

(S Vessel), was under repair. Appellant claimed he should be credited with the logbook trips logged in the logbook issued to Leased Vessel's owner (Lessor), ADF&G advised Appellant the logbook had to be issued to Lessor. RAM further acknowledged Appellant's claim that due to unavoidable circumstances, he should receive a CHP. RAM set a June 2, 2010 deadline for Appellant to submit evidence to show he met participation requirements in 2004 or 2005.

On May 28, 2010, Appellant responded to the Notice. Appellant submitted information about Leased Vessel in the form of a marine survey and marine insurance. Appellant also submitted affidavits from clients which Appellant contends show he took four more bottomfish trips than reflected in ADF&G records.³

On September 15, 2010, RAM sent Appellant the IAD which is the subject of this appeal. In the IAD RAM denied Appellant a CHP. RAM reasoned Appellant did not meet the basic participation requirements for one of two periods of participation, namely five or more qualifying charter trips in 2004 or 2005. RAM reiterated that Appellant did meet the participation requirements for 2008. In not crediting Appellant with Lessor's logbook RAM reasoned:

You are claiming that you should be credited with the 2005 logbook fishing trips reported in the logbook issued by ADF&G to [Lessor under his business name]. However, you were not the person that ADF&G issued the business owner license that authorized the logbook fishing trips claimed. Therefore, RAM cannot credit you with those logbook trips.⁴

RAM noted Appellant had the right to appeal the IAD to OAA, and stated only OAA can resolve claims based on unavoidable circumstances.

On November 8, 2010, Appellant timely filed his appeal of the IAD with OAA.⁵ On November 29, 2010, NAO sent Appellant a letter advising Appellant that if he wished to add additional information to the record to support his appeal, he should do so by December 20, 2010. On December 20, 2010, Appellant provided NAO with additional statements in support of his appeal. In his appeal paperwork, Appellant asserts three central arguments: one, that he should be credited with logbook trips he operated on Leased Vessel; two, he should be credited with four charter trips he took with S Vessel but not acknowledged in ADF&G records, and; three, an unavoidable circumstance, namely losing an engine on S Vessel, is a basis for him to receive a CHP.

I have determined that the information in the record is sufficient to render a decision.⁶ Accordingly, I have closed the record and issue this Decision. I acknowledge

³ Original File Tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, signed May 28, 2010, with attachments.

⁴ Original File Tab, IAD, page 3.

⁵ Pleadings Tab, letter dated November 10, 2010 with attachments.

⁶ See 50 C.F.R. § 679.43(g)(2).

Appellant's request for a hearing. The procedural regulations applicable to this appeal, allow me to "[i]ssue a decision on the merits...if the record contains sufficient information on which to reach final judgment."⁷ Further, "A hearing will not be ordered on factual issues that are not determinative with respect to the action requested," and there must be genuine and substantial issues of adjudicative fact to be resolved at a hearing.⁸ There is sufficient evidence in the record to resolve this appeal. Even if I assume the factual issues argued by Appellant were resolved in his favor, as a matter of law, he still cannot prevail. As explained more fully in the Analysis section of this Decision, even if I assume ADF&G misinformed Appellant, and even when I assume or even find as a fact that Appellant took more charter trips than were officially reported, the CHLAP regulations do not provide Appellant a remedy.

ISSUES

I will first decide whether Appellant is eligible for a CHP under what sometimes are referred to as the "basic requirements." I thus must consider:

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

If the answer to that Question is "no," Appellant is not eligible for a permit under the basic requirements and I will consider whether Appellant is eligible for a permit under the unavoidable circumstances provisions of the CHLAP regulations. That analysis involves the following inquiries:

1. Did Appellant prove by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business during 2005?
2. If the answer to Question 1 is "yes," did Appellant prove by a preponderance of the evidence that in 2005 he suffered an "unavoidable circumstance" that "actually occurred."
3. If the answer to Question 2 is "yes," did Appellant prove by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance.
4. If the answer to Question 3 is "no," Appellant has not met his burden of establishing an unavoidable circumstances claim, and I must uphold the IAD.

⁷ 50 C.F.R. § 679.43(g)(2).

⁸ 50 C.F.R. § 679.43(g)(3).

FINDINGS OF FACT

1. Since 1984, Appellant has been a licensed captain.⁹
2. Since 1997, Appellant has operated his charter business.¹⁰
3. In 2005, Appellant operated both S Vessel and Leased Vessel.¹¹
4. Appellant leased Leased Vessel from Lessor.¹²
5. Appellant operated S Vessel between September and November 2005.¹³
6. In the summer of 2005, S Vessel lost an engine and was not operable and therefore Appellant did not use it for charter fishing during most of the summer months.¹⁴
7. In August 2005, Appellant had a new engine installed in S Vessel.¹⁵
8. For 2005, Appellant reported three logbook fishing trips to ADF&G.¹⁶
9. In 2005, Appellant took four charter fishing trips on S Vessel which were not properly reported to ADF&G as bottomfish logbook fishing trips.¹⁷
10. In 2005, Appellant, on behalf of Lessor, reported nine logbook fishing trips to ADF&G.¹⁸
11. For 2008, Appellant reported sixteen logbook fishing trips to ADF&G.¹⁹

⁹ Pleadings Tab, Appellant's affidavit dated March 30, 2010 attached to Appellant's appeal dated November 10, 2010.

¹⁰ Pleadings Tab, Appellant's affidavit dated March 30, 2010 attached to Appellant's appeal dated November 10, 2010.

¹¹ Pleadings Tab, letter dated November 8, 2010 attached to Appellant's appeal dated November 10, 2010.

¹² Pleadings Tab, letter dated November 8, 2010 attached to Appellant's appeal dated November 10, 2010.

¹³ Pleadings Tab, letter dated November 8, 2010 attached to Appellant's appeal dated November 10, 2010; Pleadings Tab, Appellant's affidavit dated March 30, 2010 attached to Appellant's appeal dated November 10, 2010.

¹⁴ Pleadings Tab, email message dated November 2, 2010 attached to Appellant's appeal dated November 10, 2010; Pleadings Tab, Appellant's affidavit dated March 30, 2010 attached to Appellant's appeal dated November 10, 2010; Pleadings Tab, Appellant's statement dated December 16, 2010.

¹⁵ Pleadings Tab, Appellant's affidavit dated March 30, 2010 attached to Appellant's appeal dated November 10, 2010.

¹⁶ Original File Tab, Official Record provided to NAO on May 2, 2011.

¹⁷ Pleadings File Tab, Appellant's Statement dated November 8, 2010, page 2 and Exhibit 6.

¹⁸ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A; Original File Tab, 2005 Lessor Vessel logbook record generated March 4, 2010.

PRINCIPLES OF LAW

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP, including evaluating applications for Charter Halibut Permits.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 nontransferable permits.”²¹

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).²²

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. At a minimum, to be eligible for a permit, an applicant must timely properly report five logbook fishing trips in an official logbook to ADF&G in 2004 or 2005 and 2008. This threshold criteria may be referred to as the basic participation requirements.²³

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to ADF&G in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.²⁴ 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.²⁵

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to 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.²⁶

¹⁹ Original File Tab, Official Record provided to NAO on May 2, 2011.

²⁰ See 50 C.F.R. § 300.67(f)(5); 75 Fed. Reg. 554, 556 (January 5, 2010).

²¹ 50 C.F.R. § 300.67(f)(1).

²² 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

²³ See 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed. Reg. 554, 554-555 (January 5, 2010).

²⁴ 50 C.F.R. § 300.67(f)(4).

²⁵ Available at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

²⁶ 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 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.²⁷

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2005, but does meet the participation requirements for the other period, 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule.²⁸

Under the unavoidable circumstances rule as it applies to this case, an applicant for a CHP may be eligible for a permit if:

- (1) he met the participation requirements for 2008, but not for 2005;
- (2) he specifically intended to operate a charter halibut fishing business in 2005;
- (3) his intent was thwarted by an unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred, and;
- (4) he took all reasonable steps to overcome the unavoidable circumstance.²⁹

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.³⁰

ANALYSIS

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

The Official Record shows Appellant reported three logbook fishing trips to ADF&G for 2005. Since that is less than the five-trip minimum, Appellant cannot prevail under the basic requirements for a permit.

²⁷ 50 C.F.R. § 300.67(f)(3).

²⁸ See 50 C.F.R. § 300.67(g)(2).

²⁹ See 50 C.F.R. § 300.67(g)(2).

³⁰ 50 C.F.R. § 300.67(g)(2)(v).

I understand Appellant believes he should be credited with four more bottomfish trips for 2005 than reflected in the Official Record. Appellant submitted affidavits from anglers in an attempt to meet his burden of showing error in the Official Record. I have read those affidavits as well as the entire record and case file with care. Appellant notes four entries in his logbook where he entered “none” under “bottomfish fishing.” He explains that he took a short cut and wrote “none” instead of zeros.

While I believe Appellant took those trips and have so found, I cannot accept Appellant’s explanation as a basis to change the Official Record. Instructions explaining how to complete the 2004 Saltwater Charter Vessel Logbooks were provided in the logbooks.³¹ With respect to recording bottomfish trips, those instructions provided as follows:

BOTTOMFISH	
Primary Stat Area (Incl. Halibut)	The 6-digit area code where you caught most of the bottomfish on this trip. If you fished for bottomfish, but caught none, write the 6-digit code for the location fished the most time on this date and trip.
Maximum Rods Fished	The maximum number of rods/lines fished when targeting bottomfish (incl. halibut) and targeting salmon and halibut simultaneously. . . .
No. Boat Hours Fished	The number of boat hours that at least one rod/line was targeting bottomfish (incl. halibut) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew. . . . Halibut kept and released is no longer being collected in logbooks, but effort continues to be collected. . . .
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted? Example 1: One Target Salmon	. . . NOTE: If bottomfish are caught when targeting salmon only, record the number of bottomfish in the appropriate columns in the bottomfish section. . . .
Example 3: Two Targets Salmon <u>and</u> Bottomfish (including halibut)	. . . [R]ecord the maximum number of rods and boat hours spent fishing simultaneously for salmon and bottomfish in the appropriate columns in BOTH the salmon and bottomfish sections.

³¹ ADF&G Saltwater Logbooks for the years 2001 through 2011 are displayed on the NMFS, Alaska Region, website at: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

Simultaneously (i.e., mooching)	
Example 4: A combination of any of the above	. . . [R]ecord the maximum number of rods and boat hours spent targeting salmon AND targeting both salmon and bottomfish (including halibut) simultaneously in the appropriate columns in the salmon section, and the maximum number of rod and boat hours spent targeting bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.
SPECIAL NOTES AND INSTRUCTIONS	
“Halibut”	The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to record your effort . Complete the first five columns on the far left of each logbook page and the first three columns under the Bottomfish section (state area, no. rods, and boat hrs).

There were similar instructions for 2005 logbooks. If Appellant had followed the written instructions supplied with the Saltwater Charter Vessel Logbook, he would have properly recorded and reported his charter halibut fishing business activity. He also would have met the five-trip minimum to qualify for a permit.

I recognize Appellant’s argument concerning misinformation from ADF&G about in whose name a logbook could be issued. ADF&G personnel believe their office did not give accurate advice to Appellant concerning logbooks: “[B]eing the first year of licensing it’s possible that [ADF&G] staff were unclear on how to issue a logbook for a vessel when that vessel didn’t belong to the business getting licensed... In [Appellant’s] case, he was told [by ADF&G personnel] he couldn’t get a business license, that the logbook would have to be issued to the business that owned the vessel: [Lessor’s business].”³² While the record does not show if the ADF&G employee from whom Appellant submitted statements is an official who can speak on behalf of the state agency, even if she is not, the statements certainly support Appellant’s arguments on appeal.

However, NMFS has stated quite clearly that it would not use ADF&G misinformation/miscommunication with CHP applicants as a basis to change the Official Record. Indeed, in this appeal, the Official Record is correct. ADF&G issued a logbook pursuant to Lessor’s business license; therefore, when Appellant reported trips to

³² Pleadings Tab, email message dated November 2, 2010 attached to Appellant’s appeal dated November 10, 2010.

ADF&G, he did so on behalf of Lessor, not his business. The Official Record comports with the CHLAP regulations, section 300.67(b)(1)(ii), that provides the person to whom NMFS issues a CHP is the one to whom ADF&G “issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements.”³³ The link between the business license and the logbook is Lessor’s business license under which the logbook relevant to this appeal was issued. It was not Appellant’s business license and logbook issued pursuant to Appellant’s business license.

NAO may not deviate from NMFS’s policy, since there is nothing in the CHLAP regulations that authorizes NAO to modify regulatory requirements or act out of a sense of equity. In order to provide Appellant relief in this appeal, the CHLAP regulations would have to have a provision to by-pass the requirements of section 300.67(b)(1)(ii); there is not. Accordingly, the IAD is consistent with applicable regulations. Therefore, unless Appellant can establish eligibility for a CHP under the unavoidable circumstance provisions of the CHLAP regulations, he will not receive a permit by this Decision.

Did Appellant prove by a preponderance of the evidence that he specifically intended to operate a charter halibut fishing business in 2005?

Appellant did in fact operate a charter fishing business in 2005. Therefore, I conclude that Appellant held the specific intent to operate a charter halibut fishing business in 2005. I turn, then, to the next inquiry in the unavoidable circumstances analysis.

Did Appellant prove by a preponderance of the evidence that in 2005 he suffered an “unavoidable circumstance” that “actually occurred?”

Appellant met his burden of proving one of his engines on his charter vessel, S Vessel, did not work in the Summer of 2005 and was not replaced until August 2005. The breakdown of the charter vessel is typically considered an unavoidable circumstance and I so find here. I do not decide whether the ADF&G communications with Appellant about the logbook to use for Leased Vessel’s charter trips constitute an unavoidable circumstance. The reason I do not decide that, is because even if true, it would not be the cause of Appellant not having sufficient logbook trips to qualify for a permit. That reasoning is explained in more detail below.

Did Appellant prove by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance?

The engine went out on Appellant’s vessel. Generally, a boat breaking down is considered unforeseen, and there is nothing in the record to suggest Appellant could have reasonably foreseen the extent of repair needed for the 2005 charter season. However, that did not thwart Appellant’s operations. Indeed, he states he took charter

³³ 50 C.F.R. § 300.67(b)(1)(ii).

trips that but for his errors in reporting them, would have qualified him for a permit. Similarly, even if the facts surrounding the procurement of the second logbook are accurate, they too did not stop Appellant's operations since he continued to charter fish.

CONCLUSIONS OF LAW

Appellant held the specific intent to operate a charter halibut business during 2005.

In 2005 Appellant suffered an "unavoidable circumstances" that "actually occurred."

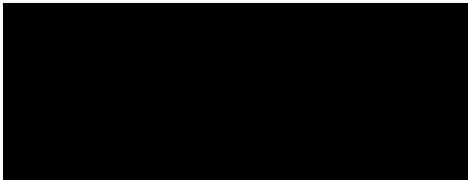
Appellant's specific intent was not thwarted by the unavoidable, unique, unforeseen, and reasonably unforeseeable circumstances.

The IAD is consistent with the CHLAP regulations.

ORDER

The IAD dated September 15, 2010 is upheld. This decision takes effect thirty (30) days from the date issued, December 16, 2011,³⁴ 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 remands, modifies, or reverses 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 November 28, 2011, the tenth day after the date of this Decision. 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.



Eileen G. Jones
Chief Administrative Judge

Date Issued: November 16, 2011

³⁴ 50 C.F.R. § 679.43(k) and (o).