

that he could submit additional evidence to support his claim. RAM received Appellant's submissions on May 17, 2010.⁶

On July 21, 2010, RAM sent Appellant the IAD at issue in this case. In its IAD, RAM notified Appellant that according to information in the Official Record, Appellant met the minimum participation requirements in the qualifying period (2004 or 2005), but he did not meet the minimum participation requirements for the recent participation period (2008). RAM also acknowledged Appellant's unavoidable circumstance claim, but it explained that the claim needed to be determined by OAA, provided Appellant filed an appeal with OAA to pursue his claim.⁷ In the Principles of Law section and Analysis section of this Decision, I explain in more detail the meaning and significance of the unavoidable circumstance claim.

On August 30, 2010, Appellant's appeal to OAA was received and timely filed.⁸ In his appeal, Appellant renews his claim that an unavoidable circumstance prevented him from operating his charter fishing business in 2008. Appellant explains that in an attempt to upgrade his charter fishing business, he sold his fishing vessel (Vessel 1) in March 2008 and was unable to find a suitable replacement vessel (Vessel 2) until September 2008.⁹ On November 15, 2010, NAO sent Appellant a letter acknowledging his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by December 6, 2010.¹⁰ The record does not show that Appellant responded with additional evidence or information through his correspondence with NAO.

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

ISSUE

At issue in this appeal is whether Appellant is eligible for a CHP under the CHLAP regulations. Because Appellant does not meet the minimum participation requirements, I must determine whether Appellant has established by a preponderance of the evidence that he meets the threshold requirements for an unavoidable circumstances claim. In particular, I must determine whether Appellant's circumstance in 2008 was unavoidable, and unforeseen and reasonably unforeseeable by Appellant as an owner of a charter halibut fishing business.

⁶ Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence dated May 11, 2010 (received by RAM on May 17, 2010).

⁷ Original File Tab, IAD dated July 21, 2010.

⁸ Pleadings Tab, Appellant's Letter of Appeal dated Aug. 7, 2010 (received by RAM on Aug. 30, 2010).

⁹ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

¹⁰ Appeals Correspondence Tab, NAO's letter to Appellant dated Nov. 15, 2010.

¹¹ See 50 C.F.R. § 679.43(g)(2), (k).

If Appellant has not demonstrated that he meets the threshold requirements for an unavoidable circumstance claim, Appellant is not eligible for a CHP, and I must uphold the IAD.

FINDINGS OF FACT

1. Appellant has participated in the charter halibut fishing industry since 1998.¹²
2. In 2004, Appellant reported twenty-nine logbook fishing trips to ADF&G¹³
3. In 2005, Appellant reported nineteen logbook fishing trips to ADF&G¹⁴
4. In the winter of 2007, Appellant decided to upgrade his fishing business by purchasing a larger vessel.¹⁵
5. In March 2008, Appellant sold Vessel 1.¹⁶
6. In his search for a larger vessel, Appellant travelled to Washington and California and consulted with boat brokers. The search for a replacement vessel took longer than Appellant anticipated.¹⁷
7. On September 5, 2008, Appellant purchased Vessel 2.¹⁸
8. Due to the delay in finding a replacement vessel, Appellant cancelled his bookings for fishing trips during the 2008 season.¹⁹
9. In 2008, Appellant reported no logbook fishing trips to ADF&G.²⁰

¹² Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

¹³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

¹⁴ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

¹⁵ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

¹⁶ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

¹⁷ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

¹⁸ Original File Tab, Bill of Sale dated Sept. 5, 2010 (received by RAM on May 17, 2010).

¹⁹ Original File Tab, Appellant's Letter Accompanying his Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

²⁰ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated March 24, 2010 (received by RAM on March 29, 2010).

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 an ADF&G Business Owner License. This license authorized the logbook fishing trips that were used to meet the minimum participation requirements to qualify for a CHP.²¹

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 (2004 or 2005) and must have reported five or more halibut logbook fishing trips during the recent participation period (2008).²²

If an applicant does not qualify for a CHP based on the criteria outlined above, he may still be eligible for a permit if he meets the requirements of the unavoidable circumstance provisions of the CHLAP regulations. Under the unavoidable circumstance provisions as they apply to this case, 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 CHPs if the applicant proves the following:

- he had a specific intent to operate a charter halibut fishing business in the recent participation period;
- his specific intent was thwarted by an actual circumstance that was unavoidable, unique to him as the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable, and;
- he took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in the recent participation period in 2008.²³

ANALYSIS

Since Appellant does not dispute that he did not meet the minimum participation requirements to qualify for a CHP, I must determine whether the unavoidable circumstance provisions of the CHLAP regulations may provide a basis for Appellant to receive a CHP.²⁴ The unavoidable circumstance provision has a number of requirements. Among the requirements is sufficient evidence of a circumstance that was unavoidable, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business. Appellant bears the burden of proving that requirement by a preponderance of the evidence.

²¹ 50 C.F.R. § 300.67(b)(1)(ii).

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

²³ 50 C.F.R. § 300.67(g)(1)(i)-(iv).

²⁴ See 50 C.F.R. § 300.67(g)(1).

The record shows that by his voluntary actions, Appellant removed himself from the charter fishing business in 2008 when he decided to upgrade his fishing business by seeking a larger vessel. Appellant chose to sell Vessel 1 in March 2008, six months before purchasing Vessel 2. It was reasonably foreseeable that when Appellant arranged for the sale of Vessel 1 before selecting a replacement, he would be without a vessel during the 2008 fishing season. Through the sale of his only vessel, Appellant caused his own unavailability to operate his charter fishing business in 2008. While Appellant took trips to Washington and California in hopes of purchasing a replacement vessel, the fact remains that he chose a course of action that compromised his ability to operate a charter fishing business in 2008. It was reasonably foreseeable that selling Vessel 1 without plans to have a charter vessel available for the 2008 season would result in Appellant not chartering in the 2008 season.

After carefully reviewing the case record, I conclude that Appellant did not experience an unavoidable, and unforeseen and reasonably unforeseeable circumstance; therefore, Appellant cannot prevail in this appeal under the unavoidable circumstances provision of the CHLAP regulations. Whether Appellant experienced an unavoidable circumstance is dispositive; therefore, I need not address the remaining requirements of the unavoidable circumstance provision.

In reviewing this case, I have carefully considered Appellant's appeal as well as the entire file. I am aware that Appellant has been involved in the charter fishing industry since 1998. I am also aware that Appellant has stated that not being eligible for a CHP "directly and adversely affects" Appellant's business.²⁵ However, I am bound to follow the regulations, and as analyzed above, under those regulations, Appellant is not eligible for a permit.

CONCLUSIONS OF LAW

Appellant does not meet the minimum participation requirements for a CHP because Appellant reported no logbook fishing trips to ADF&G for 2008.

Appellant did not experience a circumstance in 2008 that was unavoidable, and unforeseen and reasonably unforeseeable by Appellant as an owner of a charter halibut fishing business.

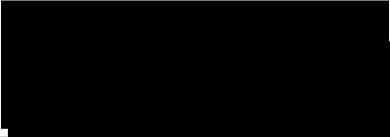
Appellant is not eligible for a CHP; the IAD is consistent with applicable regulations.

²⁵ Pleadings Tab, Appellant's Letter of Appeal dated Aug. 7, 2010 (received by RAM on Aug. 30, 2010).

ORDER

The IAD dated July 21, 2010 is upheld. This decision takes effect thirty days from the date issued, August 29, 2011, 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), (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 Standard Time, on the tenth day after the date of this Decision, August 8, 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 of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.


Eileen G. Jones
Chief Administrative Judge

Date Issued: July 29, 2011