

Appellant he could submit additional evidence to support his claim. RAM received Appellant's submissions on June 15, 2010.⁸

On June 17, 2010, RAM sent Appellant the IAD at issue in this case.⁹ 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. 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 9, 2010, Appellant's appeal to OAA was received and timely filed.¹⁰ 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 improve the operation of his charter fishing business, he applied for a permit to build a dock at his lodge. Appellant states he had to cancel planned trips because he did not receive his permit until September 2008. On August 20, 2010, OAA issued an order acknowledging Appellant's appeal and requesting that any additional documentation or information in support of his appeal be submitted to OAA.¹¹

On May 13, 2011, Contractor held a hearing for this appeal.¹² At the recorded hearing, Appellant and three witnesses testified.¹³ I have reviewed the entire case record, including the audio recording of the hearing, and I have determined that the record contains sufficient information on which to reach a decision. Accordingly, I close the record and issue this decision.¹⁴

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 circumstance claim. In particular, I must determine whether Appellant's circumstance in 2008 was unavoidable, unforeseen and reasonably unforeseeable by Appellant as an owner of a charter halibut fishing business.

⁸ Original File Tab, Charter Halibut Permit Application Instructions for Processing Response 30 Day Notice of Opportunity to Submit Evidence (received by RAM on June 15, 2010).

⁹ Original File Tab, IAD dated June 17, 2010.

¹⁰ Pleadings Tab, Appellant's Letter of Appeal (received by RAM on Aug. 9, 2010).

¹¹ Pleadings Tab, Initial Order dated Aug. 20, 2010.

¹² See 50 C.F.R. § 679.43(g)(3), (n)(1)(ii).

¹³ Appellant's Hearing Testimony dated May 13, 2011.

¹⁴ See 50 C.F.R. § 679.43(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. In 2004, Appellant reported ten bottomfish logbook fishing trips to ADF&G.¹⁵
2. In 2005, Appellant reported twenty-four bottomfish logbook fishing trips to ADF&G.¹⁶
3. In winter 2007, Appellant decided to improve his fishing business by constructing a dock so he could operate his charter fishing business from his lodge directly, rather than transporting clients to another location to launch his vessel.¹⁷
4. In December 2007, Appellant began the process of obtaining the necessary approval to build a personal use dock.¹⁸
5. Near the end of 2007, Appellant ended his vessel moorage agreement with the city.¹⁹
6. Appellant was initially informed that the time for processing his permit would be approximately forty-five to sixty days from the date of filing.²⁰
7. On February 20, 2008, the State of Alaska employee (Employee) responsible for issuing the permit learned that Appellant's dock would be used for a commercial purpose, and thus needed a commercial dock permit rather than a personal use permit.²¹
8. In February 2008, Employee informed Appellant that the commercial permit process would take nine months to one year.²²
9. Appellant owned a twenty-two foot vessel in 2008, which he stored on a boat trailer.²³
10. Appellant held the requisite licenses to operate his charter halibut fishing business in 2008 and insured his vessel for operation in 2008.²⁴

¹⁵ Original File Tab, IAD dated June 17, 2010.

¹⁶ Original File Tab, IAD dated June 17, 2010.

¹⁷ Hearing testimony of Appellant (May 13, 2011).

¹⁸ Pleadings Tab, Appellant's Letter of Appeal (received by RAM on Aug. 9, 2010).

¹⁹ Hearing testimony of Appellant (May 13, 2011).

²⁰ Hearing testimony of Appellant (May 13, 2011).

²¹ Hearing testimony of Employee (May 13, 2011).

²² Hearing testimony of Appellant (May 13, 2011).

²³ Hearing testimony of Appellant (May 13, 2011).

²⁴ Original File Tab, Guide License Lookup 2008 (received by RAM on Mar. 26, 2010); Original File Tab, Charter Policy (received by RAM June 15, 2010).

11. At least two parties had arranged to fish for halibut with Appellant in 2008. Recognizing that the dock permitting process would extend into the summer, Appellant informed both parties that the lodge would not be open so they postponed their trips to another year.²⁵
12. Appellant's commercial use dock permit application was expedited. Appellant's permit was approved on August 19, 2008, and the permit was issued to Appellant on September 9, 2008.²⁶
13. In 2008, Appellant reported no logbook fishing trips to ADF&G.²⁷

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.²⁸

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).²⁹

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;

²⁵ Hearing testimony of Client 1 (May 13, 2011); Hearing testimony of Client 2 (May 13, 2011).

²⁶ Hearing testimony of Employee (May 13, 2011); Letter from Employee to Appellant "Final Finding and Decision" dated Aug. 19, 2008.

²⁷ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A dated Mar. 16, 2010 (received by RAM on Mar. 26, 2010).

²⁸ 50 C.F.R. § 300.67(b)(1)(ii).

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

- 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 2008.³⁰

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 be eligible for a permit.³¹ The unavoidable circumstance provision has a number of requirements. The provision first requires an applicant to demonstrate that he had a specific intent to operate a charter halibut fishing business in 2008.

Appellant testified that he was properly licensed and insured to operate his charter halibut fishing business in 2008. Additionally, two potential clients testified that they were prepared to travel to Alaska to fish with Appellant in 2008. These individuals postponed their plans after Appellant informed them that he could not accommodate them because the dock permitting process was ongoing. I conclude that Appellant held a specific intent to operate his charter halibut fishing business in 2008, at least until it became evident to Appellant that he would not be able to build the dock at his lodge in time to use it during the 2008 halibut fishing season.

The unavoidable circumstance provision next requires that an applicant's intent to participate in the charter halibut fishing business be thwarted by a circumstance that was unique to him, unavoidable, unforeseen, and reasonably unforeseeable. 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 installing a private dock at his lodge. Appellant chose to allow his moorage lease with the city to expire in 2007, at least nine months before receiving a permit to build his dock.

Further, in February 2008, Employee informed Appellant that the commercial dock permitting process may take nine months to a year. However, Appellant continued the permitting process. I conclude that Appellant's circumstance, namely a prolonged commercial dock permitting process, was not unavoidable, unforeseen, or reasonably unforeseeable because Appellant chose to improve his business by building this dock and it was foreseeable that delays could arise to prevent Appellant from fishing for halibut in the 2008 season. Indeed, nine months from February 2008 is October 2008, past the practical end and past the heart of the charter season. Despite knowing his dock would not be ready until sometime after the permit was issued in the Fall or Winter 2008, Appellant proceeded as planned and did not develop alternative plans to run his charter business.

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 circumstance

³⁰ 50 C.F.R. § 300.67(g)(1)(i)-(iv).

³¹ See 50 C.F.R. § 300.67(g)(2).

provision of the CHLAP regulations. In reviewing this case, I have carefully considered Appellant's appeal as well as the entire file. I am aware that Appellant has significantly invested in his lodge and charter fishing business. I am also aware that Appellant's compliance with state law in obtaining a commercial dock permit caused a significant delay and that Appellant is frustrated that some fishing businesses may operate illegally, having only obtained personal use dock permits. 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.

ORDER

The IAD dated June 17, 2010 is upheld. This decision takes effect thirty days from the date issued, November 18, 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 reverses, modifies, or remands 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, October 31, 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.

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date Issued: October 19, 2011