

Owner 1). Prior Owner 1 was the entity issued the Alaska Department of Fish and Game (ADF&G) business owner's license that authorized logbook fishing trips in 2004 and 2005 under Lodge's business name.³ Lodge was later sold and operated in 2008 by ██████████, under the business name ██████████ (Prior Owner 2). Prior Owner 2 was the entity issued the ADF&G business owner's license that authorized logbook fishing trips in 2008.⁴ Thereafter, Lodge was purchased by Current Owner. On January 1, 2010, Current Owner and Appellant entered into *Lease Agreement* (Lease) for Lodge. Lease is for a term of 24 months, commencing on January 1, 2010 and terminating on December 31, 2011.⁵

In the IAD, RAM explained that, according to the Official Record, Appellant was not the entity to which the ADF&G issued an ADF&G Business Owner's License that authorized logbook fishing trips under the business name, ██████████ (Lodge). RAM noted that "Appellant does not claim to have been issued the ADF&G Business Owner's License that authorized logbook fishing trips under Lodge in 2004, 2005, or 2008. RAM explained that Appellant's claim—that Appellant is eligible for a CHP because of its current lease arrangements with the current owner of Lodge—does not establish eligibility for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii). RAM explained that CHPs are not issued to "Lessees" or "Operators;" rather, the regulations require that the individual or non-individual entity seeking the CHP has been issued an ADF&G Business Owner's License that authorized logbook fishing trips. The recorded trips can then be used to meet minimum participation requirements of the CHLAP.⁶

RAM also considered Appellant's claim of eligibility for a CHP based on the successor-in-interest provisions of the CHLAP regulations in spite of the fact that Appellant did not make such a claim on its application for a CHP. RAM concluded that the successor-in-interest provisions do not apply to Appellant. Specifically, RAM determined that Appellant does not qualify as a successor-in-interest to a non-individual entity, since it has not been established, as required by applicable regulations, that the businesses that operated Lodge in 2004, 2005, and 2008 were dissolved. RAM explained that

³ Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, Official Record summary for Prior Owner in 2004 and 2005 and Logbook Business report for 2004, Alaska Professional License Detail and Alaska Biennial Report for Prior Owner 1, Pleadings Tab, Appellant's appeal submissions.

⁴ Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, Logbook Business report for 2008, Alaska Professional License Biennial Report for Prior Owner 2, Prior Owner 2's Articles of Organization and Alaska Certificate of Organization, Pleadings Tab, Appellant's appeal submissions.

⁵ Case File, Original File Tab, Lease dated January 1, 2010, letter from Appellant's attorney dated March 24, 2010, Pleadings Tab, Appellant's appeal submissions.

⁶ Case File, Original File Tab, IAD dated September 8, 2010.

leasing Lodge, as Appellant has done, does not constitute being successor-in-interest to a dissolved business. Consequently, RAM denied Appellant's application for a CHP.⁷

Lastly, RAM noted Appellant's claim that an unavoidable circumstance occurred in 2008, namely, the "business failure of [Lodge] and the foreclosure action resulting in the current ownership of the property" by ██████████ Trustee of the ██████████ ██████████ [hereinafter referred to as Current Owner].⁸ RAM explained that unavoidable circumstance claims had to be resolved by the OAA, following the filing of an appeal to the IAD.⁹

On appeal, Appellant argues that "as Lessee it is the only entity that can claim status as a successor-in-interest to the operators both in the qualifying period 2004 and 2005 and in the most recent period 2008." Appellant argues the 2004-2005 logbook data for Lodge is applicable to Appellant's application because of the current involvement of Prior Owner 1 as the current charter services provider for Lodge. Appellant also contends that it may use the 2008 fishing logbook data from Prior Owner 2 based on the conveyance of Lodge to Current Owner, who now leases Lodge to Appellant.¹⁰

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.¹¹

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 or 2005 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)(1) and (g)(2), would enable Appellant to receive a CHP in lieu of meeting the participation requirements. To resolve that issue, I must determine whether the CHLAP regulations permit a claim of

⁷ Case File, Original File Tab, IAD dated September 8, 2010.

⁸ Case File, Original File Tab, IAD dated September 8, 2010, Pleadings Tab, Appellant's appeal submission.

⁹ Case File, Original File Tab, IAD dated September 8, 2010.

¹⁰ Case File, Pleadings Tab, Appellant's appeal submissions.

¹¹ See 50 C.F.R. § 679.43(g)(2) and (k).

unavoidable circumstance for both periods of participation, that is 2004 or 2005, and 2008.

Additionally, I must examine whether the successor-in-interest provisions of the CHLAP apply to Appellant.

FINDINGS OF FACT

1. Appellant did not operate a charter halibut fishing business under the business name of Lodge and did not report logbook fishing trips to ADF&G under the business name of Lodge in 2004, 2005, or 2008.¹²
2. In 2004 and 2005, Prior Owner 1 operated a charter halibut fishing business under Lodge's business name and was issued an Alaska Business Owner's License. In 2004 and 2005, Prior Owner 1 reported to ADF&G 81 and 122 bottomfish logbook fishing trips, respectively.¹³
3. Lodge was later sold and operated in 2008 by Prior Owner 2. Prior Owner 2 was the entity issued the ADF&G Business Owner's license that authorized logbook fishing trips in 2008.¹⁴
4. Thereafter, Lodge was purchased by Current Owner. On January 1, 2010, Current Owner and Appellant entered into Lease of Lodge. Lease is for a term of 24 months, commencing on January 1, 2010 and terminating on December 31, 2011.¹⁵

¹² Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, CHP application dated March 26, 2010, Official Record summary for Prior Owner 1 in 2004 and 2005 and Logbook Business report for 2004, Alaska Professional License Detail and Alaska Biennial Report for Prior Owner 1 and Prior Owner 2, Prior Owner 2's Articles of Organization and Alaska Certificate of Organization, Pleadings Tab, Appellant's appeal submission.

¹³ Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, Official Record summary for Prior Owner 1 in 2004 and 2005 and Logbook Business report for 2004, Alaska Professional License Detail and Alaska Biennial Report for prior Owner 1, Pleadings Tab, Appellant's appeal submissions.

¹⁴ Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, Logbook Business report for 2008, Alaska Professional License Biennial Report for Prior Owner 2, Prior Owner 2's Articles of Organization and Alaska Certificate of Organization, Pleadings Tab, Appellant's appeal submissions.

¹⁵ Case File, Original File Tab, Lease dated January 1, 2010, letter from Appellant's attorney dated March 24, 2010, Pleadings Tab, Appellant's appeal submissions.

5. The status of Prior Owner 1's Alaska Business Owner's License is listed as "Active-Non Compliant."¹⁶
6. The status of Prior Owner 2's Alaska Business Owner's License is listed as "Active-Non Compliant."¹⁷
7. On March 26, 2010, Appellant submitted to RAM a signed completed *Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A* (Application). In Application, Appellant claimed eligibility for a CHP based on an unavoidable circumstance that occurred in 2008.¹⁸

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.¹⁹ Minimum participation requirements to qualify for a non-transferable 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 (for transferable permits the minimum number of trips that had to be reported in each period is fifteen).²⁰

If the person is applying for a CHP as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet the participation requirements described in 50 C.F.R. § 300.67(b)(1)(ii) for one or more charter halibut permits, NMFS will require the following written documentation: (A) If the applicant is applying on behalf of a deceased individual, the applicant must document that the individual is deceased, that the applicant is the personal representative of the deceased's estate appointed by a court, and that the applicant specifies who, pursuant to the applicant's personal representative duties, should receive the permit(s) for which application is made; or (B) If the applicant is applying as a successor-in-interest to an entity that is not an individual, the applicant must document

¹⁶ Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, Alaska Biennial Report for Prior Owner 1.

¹⁷ Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, Alaska Biennial Report for Prior Owner 2.

¹⁸ Case File, Original File Tab, CHP application dated March 26, 2010.

¹⁹ 50 C.F.R. § 300.67(b)(1)(ii).

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

that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.²¹

The CHLAP regulations also provide that one logbook fishing trip made pursuant to one ADF&G Business Owner's License shall not be credited to more than one applicant.²²

Unavoidable circumstance claims are limited to the following circumstances: (1) An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period, and (2) An applicant for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period. In each circumstance, certain conditions must be met for the applicant to prevail as set out in 50 C.F.R. § 300.67(g)(1) and (2), respectively.

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.²³

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 2008.²⁴ My review of the record reveals Appellant does not meet such minimum participation requirements.

It is undisputed that in 2004 or 2005 and in 2008 Appellant did not report to ADF&G any logbook fishing trips under the business name of Lodge.²⁵ In fact, Appellant did not incorporate its own business until November 2006 and did not become associated with

²¹ 50 C.F.R. § 300.67(b)(1)(iii)(A) and (B).

²² 50 C.F.R. § 300.67(b)(2)(ii).

²³ 50 C.F.R. § 300.67(f)(5).

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

²⁵ Case File, Original File Tab, IAD dated September 8, 2010, August 26, 2010 e-mail from RAM, CHP application dated March 26, 2010, Official Record summary for Prior Owner 1 in 2004 and 2005 and Logbook Business report for 2004, Alaska Professional License Detail and Alaska Biennial Report for Prior Owner 1 and Prior Owner 2, Prior Owner 2's Articles of Organization and Alaska Certificate of Organization, Pleadings Tab, Appellant's appeal submission.

Lodge until 2010 when Appellant and Current Owner entered into Lease.²⁶ Consequently, the facts of this case show that Appellant did not meet the minimum participation requirements outlined in 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) to be eligible for a CHP.

Since Appellant did not meet the minimum participation requirements in both periods (2004 or 2005, 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 its lack of participation. Since Appellant lacks participation in both periods, I must first determine whether the CHLAP regulations permit a claim of unavoidable circumstance for both periods of participation, that is 2004 or 2005, and 2008, I have concluded the regulations do not permit such a claim.

Fifty C.F.R. § 300.67 (g) states that the unavoidable circumstance provisions are “limited to the following circumstances.” Fifty C.F.R. § 300.67 (g)(1) begins with the following proposition: “an applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period may receive one or more charter halibut permits if the applicant proves....” Fifty C.F.R. § 300.67 (g)(2) begins with the following proposition: “an application for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period may receive one or more charter halibut permits if the applicant proves” Since Appellant has not established that it met the participation requirements for one of the two periods of participation, that is 2004 or 2005, or 2008, he does not meet the threshold requirements for eligibility for a permit pursuant to the “unavoidable circumstance” exception under 50 C.F.R. § 300.67(g).

I considered Appellant’s arguments on appeal, which relate to claims of successor-in-interest. Appellant argues that “as Lessee it is the only entity that can claim status as a successor-in-interest to the operators both in the qualifying period 2004 and 2005 and in the most recent period 2008.” Appellant argues the 2004-2005 logbook data for Lodge is applicable to Appellant’s application because of the current involvement of Prior Owner 1 as the current charter services provider for Lodge. Appellant also contends that it may use the 2008 fishing logbook data from Prior Owner 2 based on the conveyance of Lodge to Current Owner, who now leases Lodge to Appellant.²⁷

²⁶ Case File, Original File Tab, CHP application dated March 26, 2010, Lease dated January 1, 2010.

²⁷ Case File, Pleadings Tab, Appellant’s appeal submissions.

I am not persuaded by Appellant's arguments. Contrary to Appellant's assertions on appeal, the fact that Appellant now leases Lodge from Current Owner does not provide it with status as a successor-in-interest to the prior operators of Lodge. The CHLAP regulations provide that if an applicant is applying as a successor-in-interest to an entity that is not an individual, the applicant must document that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.²⁸ The evidence in this record does not establish that Prior Owner 1's business entity or Prior Owner 2's business entity has been dissolved and that Appellant has succeeded to either entity. In fact, the status of Prior Owner 1 and Prior Owner 2's Alaska Business Owner's Licenses are listed as "Active-Non Compliant." Moreover, by Appellant's own admission, it states it "had insufficient knowledge of the 2008 operator's choice of legal entity to claim status as the 'successor-in-interest' to a dissolved non-individual entity."²⁹

The fact that Appellant may currently be utilizing Prior Owner 1 to provide charter services to Lodge does not entitle Appellant to use of Prior Owner 1's past logbook data to support Appellant's claim for a CHP. Rather, what determines use of the logbook data is the individual or non-individual entity to which the ADF&G issued the ADF&G Business Owner's License that authorized logbook fishing trips during the relevant period.³⁰

Further, the CHLAP regulations state that one logbook fishing trip made pursuant to one ADF&G Business Owner's License shall not be credited to more than one applicant.³¹ Accordingly, since Appellant is not a successor-in-interest to the prior operators of Lodge, Appellant is not entitled to receive credit for the 2004 and 2005 logbook fishing trips Prior Owner 1 conducted or the 2008 logbook fishing trips Prior Owner 2 conducted.

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 and the recent participation period.

The unavoidable circumstance provisions of the CHLAP regulations as set out in 50 C.F.R. § 300.67(g)(1) and (2) do not enable Appellant to receive a CHP in lieu of such participation since Appellant lacks participation in both periods, namely in 2004 or 2005 and in 2008.

²⁸ 50 C.F.R. § 300.67(b)(1)(iii)(A) and (B).

²⁹ Case File, Pleadings Tab, Appellant's appeal submissions.

³⁰ 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B).

³¹ 50 C.F.R. § 300.67(b)(2)(ii).

The successor-in-interest provisions of the CHLAP, as set out in 50 C.F.R. § 300.67(b)(1)(iii) are not applicable to Appellant.

ORDER

The IAD dated September 8, 2010 is Upheld. This decision takes effect (30) days from the date issued, August 19, 2011³², 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]

Christine D. Coughlin
Administrative Judge

Date Issued: July 20, 2011

³² 50 C.F.R. § 679.43(k) and (o).