

**NATIONAL APPEALS OFFICE
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC and ATMOSPHERIC ADMINISTRATION**

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| In Re Application of |) | |
| |) | |
|  |) | Appeal No. 10-0104 |
| |) | |
| |) | DECISION |
| Appellant |) | |
| |) | |
| |) | |

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 is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with OAA. 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 7 C.F.R. § 679.43.

In an Initial Administrative Determination (IAD) issued to  doing business as (dba)  (collectively referred to herein as Appellant), NMFS' Restricted Access Management program (RAM) denied Appellant a permit to operate a charter halibut business in certain waters off the coast of Alaska.¹ That denial was made pursuant to regulations for issuing permits under the Charter Halibut Limited Access Program (CHLAP) published at 50 C.F.R. § 300.67. The basis for the denial was Appellant's lack of sufficient official logbook information for 2004 or 2005, and 2008, as required under 50 C.F.R. § 300.67(b)(1)(i) and (ii) and 50 C.F.R. § 300.67(f)(4).

After Appellant applied for a charter halibut permit (CHP or permit) on March 22, 2010,² RAM made a preliminary assessment that it seemed unlikely, based on the information in the Official Record, that Appellant would qualify for a permit. RAM notified Appellant of its preliminary assessment in a Notice of Opportunity to Submit Evidence (Notice) dated July 27, 2010.³ According to RAM, the Official Record showed Appellant recorded no qualifying bottomfish logbook trips in 2004 and 2005 and no halibut logbook trips for 2008.⁴ Since Appellant would need five trips in 2004 or 2005 and in 2008, it did not appear that Appellant would qualify for a permit. However, RAM informed Appellant that he could submit evidence to show that the Official Record was

¹ RAM administers the CHLAP.

² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

³ Original File Tab, Notice of Opportunity to Submit Evidence dated June 30, 2010.

⁴ Original File Tab, Notice of Opportunity to Submit Evidence dated July 27, 2010; Original File Tab, Print Summary created January 26, 2010.

wrong. The record does not show that Appellant responded to the Notice with additional information.

On November 12, 2010, RAM sent Appellant the IAD at issue in this case. In the IAD RAM denied Appellant a permit, because he lacked the requisite logbook trips as explained in the Notice and as reiterated in the IAD. RAM noted that on Appellant's permit application he was requesting recognition that unavoidable circumstances prevented him from meeting the participation requirements in all relevant years, 2004, 2005, and 2008. RAM opined that Appellant could not prove a claim under the unavoidable circumstances rule because Appellant did not meet the participation requirements in at least one of the participation periods (2004/2005 or 2008). However, RAM did not make a determination on that issue because pursuant to CHLAP regulations, OAA resolves unavoidable circumstance claims.⁵

On November 29, 2010, Appellant timely filed an appeal with OAA.⁶ On February 16, 2011, 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 March 18, 2011.⁷ The record does not show that Appellant responded with additional evidence or information.

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

The broad issue in this case is whether Appellant is eligible for a permit under the CHLAP rules. To resolve that issue, I must answer the following:

1. Did Appellant prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005?
2. If the answer to Question 1 is "no," I will decide whether Appellant has established by a preponderance of the evidence the threshold requirement for an unavoidable circumstances claim, namely that he properly recorded at least five charter halibut logbook fishing trips for 2008?

If the answer to Question 2 is "no," Appellant is not eligible for a permit and I must uphold the IAD.

⁵ Original File, IAD dated October 22, 2010. .

⁶ Appeal letter dated December 3, 2010. See 7 C.F.R. § 679.43(d).

⁷ Appeals Correspondence Tab, letter dated February 16, 2011.

FINDINGS of FACT

1. Between 2005 and 2009, Appellant concentrated his business activities in crab fishing.⁸
2. Appellant did not report any qualifying logbook fishing trips to ADF&G for 2004, 2005, or 2008.⁹
3. On March 22, 2010, Appellant applied to NMFS for a CHP.¹⁰
4. On Appellant's application for a CHP, Appellant did not indicate that he took any qualifying logbook trips for any of the three relevant years, 2004, 2005, and 2008.¹¹
5. On Appellant's application for a CHP, Appellant requested he be considered eligible for a permit because he had experienced an unavoidable circumstance in 2004 or 2005, and 2008.¹²

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 ADF&G issued an ADF&G Business Owner License 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 [ADF&G] in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the

⁸ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A; Original File Tab, Alaska Department of Fish and Game, Shellfish Registration for Vessel – Gear-Operator for 2005-2009; Pleading Tab, Appeal dated November 23, 2010.

⁹ Original File Tab, IAD dated November 12, 2010; Original File Tab, Print Summary created January 26, 2010. Appellant has not presented evidence of qualifying trips in 2004 and 2005.

¹⁰ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

¹¹ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

¹² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

trip. 50 C.F.R. § 300.67(f)(4). The time limit to submit data about logbook fishing trips was within eight to fourteen days of a qualifying trip, as delineated in the logbooks.¹³

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska [ADF&G] 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 [ADF&G] 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).

“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 nontransferable permits. 50 C.F.R. § 300.67(f)(1).

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). If an applicant for a permit cannot meet the requirements for a permit outlined above, he may still be eligible for a permit if he can prove he meets the requirements for what is known as an “unavoidable circumstances claim.” An unavoidable circumstance claim has a threshold requirement. That threshold requirement, as relevant to this case, is that an applicant for a CHP does not meet the participation requirement for the qualifying period (2004 or 2005) but does meet the participation requirement for the recent participation period (2008). See 50 C.F.R. § 300.67(g)(1). In short and as relevant to this case, the threshold requirement is proof of five or more reported halibut logbook trips in 2008.

ANALYSIS

Did Appellant prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005?

The CHLAP regulations have two general ways to qualify for a permit. First, an applicant can meet the general participation and other requirements. Second, as an exception to the general participation requirements, an applicant can qualify for a permit under what is known as the “unavoidable circumstances” rule. Each way is discussed in turn below.

¹³ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

The general participation requirements mandate a minimal level of participation in the industry, or charter halibut fishing business, in certain areas in waters off the Alaska coast. To be more precise and as pertaining to the particular regulatory requirements relevant to the case before me, an appellant must prove his charter halibut fishing participation in two periods: one, known as the qualifying period, which occurred in 2004 or 2005; two, known as the recent participation period, which occurred in 2008. To establish that he met those participation requirements, he must show that for 2004 or 2005 he timely reported at least five bottomfish logbook fishing trips and for 2008 he timely reported at least five halibut logbook fishing trips.

Appellant does not dispute that he did not report five or more qualifying trips in 2004 or 2005. Indeed, on Appellant's application for a CHP, Appellant requested he be considered eligible for a permit because he had experienced an unavoidable circumstance in 2004 or 2005, and 2008. The regulations do not allow one to use the unavoidable circumstance rule to excuse lack of participation in both periods (i.e., 2004/2005 or 2008). Therefore, Appellant cannot qualify for a permit under 50 C.F.R. § 300.67(b)(1)(ii)(A)&(B) and (f)(6) and (7).

Rather than argue he did report the requisite trips for 2004 or 2005, Appellant asks NAO to consider that he was available each year to provide charter fishing, that he has submitted proof that his vessel was registered, he had a business license, and state charter/guide license. He also notes that his main income historically has been from crab fishing, but that he needs the revenue from chartering to stay financially solvent. He asks that NAO consider his circumstances and issue him a permit. Given Appellant's appeal paperwork as well as the rest of the file, I construe Appellant's central argument to be in support of a claim for unavoidable circumstances. I thus turn to whether Appellant can meet the threshold requirement for an unavoidable circumstance claim so that he may be eligible for a CHP permit notwithstanding his lack of fishing history in 2004 or 2005.

Has Appellant established by a preponderance of the evidence the threshold requirement for an unavoidable circumstances claim, namely that he properly reported at least five charter halibut logbook fishing trips 2008?

As a threshold requirement, to prevail on a claim for unavoidable circumstances, an applicant must show that he met the participation requirements in either the qualifying period (2004 or 2005) or the recent participation period in 2008. As stated previously, Appellant did not meet the participation requirements in 2004 or 2005. I must therefore examine the possibility that Appellant can meet the threshold requirement with proof of participation in 2008. The Official Record shows no logbook fishing trips for 2008.

Indeed, Appellant typed in "none" on the line for 2008 qualifying trips on his CHP application. Given the evidence, I have concluded, as indicated in the Findings of Fact section of this Decision, that Appellant did not report any requisite trips to ADF&G for 2008. Accordingly, Appellant does not show that he can meet the threshold requirement for an unavoidable circumstances claim. I need not address the other

requirements for an unavoidable circumstances claim, since the threshold issue, establishment of participation in at least one period (in this case 2004/2005 or 2008), is dispositive. I therefore conclude Appellant is not eligible for a permit under the unavoidable circumstances rule.

In reaching my decision in this case, I carefully reviewed the entire record. I have carefully considered Appellant's concerns raised in the appeal. However, under the CHLAP regulations, as analyzed above and as applied to this case, Appellant does not qualify for a CHP.

CONCLUSION

Appellant is not eligible for a permit under the CHLAP rules.

Appellant did not prove by preponderance of the evidence that he reported at least five logbook fishing trips for 2004 or 2005.

Appellant did not establish by a preponderance of the evidence the threshold requirement for an unavoidable circumstances claim, namely that he properly reported at least five charter halibut logbook fishing trips for 2008.

The IAD is consistent with CHLAP regulations.

ORDER

The IAD dated November 12, 2010 is upheld. This decision is effective thirty days from the date issued¹⁴ 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).


Eileen G. Jones
Chief Administrative Judge

Date issued: May 13, 2011

¹⁴ 50 C.F.R. § 679.43(k) and (o).