

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0067

DECISION

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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 operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. 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 50 C.F.R. § 679.43.

On September 17, 2010 [REDACTED] (Appellant) timely filed an appeal challenging a National Marine Fisheries Service (NMFS) Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated July 21, 2010.<sup>1</sup> In that determination, RAM notified Appellant that it denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP), which conditions issuance of a permit on, among other factors, meeting participation requirements in 2004 or 2005, and in 2008.<sup>2</sup>

In the IAD, RAM determined that Appellant had met the minimum participation requirements for 2004 or 2005, the qualifying period, but that Appellant had not reported a minimum of five halibut logbook fishing trips in 2008 to meet minimum participation requirements for the recent participation period. RAM noted that Appellant had made a

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<sup>1</sup> Case File, Pleadings Tab, Appellant's appeal submission, Original File Tab, IAD dated July 21, 2010.

<sup>2</sup> The CHLAP regulations are codified at 50 C.F.R. § 300.67. Unless otherwise noted, citations to the CHLAP regulations are to the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition, of the CFR.

claim of an unavoidable circumstance that occurred in 2008 and advised Appellant that such claims had to be resolved by OAA.<sup>3</sup>

In his appeal to OAA, now before NAO, Appellant renews his claim that an unavoidable circumstance in 2008 prevented him from operating his charter fishing business in 2008. Appellant states that his employer, ██████████ (hereinafter referred to as Employer), temporarily assigned him to its ██████████ (Station) from January 2008 to October 2009 as a member of a transition team that worked to facilitate the transitioning of positions within Station from contract employees to local permanent employees. Appellant states that he has conducted charter fishing on a part-time basis since 1997 and that, once he retires from Employer, he plans to increase his charter fishing business to full-time work to supplement his retirement income.<sup>4</sup>

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.<sup>5</sup> Accordingly, I ordered a hearing on May 4, 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.<sup>6</sup> At the conclusion of the hearing on May 4, 2011, I determined the record contained sufficient information on which to reach final judgment and I closed the record. This decision follows.<sup>7</sup>

## 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, namely 2008.

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<sup>3</sup> Case File, Original File Tab, IAD dated July 21, 2010.

<sup>4</sup> Case File, Pleadings Tab, Appellant's appeal submission.

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

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

<sup>7</sup> 50 C.F.R. §§ 679.43(n)(8) and (k).

## FINDINGS OF FACT

1. Appellant has been a charter fishing operator on a part-time basis since 1997. To obtain charter fishing trips, Appellant primarily relied on referrals from other businesses.<sup>8</sup>
2. Appellant owns a vessel (Vessel), which he has used for his charter fishing business.<sup>9</sup>
3. In 2004, Appellant reported four bottomfish logbook fishing trips to the Alaska Department of Fish and Game (ADF&G). In 2005, Appellant reported five bottomfish logbook fishing trips to ADF&G.<sup>10</sup>
4. From September 2006 through January 2007, Appellant was part of a team that made an initial assessment of Employer's project to transition employees at Station from contract employees to locally hired staff.<sup>11</sup>
5. Later in 2007, Appellant accepted a voluntary reassignment from Juneau to Station to begin work on the project. Assignments were for 90-day periods, but could be extended for additional 90-day periods.<sup>12</sup>
6. Appellant's reassignment began on January 2, 2008 and was extended to November 1, 2009. Although Appellant could have terminated his voluntary reassignment with thirty days notice, he chose not to do so because, as a trainer for Employer and long-term employee, he believed it was his obligation to participate in and complete the project.<sup>13</sup>
7. During Appellant's voluntary reassignment, he regularly returned to Juneau. Appellant's schedule rotated between two weeks at Station followed by two weeks in Juneau.<sup>14</sup>

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<sup>8</sup> Case File, Original File Tab, Appellant's undated letter received by RAM on May 21, 2010; Appellant's hearing Testimony.

<sup>9</sup> Appellant's Hearing Testimony.

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

<sup>11</sup> Appellant's Hearing Testimony.

<sup>12</sup> Appellant's Hearing Testimony.

<sup>13</sup> Appellant's Hearing Testimony.

<sup>14</sup> Appellant's Hearing Testimony.

8. During the two-week periods when Appellant returned to Juneau, Appellant attended to household duties and coached his son's sports teams. During these two-week periods back in Juneau, Appellant did not receive business referrals to conduct charter fishing trips.<sup>15</sup>
9. For the 2008 season, Appellant had not booked any charter fishing trips and had not reported any halibut logbook fishing trips to ADF&G.<sup>16</sup>
10. In 2008, Appellant maintained his licensing as a business owner and charter fishing operator and had maintained his guide license.<sup>17</sup>
11. On March 31, 2010, Appellant signed a completed *Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A* (Application). In Application, Appellant selected 2005 as his "applicant selected year." In Application, Appellant claimed eligibility for a CHP based on an unavoidable circumstance that occurred in 2008 that impacted his ability to operate his charter fishing business in 2008.<sup>18</sup>
12. In the IAD dated July 21, 2010, RAM notified Appellant it denied his application for a CHP. RAM determined Appellant did not qualify for a CHP because he had not met the basic eligibility requirements, namely minimum participation requirements in both periods (2004 or 2005, and 2008). RAM noted that applications for an unavoidable circumstance had to be made pursuant to an appeal of the IAD to OAA.<sup>19</sup>

## 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.<sup>20</sup>

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<sup>15</sup> Appellant's Hearing Testimony.

<sup>16</sup> Case File, Original File Tab, CHP application received by RAM on April 5, 2010; Appellant's Hearing Testimony.

<sup>17</sup> Case File, Original File Tab, Appellant's undated letter received by RAM on May 21, 2010, Pleadings Tab, Appellant's appeal submission; Appellant's Hearing Testimony.

<sup>18</sup> Case File, Original File Tab, CHP application received by RAM on April 5, 2010.

<sup>19</sup> Case File, Original File Tab, IAD dated July 21, 2010.

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

“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.<sup>21</sup>

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.<sup>22</sup>

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 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.<sup>23</sup>

#### 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.

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 the recent participation period, namely 2008.<sup>24</sup>

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<sup>21</sup> 50 C.F.R. § 300.67(f)(1).

<sup>22</sup> 50 C.F.R. § 300.67(f)(5).

<sup>23</sup> 50 C.F.R. § 300.67(g)(1)(i)-(iv).

<sup>24</sup> See generally, 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

The evidence presented, including Appellant's logbook data, reveals that Appellant reported four bottomfish logbook fishing trips in 2004 and five bottomfish logbook fishing trips in 2005.<sup>25</sup> 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.<sup>26</sup> Thus, Appellant satisfied the minimum participation requirements for the qualifying period since he reported five bottomfish logbook fishing trips in 2005. However, Appellant did not report any halibut logbook fishing trips in 2008, which meant he fell short of meeting the minimum participation requirements for the recent participation period.<sup>27</sup> Accordingly, 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 such participation in 2008.

The unavoidable circumstance provision of 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), addressed as follows.

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 preponderance of the evidence presented in this case does not convince me that Appellant had such specific intent. It is true that, for 2008, Appellant maintained his licensing as a business owner and charter fishing operator and had maintained his guide license.<sup>28</sup> It is also true that Appellant owns Vessel, which he has used for his charter fishing business.<sup>29</sup> While this evidence shows some indication of intent, it is not persuasive on the issue.

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<sup>25</sup> Case File, Internal Correspondence, Appellant's logbook data for 2004 and 2005; Appellant's Hearing Testimony.

<sup>26</sup> Case File, Original File Tab, CHP application received by RAM on April 5, 2010; 50 C.F.R. § 300.67(f)(1).

<sup>27</sup> Case File, Original File Tab, CHP application received by RAM on April 5, 2010.

<sup>28</sup> Case File, Original File Tab, Appellant's undated letter received by RAM on May 21, 2010, Pleadings Tab, Appellant's appeal submission; Appellant's Hearing Testimony.

<sup>29</sup> Appellant's Hearing Testimony.

Other evidence in this case shows that from September 2006 through January 2007, Appellant was part of a team that made an initial assessment of Employer's project to transition employees at Station from contract employees to locally hired staff. Later in 2007, Appellant accepted a voluntary reassignment from Juneau to Station to begin work on the project. Assignments were for 90-day periods, but could be extended for additional 90-day periods. In Appellant's case, his reassignment began on January 2, 2008 and was extended to November 1, 2009. Although Appellant could have terminated his voluntary reassignment with thirty days notice, he chose not to do so because, as a trainer for Employer and long-term employee, he believed it was his obligation to participate in and complete the project.<sup>30</sup>

During Appellant's voluntary reassignment, he regularly returned to Juneau. Appellant's schedule rotated between two weeks at Station followed by two weeks in Juneau. During his time in Juneau, Appellant attended to household duties and coached his son's sports teams. Although Appellant was open to charter fishing during the time periods he spent in Juneau, he relied on referrals from other business and had not received business referrals during these periods.<sup>31</sup> In 2008, Appellant had no fishing trips booked.<sup>32</sup>

I have carefully reviewed the evidence in this case. The preponderance of the evidence leads me to conclude that Appellant lacked the requisite specific intent contemplated by 50 C.F.R. § 300.67(g)(1)(i). By his voluntary actions, Appellant removed himself from the charter fishing business in 2008 when he chose to leave the area and work on a long-term project for Employer. In doing so, Appellant caused his own unavailability to pursue work in the charter fishing industry. Further, by his regular absence from the Juneau area, Appellant limited the extent to which he could receive business referrals for charter fishing trips. While Appellant's dedication to Employer's project was commendable, the fact remains that he chose a course of action that compromised his participation in the charter fishing industry and his ability to operate a charter fishing business in 2008. Consequently, I conclude Appellant lacked specific intent to operate a charter halibut fishing business in the recent participation period, 2008. Since resolution of this issue is dispositive, I need not address the remaining elements of 50 C.F.R. § 300.67(g)(1).

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<sup>30</sup> Appellant's Hearing Testimony.

<sup>31</sup> Appellant's Hearing Testimony.

<sup>32</sup> Appellant's Hearing Testimony

## 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) and 300.67(d)(1) since Appellant did not meet the minimum participation requirement for the recent participation period of 2008.

The unavoidable circumstance provisions of the CHLAP regulations do not qualify Appellant to receive a CHP in lieu of such participation since Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(1)(i)-(iv).

## ORDER

The IAD dated July 21, 2010 is upheld. This decision takes effect (30) days from the date issued, on June 22, 2011<sup>33</sup> 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, June 2, 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]

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Christine D. Coughlin  
Administrative Judge

Date Issued: May 23, 2011

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<sup>33</sup> 50 C.F.R. § 679.43(k) and (o).