

from meeting recent participation requirements, and RAM advised Appellant that such claims had to be resolved by OAA.³

In his appeal, Appellant explains that he has conducted charter fishing since 1984. Appellant states that he intended to charter fish in 2008, but that an unavoidable circumstance prevented him from doing so, namely the illness of his wife (Wife). Appellant explains that the nature and severity of Wife's illness required him, as her primary caregiver, to be with her at all times throughout 2008 until she recovered from her medical condition. For this reason, Appellant was unable to conduct charter fishing trips during 2008.⁴

I reviewed Appellant's appeal and the case record and determined that an oral hearing would best resolve the issues of adjudicative fact presented in this case.⁵ Accordingly, I ordered a hearing on April 27, 2011, and provided Appellant with at least thirty days advance notice of the date, place, and time of the oral hearing and of the issues to be determined at the hearing.⁶ At the conclusion of the hearing on April 27, 2011, I determined the record contained sufficient information on which to reach final judgment and I closed the record. This decision follows.⁷

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) and 300.67(d)(1). If Appellant does not meet the minimum participation requirements, meaning 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), qualifies Appellant to receive a CHP in lieu of meeting the participation requirement for the recent participation period (2008).

³ Case File, Original File Tab, IAD dated July 21, 2010.

⁴ Case File, Pleadings Tab, Appellant's appeal submission dated September 20, 2010.

⁵ 50 C.F.R. §§ 679.43(g)(3)(i) 679.43(h)(2), and 679.43(n)(1).

⁶ Case File, Appeals Correspondence Tab, Notice of Scheduled Hearing; 50 C.F.R. § 679.43(n)(1)-(2).

⁷ 50 C.F.R. §§ 679.43(n)(8) and (k).

FINDINGS OF FACT

1. Appellant has been in the charter fishing business for about twenty-five years. Appellant owns a thirty-six foot vessel (Vessel), which is the only vessel Appellant uses for charter fishing, including during the years of 2004 and 2005.⁸
2. Appellant has maintained his business owner's license from the Alaska Department of Fish and Game, including for 2008.⁹
3. In 2004, Appellant reported twenty-eight bottomfish logbook fishing trips, with a maximum number of anglers of six. In 2005, Appellant reported thirty-three bottomfish logbook fishing trips, with a maximum number of anglers of six.¹⁰
4. In 2004, Wife became ill. Wife's illness worsened by 2007 and became more severe in and throughout 2008. [REDACTED]
[REDACTED] In and throughout 2008, Wife's condition had become severe enough that she needed Appellant's assistance with "everything," [REDACTED]
[REDACTED] Throughout 2008, Appellant handled the household duties, [REDACTED] As the primary caregiver, Appellant abandoned his intent to charter fish in 2008 to care for Wife, since by that time Wife's condition had worsened and Appellant believed Wife could not safely be left alone.¹¹
5. Appellant and Wife's children live in other states throughout the country and were not available to assist Appellant in Wife's care. Appellant and Wife have a granddaughter (Granddaughter) who lives in their area and works full-time. Granddaughter assisted Appellant on occasion, but was not regularly available to allow Appellant time to charter fish in 2008.¹²
6. Appellant did not pursue outside assistance for Wife's care because he believed it would be cost prohibitive given the time commitment to conduct charter fishing

⁸ Case File, Original File Tab, CHP application received by RAM on April 5, 2010, Appellant's undated letter to RAM received by RAM on April 5, 2010, Pleadings Tab, Appellant's appeal submission dated September 20, 2010; Appellant's Hearing Testimony.

⁹ Appellant's Hearing Testimony.

¹⁰ Case File, Internal Correspondence, Appellant's logbook data for 2004 and 2005; Appellant's Hearing Testimony.

¹¹ Case File, Original File Tab, Appellant's undated letter to RAM received by RAM on April 5, 2010; Appellant and Wife's Hearing Testimony.

¹² Appellant's Hearing Testimony.

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. The minimum participation requirements to qualify for a non-transferable CHP are that 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 a transferable permit, the minimum number of trips that the applicant had to report in each period as identified above is fifteen.¹⁹ The number of transferable CHPs issued to an applicant will be equal to the lesser of the number of vessels that met the minimum transferable permit qualifications described above.²⁰

“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.²¹

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.²²

An applicant that meets the participation requirements will be issued the number of charter halibut permits equal to the lesser of the number of permits as follows: (1) The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business License in the applicant-selected year divided by five, and rounded down to a whole number; or (2) The number of vessels that made the bottomfish logbook fishing trips in the applicant-selected year.²³

The angler endorsement number for the first non-transferable or transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area.²⁴

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

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

²⁰ 50 C.F.R. § 300.67(d)(2).

²¹ 50 C.F.R. § 300.67(f)(1).

²² 50 C.F.R. § 300.67(f)(5).

²³ 50 C.F.R. § 300.67(c)(1) and (2).

²⁴ See generally, 50 C.F.R. § 300.67(e)(1).

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.²⁵

If the applicant proves the foregoing, the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in 50 C.F.R. § 300.67 (b) through (f). To this end, the preamble to the Proposed Rule for the CHLAP regulations states:

NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.²⁶

The preamble to the Final Rule implementing the CHLAP restated this intent as follows: "The preamble to the proposed rule (74FR 18178, April 21, 2009) on page 18187 contains a detailed description of the unavoidable circumstances exception to the qualification requirements."²⁷

ANALYSIS

The first issue I must resolve in this case is 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) and 300.67(d)(1). The case record before me reveals he does not.

²⁵ 50 C.F.R. § 300.67(g)(1)(i)-(iv).

²⁶ See 74 Fed. Reg. 18187 (April 21, 2009).

²⁷ See 75 Fed. Reg. 586 (January 5, 2010)(response to comment 109).

To qualify for a CHP, certain minimum participation requirements need to be met. For a non-transferable permit, 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 2008, the recent participation period. For a transferable permit, the minimum number of reported logbook fishing trips for each period increases to fifteen.²⁸

The evidence presented, including Appellant's logbook data, reveals that Appellant reported twenty-eight trips in 2004 and thirty-three trips in 2005.²⁹ Appellant chose 2005 as his "applicant selected year" meaning the year he wanted NMFS to use in evaluating the number and type of permits Appellant was qualified to receive.³⁰ Thus, Appellant satisfied the minimum participation requirements for the qualifying period. However, Appellant did not report any trips in 2008, which meant he fell short of meeting the minimum participation requirements for the recent participation period.³¹ Consequently, the evidence in this case demonstrates that Appellant did not report the minimum number of logbook fishing trips in both periods of participation to qualify for a CHP.

Since Appellant does not meet the minimum participation requirements to qualify for a CHP, namely with regard to the 2008 recent participation period, I must now determine whether the unavoidable circumstance provision of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(1), qualifies Appellant to receive a CHP in lieu of not meeting the participation requirements for 2008.

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). I will now address each element.

Fifty C.F.R. § 300.67(g)(1)(i) requires that the applicant had a specific intent to operate a charter halibut fishing business in the recent participation period, 2008. The evidence presented shows that Appellant intended to operate a charter halibut fishing business in 2008. Appellant has been in the charter fishing business for about twenty-five years. In

²⁸ See generally, 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(d)(1)(i) and (ii); and 50 C.F.R. § 300.67(f)(6) and (7).

²⁹ Case File, Internal Correspondence, Appellant's logbook data for 2004 and 2005; Appellant's Hearing Testimony.

³⁰ Case File, Original File Tab, CHP application received by RAM on April 5, 2010; 50 C.F.R. § 300.67(f)(1).

³¹ Case File, Original File Tab, CHP application received by RAM on April 5, 2010.

2008, Appellant owned Vessel, which is the only vessel Appellant uses for charter fishing. Appellant maintained his business owner's license from the Alaska Department of Fish and Game in 2008. For the 2008 season, Appellant had approximately twenty fishing trips that were booked in advance for his charter fishing business. Since Appellant was unable to charter fish in 2008, due to Wife's illness discussed in greater detail below, he had to refer these advance bookings to other fishing operations.³² The preponderance of the evidence presented in this case convinces me that Appellant had a specific intent to operate a charter halibut fishing business in 2008.

Fifty C.F.R. § 300.67(g)(1)(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. Fifty C.F.R. § 300.67(g)(1)(iii) requires that the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred.

The evidence presented establishes that a circumstance, namely Wife's illness, thwarted Appellant's intent to operate a charter halibut fishing business in 2008. Wife's illness began in 2004, but worsened by 2007 and became more severe in and throughout 2008. As the primary caregiver, Appellant had to abandon his intent to charter fish in 2008 to care for Wife when her condition worsened to the point that she could not safely be left alone. [REDACTED]

[REDACTED] In and throughout 2008, Wife's condition had become severe enough that she needed Appellant's assistance with "everything," [REDACTED]

Throughout 2008, Appellant handled the household duties, [REDACTED]

[REDACTED]³³ Despite efforts over time of visiting doctors in four states, including Alaska, it was not until later in 2008, after extensive and costly diagnostic testing, that Wife's medical condition was finally diagnosed [REDACTED]

³² Case File, Original File Tab, CHP application received by RAM on April 5, 2010, Letters dated May 10 and May 11, 2010 from other charter fishing operations, Appellant's undated letter to RAM received by RAM on April 5, 2010, Pleadings Tab, Appellant's appeal submission dated September 20, 2010; Appellant's Hearing Testimony.

³³ Case File, Original File Tab, Appellant's undated letter to RAM received by RAM on April 5, 2010; Appellant and Wife's Hearing Testimony.

³⁴ Case File, Original File Tab, operative report dated December 12, 2008, Appellant's undated letter to RAM received by RAM on April 5, 2010, Pleadings Tab, Appellant's appeal submission dated September 20, 2010; Appellant's Hearing Testimony.

to overcome the circumstance that prevented him from operating a charter halibut fishing business in 2008.

Having determined Appellant meets the criteria of 50 C.F.R. § 300.67(g)(1), I must now determine the number and type of CHP Appellant is qualified to receive, meaning a transferable or non-transferable permit, and the angler endorsement for that permit. See 50 C.F.R. § 300.67(g)(1)(v), and 50 C.F.R. § 300.67 (b) through (f). As to the number of permits Appellant is qualified to receive, 50 C.F.R. § 300.67(c) specifies that the number of permits allowed will be the lesser of two factors, one of which is “the number of vessels that made the bottomfish logbook fishing trips in the applicant selected year.” Appellant’s “applicant selected year” is 2005.³⁸ The evidence also establishes that Appellant used only one vessel to conduct charter fishing activities, including the bottomfish logbook fishing trips he made in 2005.³⁹ Hence, Appellant is qualified to receive one CHP.

As to the type of permit Appellant is qualified to receive, the preamble to the Proposed Rule and to the Final Rule of the CHLAP provide guidance on the issue. The preamble to the Proposed Rule for the CHLAP regulations states:

NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.⁴⁰

The preamble to the Final Rule restated this intent as follows: “The preamble to the proposed rule (74FR 18178, April 21, 2009) on page 18187 contains a detailed description of the unavoidable circumstances exception to the qualification requirements.”⁴¹

Thus, for purposes of resolving the type of permit Appellant is qualified to receive, meaning a non-transferable or a transferable permit, I must examine the extent of Appellant’s participation during the qualifying period, 2004 or 2005, as a substitute for

³⁸ Case File, Original File Tab, CHP application received by RAM on April 5, 2010.

³⁹ Case File, Original File Tab, CHP application received by RAM on April 5, 2010; Appellant’s Hearing Testimony.

⁴⁰ See 74 Fed. Reg. 18187 (April 21, 2009)

⁴¹ See 75 Fed. Reg. 586 (January 5, 2010)(response to comment 109).

ORDER

The IAD dated July 21, 2010 is vacated. RAM is directed to issue Appellant a transferable CHP for Area 3A with an angler endorsement number of six. This decision is effective thirty (30) days from the date issued⁴⁵ 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).

[REDACTED]

Christine D. Coughlin
Administrative Judge

Date Issued: May 13, 2011

⁴⁵ 50 C.F.R. § 679.43(k) and (o).