

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0115

DECISION on
RECONSIDERATION

On May 18, 2012, [REDACTED] (Appellant) filed a Motion for Reconsideration. That motion is now before NAO. Appellant filed the motion in response to NAO's Supplemental Decision on Remand. In the Supplemental Decision on Remand, NAO found Appellant was not eligible for a Charter Halibut Permit (CHP).

In the Supplemental Decision on Remand, NAO reasoned Appellant lacked the requisite specific intent to operate a charter fishing business in 2004. Because Appellant lacked specific intent, NAO did not address the issue of whether Appellant's specific intent was "thwarted" by an unavoidable circumstance. Also in the Supplemental Decision on Remand, NAO found Appellant suffered from an unavoidable circumstance in 2004 and Appellant took all reasonable steps to overcome the unavoidable circumstance. Thus, based on the Supplemental Decision on Remand, Appellant met all but two requirements for eligibility for a permit based on the unavoidable circumstances provision of the charter halibut program regulations. Those two regulatory requirements are: one, specific intent to operate a charter halibut fishing business, and; two, an unavoidable circumstance that thwarted the specific intent. Those issues, then, are the focus of Appellant's Motion for Reconsideration and this Decision on Reconsideration.

Appellant carries the burden of proof. That means Appellant must first show by a preponderance of the evidence he specifically intended to operate a charter halibut business in 2004. Upon reflection, I find Appellant has met his burden.

The most significant and persuasive fact is that Appellant actually had a charter operation in 2004. In prior appeals, NAO has stated that operating a business shows specific intent to do so. The wrinkle in this appeal is the fact that, although in operation, Appellant did not function as a for-profit business. Further, Appellant did not have other indicia of operating a for-profit business, such as a business license, guide license, logbooks, and advertising. On the other hand, he did provide charter fishing experiences in 2004 on a vessel purchased for and equipped for chartering, and had a crew member.

In short, the evidence for 2004 shows a charter “operation,” but does it show a charter “business” within the meaning of the charter halibut program regulations. In the Supplemental Decision on Remand, I assumed the term “business” was limited to a for-profit operation. However, upon reflection, I see little reason to limit the term to for-profit enterprises. The term “business” is ambiguous in that a business can be for-profit or not-for-profit. The term is not defined in the charter halibut regulations. Nor does the regulatory history to the proposed rule¹ and final rule provide much insight into NMFS’s understanding of whether the term business encompasses not-for-profit enterprises. Given the ambiguous term, lack of definition of “business,” and absence of insight in the regulatory history, I decline to limit the term “business” to a for-profit enterprise. I find Appellant was operating a non-profit charter fishing business in 2004, and based on the evidence of that, I infer he held the specific intent to operate a charter business in 2004.

To summarize, Appellant has proven that in 2004 he suffered an actual, unavoidable circumstance and he took all reasonable steps to overcome the unavoidable circumstance, as addressed in the Supplemental Decision on Remand. Further, Appellant has proven that in 2004 he held the specific intent to operate a charter fishing business.

The next question is whether that specific intent was “thwarted” by the unavoidable circumstance. Appellant testified that because of his medical condition, he could not qualify for a captain’s license. He also testified that he thought without his own captain’s license he could not obtain a guide license; therefore, he did not take steps to operate other than providing non-profit charter trips. Based on the unique record in this case, I conclude Appellant’s specific intent was thwarted. Appellant has proven he meets all requirements of an unavoidable circumstances claim. Accordingly, he is eligible for a CHP.

The remaining questions are whether the permit should be nontransferable or transferable and for what number of anglers the permit should be endorsed. Under applicable regulations, once an unavoidable circumstances claim is established, there are two methods for determining the type (transferable or nontransferable) of permit and the number of anglers for which the permit will be endorsed. First, an eligible applicant may by “default” receive a nontransferable permit endorsed for four anglers. Second, one may receive a transferable permit if he proves he took at least fifteen logbook trips in 2008 and would likely have taken at least fifteen logbook trips in 2004 had he not experienced an unavoidable circumstance. The permit is endorsed with the highest number of anglers an applicant would have taken had he not experienced an unavoidable circumstance.

In Appellant’s letter initiating the appeal, received by NMFS on April 5, 2010, Appellant stated he was not seeking a “transferable permit to resell but only a limited permit to operate.”² Further, there is little evidence to support a conclusion that he would likely have taken fifteen or more charter halibut trips in 2004 had he not experienced an

¹ That is, the rule for the Charter Halibut Limited Access Program.

² Original File Tab, undated letter sent by fax on April 5, 2010.

unavoidable circumstance. Appellant's personal logbooks reflect charter trips taken in 2005 and 2006. The record does not establish Appellant experienced an unavoidable circumstance in 2005.³ Appellant's logbook reflects some sort of chartering activity on thirteen days in 2005. It is not clear how many of those trips would constitute a logbook fishing trip had they been properly reported. Appellant's logbook reflects some sort of chartering activity on eleven days in 2006. It is not clear how many of those trips would constitute a logbook fishing trip had they been properly reported. In 2007, Appellant properly reported thirteen logbook fishing trips.⁴ In 2008, Appellant properly reported twenty-eight logbook fishing trips.⁵ In 2009, Appellant properly reported twenty-six logbook fishing trips.⁶ In 2010, Appellant properly reported thirty-six logbook fishing trips.⁷

Given the totality of the evidence, I am not persuaded Appellant would have properly reported at least fifteen logbook trips in 2004 had he not suffered from the unavoidable circumstance. It appears Appellant was building his business up, starting in 2005 and 2006 with at best eleven to thirteen charter fishing trips, to again thirteen logbook trips in 2007. By 2008 and again in 2009, and 2010, Appellant was much more active in chartering, providing over twenty-five charter halibut logbook trips each year. Thus, I conclude Appellant has been "ramping up" throughout the years he has been in business. In the early years, 2005-2007, Appellant did not take at least fifteen charter logbook trips for his business. Based on the evidence of Appellant's ramping up, including the early years of less than fifteen logbook trips, I conclude that in 2004, had Appellant not experienced an unavoidable circumstance, he likely would have completed about ten logbook trips, but not fifteen or more.

The last question is the number of anglers for which Appellant's permit should be endorsed. The number of anglers for which a permit is endorsed is determined by finding the largest number of anglers an appellant would have taken on charter logbook trips had he not experienced the unavoidable circumstance, in this case, occurring in 2004.⁸ In 2006, Appellant's personal logbook shows chartering activity involving one trip of six anglers. In each year, 2007 through 2010, Appellant had at least one logbook trip on which he had six anglers on board.⁹ Based on this evidence, I conclude that in 2004, had Appellant not experienced an unavoidable circumstance, he would have taken at least one logbook fishing trip with six anglers on board.

³ Supplemental Decision on Remand.

⁴ Pleadings File Tab, 2007 Saltwater Charter Logbook Data page.

⁵ Pleadings File Tab, 2008 Saltwater Charter Logbook Data page.

⁶ Pleadings File Tab, 2009 Saltwater Charter Logbook Data pages (2).

⁷ Pleadings File Tab, 2010 Saltwater Charter Logbook Data page. Although I highlight the logbook evidence here, in reaching my conclusion concerning Appellant's likely trips in 2004 and the entire decision, I have reviewed and considered the entire record.

⁸ See 50 C.F.R. § 300.67(g)(2)(v)(B); 74 Fed. Reg. 18178, 18187 (2009).

⁹ Pleadings File Tab, 2007-2010 Saltwater Charter Logbook Data pages.

The Supplemental Decision on Remand, except for the analysis of issue one on pages 2-3, Conclusions of Law 1, 4 and 5, and the Order section, is hereby incorporated into this Decision on Reconsideration.

CONCLUSIONS of LAW

1. Appellant held the specific intent to operate a charter halibut fishing business in 2004.
2. Appellant's intent to operate a charter halibut fishing business properly licensed under Alaskan law was thwarted by an unavoidable circumstance in 2004.
3. Appellant did not prove he would have taken at least fifteen logbook trips in 2004 had he not experienced an unavoidable circumstance; therefore Appellant is eligible for a nontransferable permit.
4. The largest number of anglers Appellant would likely have taken on charter fishing trips in 2004 was six; therefore, Appellant's nontransferable permit shall be endorsed for six anglers.

ORDER

The IAD dated October 22, 2010 is vacated. NAO's Decision dated October 19, 2011 is vacated.

RAM is directed to issue Appellant a nontransferable CHP for Area 3A with an angler endorsement of six.

This decision takes effect thirty days from the date issued, July 26, 2012,¹⁰ 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 reverse, remand, or modify this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

Appellants 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, July 6, 2012. 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.

¹⁰ 50 C.F.R. § 679.43(k) and (o).



Eileen G. Jones
Chief Administrative Judge

Date Issued: June 26, 2012