

that, for the recent participation period of 2008, Appellant had met the minimum participation requirements because he reported seven halibut logbook fishing trips, exceeding the five-trip minimum. Since the minimum participation requirements in both periods of participation were not met, RAM denied Appellant's CHP application. RAM noted Appellant's claim that an unavoidable circumstance in 2004 thwarted his participation in the charter halibut fishing business and advised Appellant that such claims had to be resolved by OAA.³

In Appellant's appeal, he explains that he visited the Alaska Department of Fish and Game (ADF&G) office in 2004 to obtain his 2004 Saltwater Charter Vessel Logbook (Logbook), at which time he was informed by the ADF&G clerk that halibut did not need to be recorded. As a consequence, Appellant states he "only recorded those bottom fishing trips during which we caught bottom fish other than halibut." Appellant argues that he should not be penalized for relying on the verbal instructions he was given by the ADF&G clerk.⁴

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 Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B). If Appellant does not meet the minimum participation requirements, specifically participation in 2004 and in 2008, then I must determine whether the unavoidable circumstance provision of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(2), would enable Appellant to receive a CHP in lieu of meeting the participation requirement for the 2004 qualifying period.

FINDINGS OF FACT

1. Appellant has operated a charter fishing business since 1996.⁵ Appellant's charter fishing business was licensed by the state of Alaska to operate in 2004, 2005, and 2008.⁶

³ Case File, Original File Tab, IAD dated August 31, 2010, Internal Correspondence, Appellant's logbook data for 2004, 2005, and 2008.

⁴ Case File, Pleadings Tab, Appellant's appeal submissions.

⁵ Case File, Pleadings Tab, Appellant's appeal submissions.

2. In 2004, Appellant reported two bottomfish logbook fishing trips to ADF&G, as confirmed by the Official Record summary.⁷
3. For the 2004 season, Appellant only recorded in Logbook those fishing trips during which he caught and kept bottomfish other than halibut. Appellant did not record fishing trips that included halibut and he did not record fishing trips in which bottomfish were not kept. In reporting fishing trips in this manner, Appellant relied on the alleged verbal information he was given by an ADF&G employee.⁸
4. The written instructions contained in Logbook instructed Appellant to record, for bottomfish, including halibut, the following information: the primary statistical area fished, the maximum rods fished, the number of boat hours fished, and the number of fish that were kept and released. The instructions further stated that an operator should continue to record his effort with respect to fishing for halibut by completing “the first five columns on the far left of each logbook page of Logbook and the first three columns under the Bottomfish section (stat area, no. rods, and boat hrs)” of Logbook.⁹
5. In 2005, Appellant reported no bottomfish logbook trips to ADF&G, as confirmed by the Official Record summary.¹⁰
6. In 2008, Appellant reported seven halibut logbook fishing trips to ADF&G.¹¹
7. On March 15, 2010, Appellant submitted to RAM a signed completed *Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A* (Application). Appellant selected 2004 as the “applicant selected year.” In Application, Appellant claimed eligibility for a CHP based on an unavoidable circumstance that occurred in 2004, namely that Appellant only reported bottomfish trips when fish other than halibut were caught.¹²

⁶ Case File, Original File Tab, Appellant’s CHP application dated March 15, 2010.

⁷ Case File, Internal Correspondence Tab, Appellant’s logbook data for 2004, 2005, and 2008, Official Record summary.

⁸ Case File, Internal Correspondence Tab, Appellant’s logbook data for 2004, 2005, and 2008, Pleadings Tab, Appellant’s appeal submissions.

⁹ http://www.fakr.noaa.gov/appeals/adfg_logbooks/2004.pdf (emphasis in original).

¹⁰ Case File, Internal Correspondence Tab, Appellant’s logbook data for 2004, 2005, and 2008, Official Record summary.

¹¹ Case File, Internal Correspondence Tab, Appellant’s logbook data for 2004, 2005, and 2008; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

¹² Case File, Original File Tab, CHP application dated March 15, 2010.

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.¹³ 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 2008.¹⁴

An applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves the following: 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 at least one year of the qualifying period.¹⁵

The Final Rule implementing the CHLAP regulations, published in the Federal Register by NMFS on January 5, 2010, responded to comments concerning the belief that halibut were not required to be reported by ADF&G in logbooks during 2004 and 2005. In its response, NMFS wrote that the ADF&G logbook instructions "stated that bottomfish fishing effort included effort targeting halibut. Reporting any of one of three types of bottomfish effort data would qualify a trip as a bottomfish logbook trip for purposes of this rule." NMFS went on to state that "[r]egardless 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."¹⁶

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

¹³ 50 C.F.R. § 300.67(b)(1)(ii).

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

¹⁵ 50 C.F.R. § 300.67(g)(2)(i)-(iv).

¹⁶ See 75 Fed. Reg. 554-604 (January 5, 2010)(response to comment 146 at page 592).

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 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.¹⁷

“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.¹⁸

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 during the recent participation period, namely 2008.¹⁹ My review of the record reveals Appellant does not meet such minimum participation requirements.

In 2004, Appellant properly reported two bottomfish logbook fishing trips. In 2005, Appellant did not report any bottomfish logbook fishing trips. Thus, in either year, Appellant fell short of the minimum requirement to report at least five bottomfish logbook

¹⁷ 50 C.F.R. § 300.67(f)(5).

¹⁸ 50 C.F.R. § 300.67(f)(1).

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

fishing trips as specified in the CHLAP regulations.²⁰ In 2008, Appellant reported seven halibut logbook fishing trips to ADF&G, exceeding the five-trip minimum specified in the CHLAP regulations.²¹ Since Appellant did not meet the minimum participation requirements in both periods (2004 and 2008) to qualify for a CHP, I must turn to the second issue presented in this case and determine whether the unavoidable circumstance provision of the CHLAP regulations enable Appellant to receive a CHP in lieu of his insufficient participation in 2004.

The CHLAP regulations provide, specific to the issue at hand, that an applicant for a CHP that meets the participation requirement for the recent participation period (2008) but does not meet the participation requirement for the qualifying period (2004 or 2005), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(2)(i)-(iv).

The first element, found at 50 C.F.R. § 300.67(g)(2)(i), requires that the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period. The evidence presented shows that Appellant has operated a charter fishing business since 1996. In 2004, Appellant intended to, and did, operate a charter halibut fishing business and properly reported two bottomfish logbook fishing trips to ADF&G in 2004.²² The evidence, namely Appellant's CHP application, also shows that Appellant's charter fishing business was licensed by the state of Alaska to operate in 2004, 2005, and 2008.²³ Accordingly, I conclude that Appellant held a specific intent to operate a charter halibut fishing business in 2004, one of the qualifying period years.

The next element, found at 50 C.F.R. § 300.67(g)(2)(ii)(A)-(C), requires that 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 evidence presented convinces me that the basis for Appellant not meeting the minimum participation requirements in 2004 was not attributable to an unavoidable circumstance that thwarted his intent to participate in the charter fishing industry that year. Rather, Appellant relied on alleged statements by an ADF&G employee as to what should be recorded in his 2004 logbook instead of relying on the written instructions contained in the logbook, explained in more detail below.

²⁰ Case File, Internal Correspondence Tab, Appellant's logbook data for 2004, 2005, and 2008; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

²¹ Case File, Internal Correspondence Tab, Appellant's logbook data for 2004, 2005, and 2008; 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

²² Case File, Internal Correspondence Tab, Appellant's logbook data for 2004, 2005, and 2008, Original File Tab, Appellant's Affidavit dated May 7, 2010.

²³ Case File, Original File Tab, Appellant's CHP application dated March 15, 2010.

The facts of this case show that Appellant properly reported two bottomfish logbook fishing trips in 2004, which were credited to Appellant's fishing history as it relates to the CHLAP. Although Appellant took other fishing trips in 2004, Appellant states he only recorded in his logbook those fishing trips during which he caught and kept "bottomfish other than halibut." Thus, Appellant did not record fishing trips that included halibut and he did not record fishing trips in which bottomfish were not kept.²⁴ While Appellant now recognizes that he erred by failing to record such fishing trips, he argues that he relied on the verbal instructions he was given by an ADF&G employee, namely that halibut need not be recorded, and he should not be penalized for doing so.²⁵

I considered Appellant's arguments and carefully reviewed the entire case record, but I am not persuaded by Appellant's claims. Regardless of the verbal information an ADF&G may have provided Appellant, as the operator of his business, Appellant was responsible for complying with the ADF&G reporting requirements, which were clearly explained in his 2004 logbook instructions.²⁶ The 2004 logbook instructions stated that bottomfish reporting included information relating to halibut and that information concerning bottomfish that were kept and released was to be recorded. Specifically, the 2004 logbook instructions stated under the heading "BOTTOMFISH," the following:

Primary Stat Area Fished (Incl. Halibut)

The 6-digit area code where you caught most of the bottomfish on this trip. If you fished for bottomfish, but caught none, write the 6-digit code for the location fished the most time on this date and trip.

Maximum Rods Fished

The maximum number of rods/lines fished when targeting bottomfish (**incl. halibut**) and targeting both salmon and bottomfish simultaneously. Record this information separately for clients and crew; DO NOT combine client and crew information.

No. Boat Hours Fished

The number of boat hours that at least one rod/line was targeting bottomfish (**incl. halibut**) and targeting salmon and bottomfish

²⁴ Case File, Internal Correspondence Tab, Appellant's logbook data for 2004, 2005, and 2008, Pleadings Tab, Appellant's appeal submissions.

²⁵ Case File, Pleadings Tab, Appellant's appeal submissions.

²⁶ See 75 Fed. Reg. 554-604 (January 5, 2010)(response to comment 146 at page 592); http://www.fakr.noaa.gov/appeals/adfg_logbooks/2004.pdf.

simultaneously. Record only number of hours spent fishing, NOT hours spent running to or from fishing areas. Round to the nearest whole hour.

Fish Kept & Released

The total number of fish kept and released by client and crew. DO NOT combine client and crew information. DO NOT record harvests of finfish other than those indicated. **Halibut kept & released is no longer being collected in logbooks, but effort continues to be collected.** Halibut kept and released data is collected through established survey programs.²⁷

Further, under the heading "SPECIAL NOTES AND INSTRUCTIONS," the following logbook instructions were provided:

"Halibut" The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to **record your effort**. Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (stat area, no. rods, and boat hrs).²⁸

The facts of this case show that Appellant had the correct reporting information available to him and could have properly recorded his 2004 fishing efforts had he complied with the written instructions contained in his 2004 logbook. Consequently, I do not conclude that Appellant's intent to operate a charter halibut fishing business was thwarted by an unavoidable circumstance. Appellant could have avoided any problems with recording his 2004 fishing efforts had he read and complied with the written instructions contained in his 2004 logbook. Since resolution of this issue is dispositive, I need not address the remaining elements of 50 C.F.R. § 300.67(g)(2).

CONCLUSIONS OF LAW

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)-(B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004.

The unavoidable circumstance provisions of the CHLAP regulations do not enable Appellant to receive a CHP in lieu of such participation since Appellant has not proven

²⁷ http://www.fakr.noaa.gov/appeals/adfg_logbooks/2004.pdf (emphasis in original).

²⁸ http://www.fakr.noaa.gov/appeals/adfg_logbooks/2004.pdf (emphasis in original).

[REDACTED]
Appeal No. 10-0081

all of the necessary elements to prevail on an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(2).

ORDER

The IAD dated August 31, 2010 is Upheld. This decision takes effect (30) days from the date issued, August 19, 2011²⁹, 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 review 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, August 1, 2011. 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.

[REDACTED]
[REDACTED]

Christine D. Coughlin
Administrative Judge

Date Issued: July 20, 2011

²⁹ 50 C.F.R. § 679.43(k) and (o).