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regarding Appellant's unavoidable circumstance claim for 2008 had to be reached by the Office of Administrative Appeals.⁴

In his appeal, Appellant acknowledges that he lacks the requisite number of halibut logbook fishing trips in 2008. Appellant had three fishing trips in 2008, not the minimum of five. Appellant contends that an economic downturn in 2008 affected his business and led to a lack of charter bookings that year, despite his marketing efforts. Appellant explains that his business provides a minimum of three-day, all inclusive, trips at a "whole boat rate" and that he cannot provide deep discounts or make up for a lack of business by providing other services, like shore excursions.⁵

Appellant explains that his client base is affluent and involved in politics and market economics, and that election years, like that in 2008, have resulted in lower charter bookings every four years. For 2008, Appellant states he booked only one multi-day trip, during which his clients fished for only three days.⁶

Appellant states his business has provided halibut fishing for twenty-four years and the inability to continue to do so will pose an economic detriment to his business. Appellant states, in the absence of a permit, he will be forced to consider the costly purchase of a permit or selling his business assets.⁷

I have reviewed Appellant's appeal and the case record and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing. See 50 C.F.R. § 679.43(g)(2) and (k).

ISSUES

At issue in this appeal is whether RAM correctly denied Appellant's application for a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he met the minimum participation requirements to qualify for a CHP. If Appellant did not meet minimum participation requirements to qualify for a CHP, then I must determine whether the unavoidable circumstance provisions of the CHLAP regulations qualify Appellant to receive a CHP in lieu of such participation.

FINDINGS OF FACT

⁴ Case File, Original File Tab, IAD dated July 23, 2010, Pages 2-4.

⁵ Case File, Pleadings Tab, Appellant's appeal letter received by RAM on September 20, 2010.

⁶ Case File, Original File Tab, letters from Appellant dated April 5, 2010 and May 17, 2010.

⁷ Case File, Pleadings Tab, Appellant's appeal letter received by RAM on September 20, 2010.

1. Appellant has been in the Alaska charter fishing business since 1987.⁸
2. Appellant's business provides a minimum three-day, all inclusive, trips at a "whole boat rate" which does not lend itself to providing deep discounts on trips or to providing other services, like shore excursions, to compensate for a lack of business.⁹
3. Appellant's business attracts an affluent clientele, involved in politics and market economics. Appellant claims that his business "has had a cyclical phenomenon of election years (2008, 2004, 2000, 1996, 1992, and 1988) having lower bookings."¹⁰
4. In 2004, Appellant reported five bottomfish logbook fishing trips for Area 2C. In 2005, Appellant reported eleven bottomfish logbook fishing trips for Area 2C.¹¹
5. From 2006 through 1999, Appellant's Saltwater Charter Logbook Data shows the following (approximated) charter fishing trips made: forty-two trips in 1999; twenty-eight trips in 2000; twenty-one trips in 2001; twenty-eight trips in 2002; seven trips in 2003; thirty-five trips in 2004; twenty-two trips in 2005; twenty-one trips in 2006 (includes multiple trips on the same day); twenty-one trips in 2007; three trips in 2008; and nineteen trips in 2009.¹²
6. In spite of his marketing efforts, Appellant attributes the decline in charter bookings for 2008 to an economic downturn in 2007 and 2008 and to the fact that 2008 was an election year.¹³
7. On April 5, 2010, Appellant completed and signed a CHP application for "IPHC Regulatory Areas 2C and 3A," which RAM received on the same day. In his application, Appellant chose 2005 as his "Applicant Selected Year" for Area 2C. Appellant also claimed that an unavoidable circumstance occurred during the

⁸ Case File, Original File Tab, Appellant's letter dated May 17, 2010, Pleadings Tab, Appellant's appeal letter received by RAM on September 20, 2010.

⁹ Case File, Pleadings Tab, Appellant's appeal letter received by RAM on September 20, 2010.

¹⁰ Case File, Original File Tab, letters from Appellant dated April 5, 2010 and May 17, 2010.

¹¹ Case File, Original File Tab, Summary of Official Record created on January 26, 2010.

¹² Case File, Pleadings Tab, 1999 through 2009 Saltwater Charter Logbook Data.

¹³ Case File, Original File Tab, letters from Appellant dated April 5, 2010 and May 17, 2010, Pleadings Tab, Appellant's appeal letter received by RAM on September 20, 2010.

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recent participation period, namely 2008, that prevented him from operating a charter halibut business.¹⁴

8. In a letter dated April 28, 2010, RAM provided Appellant with notice of the opportunity to submit evidence for RAM's consideration. On May 25, 2010, Appellant responded and submitted additional documentation to support his claim.¹⁵
9. In a letter dated July 23, 2010, RAM issued its IAD, denying Appellant's application for a CHP. RAM determined Appellant met the minimum requirements for the qualifying period, namely 2004 or 2005, but that Appellant did not meet the minimum requirements for the recent participation period in 2008 because he did not reporting a minimum of five halibut logbook fishing trips.¹⁶
10. On September 20, 2010, Appellant timely filed his appeal of the IAD to NAO.¹⁷

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements. 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 participation period, namely 2008. 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (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. 50 C.F.R. § 300.67(f)(4).

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

¹⁴ Case File, Original File Tab, Appellant's CHP application received by RAM on April 5, 2010.

¹⁵ Original File Tab, RAM's letter dated April 28, 2010 and Appellant's response.

¹⁶ Original File Tab, IAD dated July 23, 2010.

¹⁷ Pleadings Tab, Appellant's appeal submission received September 20, 2010.

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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. 50 C.F.R. § 300.67(f)(2).

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. 50 C.F.R. § 300.67(f)(3).

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. 50 C.F.R. § 300.67(f)(5).

An applicant for a CHP that meets the participation requirement for the qualifying period (2004 or 2005) but does not meet the participation requirement for the recent participation period (2008) may receive one or more permits if the applicant proves the elements of an unavoidable circumstance claim. Those elements are as follows: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period. 50 C.F.R. § 300.67(g)(1)(i)-(iv). If these elements are proven, then the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application criteria set forth in 50 C.F.R. § 300.67(b) through (f). 50 C.F.R. § 300.67(g)(1)(v).

ANALYSIS

The first issue I must resolve in this appeal is whether Appellant meets the minimum participation requirements to qualify for a CHP. Under the CHLAP regulations, minimum participation requirements to qualify for a CHP require that an applicant reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and reported five or more halibut logbook fishing trips

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during the recent participation period, namely 2008. See 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); and 50 C.F.R. § 300.67(f)(6) and (7).

My review of the record in this case reveals there is no dispute that Appellant did not meet the minimum participation requirements for the recent participation period. Appellant did not report five halibut logbook fishing trips in 2008. There is also no dispute that Appellant met the minimum participation requirements for the qualifying participation period in 2004 or 2005. The Official Record summary, to which RAM refers in its IAD, confirms that Appellant met the qualifying participation requirement by having reported eleven trips in 2005. In the IAD, RAM states that Appellant met this qualifying period requirement, but denied Appellant's CHP application because he did not meet both periods of participation and because RAM does not adjudicate claims of unavoidable circumstance. The evidence presented, therefore, establishes that Appellant did not meet the minimum participation requirements in both the qualifying and recent periods of participation to qualify for a CHP.

Since Appellant does not meet the minimum participation requirements to qualify for a CHP, namely those relating to the recent period of participation in 2008, I must turn to the second issue presented in this case and determine whether the unavoidable circumstance provisions of the CHLAP regulations qualify Appellant to receive a CHP in lieu of such participation.

The CHLAP regulations provide, specific to the issue at hand, that an applicant for a CHP that meets the participation requirement for the qualifying period (2004 or 2005) but does not meet the participation requirement for the recent participation period (2008), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(1)(i)-(iv). Those elements are as follows: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period. 50 C.F.R. § 300.67(g)(1)(i)-(iv).

To prevail with a claim of unavoidable circumstance, Appellant must prove each of the above elements. The evidence presented shows that Appellant has established some, but not all, of those elements. It is clear from the record that Appellant had a specific

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intent to operate a charter halibut fishing business in the recent participation period. Appellant has operated a fishing charter for many years prior to and since 2008. It is also clear that an economic downturn, the circumstance to which Appellant attributes reduced charter bookings in 2008, is, generally speaking, unavoidable in nature. Thus, the record supports the initial elements of an unavoidable circumstance claim found in 50 C.F.R. § 300.67(g)(1)(i) and (ii)(A).

However, Appellant has not demonstrated that the effects of an economic downturn in 2008 are unique to him as the owner of the charter halibut fishing business. While I do not doubt that Appellant's business has been impacted by poor economic conditions, such an experience is not unique to Appellant. The evidence presented does not demonstrate that Appellant was harmed in a special, or unique, way by a decline in economic conditions.

Moreover, the decline in charter bookings Appellant experienced in 2008 was, arguably, not "unforeseen and reasonably unforeseeable." Appellant stated that his business "has had a cyclical phenomenon of election years (2008, 2004, 2000, 1996, 1992, and 1988) having lower bookings." It would follow, then, that Appellant had forewarning, based on the history of his business, that charter bookings would not be as high in 2008. Yet, the evidence presented does not show that Appellant took extra measures to try to compensate for the anticipated decline in charter bookings his business would likely experience during 2008, an election year. While Appellant refers to the marketing efforts he put forth as being unsuccessful in obtaining additional charter bookings in 2008, he has not established that he marketed his business any differently than he otherwise would to compensate for the anticipated decline in business during an election year. Consequently, it is questionable whether Appellant took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in the recent participation period.

I also considered the Saltwater Charter Logbook Data records Appellant submitted for 1999 through 2009. These records show the number of fishing trips Appellant took each year, which I have approximated, as follows: forty-two trips in 1999; twenty-eight trips in 2000; twenty-one trips in 2001; twenty-eight trips in 2002; seven trips in 2003; thirty-five trips in 2004; twenty-two trips in 2005; twenty-one trips in 2006 (includes multiple trips on the same day); twenty-one trips in 2007; three trips in 2008; and nineteen trips in 2009. Interestingly, apart from 2008, the number of fishing trips Appellant took during the "election years" to which he refers in his statements, namely in 2000 and 2004, do not reflect a marked decline in charter bookings. In fact, those years, 2000 and 2004, reflect a higher number of charter bookings overall as compared to the ten-year history of logbook records Appellant submitted.

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Based on the preponderance of the evidence presented in this case, I conclude Appellant has not proven all the elements under 50 C.F.R. § 300.67(g)(1)(i)-(iv) to prevail in a claim of unavoidable circumstance regarding the recent participation period in 2008. Appellant has not demonstrated that his claim of unavoidable circumstance due to an economic decline in 2008 was unique to Appellant's business, was unforeseen and reasonably unforeseeable by Appellant, given the history of his business, and that Appellant took all reasonable steps to overcome the circumstance that prevented his charter participation in 2008, given the forewarning he would have had of reduced charter bookings during election years.

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 recent participation period of 2008.

The unavoidable circumstance provisions of the CHLAP regulations do not qualify Appellant to receive a CHP in lieu of such participation since 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)(1)(i)-(iv).

ORDER

The IAD dated July 23, 2010 is affirmed. This decision is effective thirty (30) 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.¹⁸

[REDACTED]
Christine D. Coughlin
Administrative Judge

Date Issued: February 11, 2011

¹⁸ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).