours that the vessel was used for bottomfishing, or the number of rods used from the vessel in bottomfish fishing.

If the answer to Question 1 is "no," I must answer the following:

2. Did Appellant show by a preponderance of the evidence that he timely provided the state with his Saltwater Charter Logbook for 2008 and the logbook showed that he made five qualifying trips.

If the answer to Question 2 is "no," I must answer the following:

3. Did Appellant show by a preponderance of the evidence that he qualifies for a permit under the exception to the general requirements for a

¹⁹ Pleadings, Appeal, September 14, 2010, 39th Page.

²⁰ Pleadings, Appeal, September 14, 2010, 38th Page.

permit because he meets the criteria for an “unavoidable circumstance” claim. That is, Appellant proves that he one, participated during the qualifying period of 2004 or 2005; two, had a specific intent to participate in the period actually missed; the circumstance that thwarted the intended participation was (a) unavoidable, (b) unique to him, and (c) unforeseen and unforeseeable, and; he took all reasonable steps to overcome the problem.

If the answer to Questions 1, 2, and 3 is “no,” I must uphold the IAD and conclude that Appellant does not qualify for a permit under the unavoidable circumstances rule.

FINDINGS OF FACT

1. Appellant did not timely submit to ADF&G his Saltwater Charter Logbooks that contained the information required by law in 2004, 2005 and 2008.²¹
2. In 2008, Appellant’s vessel experienced a failure in its heat exchangers.²²
3. In 2008, Appellant was unable to provide many charter halibut fishing trips in waters far from the location of his vessel; instead Appellant provided salmon fishing trips.²³
4. In 2008, Appellant timely submitted to ADF&G the requisite information in a Saltwater Charter Logbook recording two halibut logbook fishing trips.²⁴
5. It took three attempts for the heat exchanger seller to provide the correct heat exchangers to Appellant.²⁵
6. After the seller provided the correct heat exchangers, at the end of the 2008 fishing season, Appellant had the heat exchangers fixed.²⁶

²¹ Original File, IAD, 1st to 8th Page; Original File, Print Summary, 14th Page; Original File, Notice of Opportunity to Submit Evidence, 11th to 13th Page.

²² Pleadings, Memorandum dated September 14, 2010, 39th Page.

²³ Pleadings, Memorandum dated September 14, 2010, 39th Page.

²⁴ Original File, IAD; Original File, Print Summary, 14th Page.

²⁵ Pleadings, Memorandum dated September 14, 2010, 39th Page.

²⁶ Pleadings, Memorandum dated September 14, 2010, 39th Page.

PRINCIPLES OF LAW

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is an applicant's participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. See 50 C.F.R. § 300.67(a),(b)&(f)(1) and Notes to Final Rule, 75 Fed.Reg. 554, 554-555.

Proof of participating in the industry during the *qualifying period* consists of a applicant reporting at least five "bottomfish logbook fishing trips." 50 C.F.R. § 600.67(b)(ii)(A).

A "bottomfish logbook fishing trip" has specific regulatory criteria: It is timely reported to the State of Alaska in a Saltwater Charter Logbook and includes information about the statistical area where bottomfish fishing occurred, the boat hours the vessel was used for bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing. See 50 C.F.R. § 300.67(f)(2)&(4).

Proof of participating in the industry during the *recent participation period* consists of an applicant reporting at least five "halibut logbook fishing trips." 50 C.F.R. § 300.67(b)(ii)(B).

A "halibut logbook fishing trip" has specific regulatory criteria: It is one timely reported to the State of Alaska in a Saltwater Charter Logbook and includes information about the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred, or the boat hours that the vessel was used for bottomfish fishing. See 50 C.F.R. § 300.67(f)(3) and (4).

A charter halibut permit will not be issued by NMFS unless, among other criteria, the participation requirements are met or the applicant meets the regulatory exception for not meeting the participation requirements. The regulatory exception is sometimes referred to as the "unavoidable circumstance" rule. See 50 C.F.R. §§ 300.67(b)(1) and 300.67(g).

Under the regulatory exception, an applicant who meets the participation requirements in one but not both relevant periods (i.e., the qualifying period in 2004 or 2005 *and* recent participation period in 2008), may nevertheless be eligible for a charter halibut permit if he or she can meet the requirements for an "unavoidable circumstance claim." See 50 C.F.R. § 300.67(g).

If the applicant cannot meet the participation requirements for either the qualifying period (2004 or 2005) or recent participation period (2008), he or she is not

eligible for a charter halibut permit under the unavoidable circumstance exception. See 50 C.F.R. § 300.67(g).

ANALYSIS

Generally, eligibility for a permit hinges on an applicant's past participation in the industry. Stated in broad terms, without being able to prove past participation, a fishing charter business is not going to be able to obtain a permit from NMFS.

The specific terms of proving past participation under the CHLAP regulations are outlined above in the Principles of Law section. I need not repeat them extensively here. Appellant does not meet the requirements of the participation regulations because he lacks proof of the following: timely submission to ADF&G about the statistical area where bottomfish fishing occurred, the boat hours the vessel was used for bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing for 2004 or 2005; and timely submission to ADF&G the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred, or the boat hours that the vessel was used for bottomfish fishing in a Saltwater Charter Logbook for 2008. See 50 C.F.R. § 300.67(f)(2)(3) and (4); Findings of Fact (FOF) 1 & 4. Since Appellant does not meet the basic requirements for eligibility for a permit, RAM correctly denied his application in its IAD.

Since Appellant is not eligible for a permit under the general regulatory requirements, I turn to whether he may be eligible under the exception known as the unavoidable circumstance rule. Again, I do not restate the applicable law as it has been outlined previously. To prevail on the basis of the unavoidable circumstance rule, Appellant would have to have successfully shown he met the participation requirements in one period, namely either 2004 or 2005, or 2008. See 50 C.F.R. § 300.67(g). Since he has not, despite the hardship he may have experienced in 2008 (FOFs 2,3,5 and 6), I am not persuaded he should prevail in this appeal.

In deciding that I will not order RAM to issue a permit to Appellant, I am mindful of Appellant's arguments raised on appeal and have considered all of the evidence in the administrative record. I understand that Appellant thinks he took enough halibut charter trips in 2004 to qualify for a permit. However, the regulations do not merely state that five or more trips were made, but rather impose other reporting requirements such as timely submitting the records to ADF&G with certain enumerated information.

Further, I am not persuaded that if ADF&G officials advised him not to submit certain logbooks, or if he misunderstood the reporting requirements, that provides a basis for

me to rule in his favor. Those arguments are of an equitable nature. Neither the undersigned nor NAO has the authority to grant equitable claims under applicable regulations. Accordingly, while I empathize with Appellant's claims, I am not authorized to provide equitable relief under the facts of this case.

Similarly, Appellant's claim that competing businesses will have an unfair advantage also lies in equity. The role of NAO is not to make policy but to judge the validity of NMFS's decision in light of applicable regulations. In this case, under applicable regulations, I am compelled to uphold RAM's IAD.

CONCLUSIONS OF LAW

Appellant has not shown by a preponderance of the evidence that he timely provided the state with his Saltwater Charter Logbook with the required information for 2004 and 2005.

Appellant did not show by a preponderance of the evidence that he timely provided the state with his Saltwater Charter Logbook with the required information for 2008 for at least five qualifying trips.

Appellant did not show by a preponderance of the evidence that he qualifies for a permit under the unavoidable circumstances rule because he does not meet the threshold requirement of participating in the industry in 2004 or 2005, or 2008.

ORDER

Appellant has not proven by a preponderance of the evidence that the IAD is inconsistent with CHLAP regulation. Accordingly, the IAD dated July 23, 2010 and re-sent IAD, identical in substance dated July 29, 2010, are upheld. Further, Appellant has not proven by preponderance that he meets the requirements under the unavoidable circumstances rule; therefore, I deny his claim on that basis. This decision is effective thirty days from the date issued and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made or the Regional Administrator elects to review this decision.²⁷

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date Issued: 2/11/11

²⁷ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>; 50 C.F.R. § 670.43(k) and (o).