



those years. The ISD responded that they could not produce specific data on trips captained by [REDACTED] because the logbooks had not been issued to him during the years of inquiry.

On Friday, October 1, 2010, pursuant to 50 C.F.R. § 679.43(n)(8),<sup>2</sup> I closed the record. This decision follows.

### ISSUES

1. Does [REDACTED] satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of participation in the charter halibut fishery in the qualifying years (2004, 2005)?
2. Did [REDACTED] hold a specific intent to operate a charter halibut fishing business in the 2005 charter halibut fishing season?

### FACTUAL BACKGROUND<sup>3</sup>

[REDACTED] began his career as a licensed charter fishing captain in 2003, when he began working for [REDACTED]. Because there was “no room for growth” at [REDACTED], he began working for [REDACTED] in 2004. As a captain for [REDACTED], he was “in line” to purchase a vessel from the company and to transition to an independent charter fishing business doing work under contract with [REDACTED]. It was his desire to do that, but [REDACTED] chose the captain to whom they would sell the vessels on the basis of the relative seniority of their captains.

In the fall of 2004, [REDACTED] wanted to expand by selling one of its vessels to its most experienced captain, but that captain was not immediately certain that he wished to take advantage of the offer. Because of the captain’s hesitation, [REDACTED] entertained hopes that he could purchase the vessel instead, and work as an independent contractor for [REDACTED] during the 2005 season. However, the captain with more longevity finally decided to purchase the vessel.

Accordingly, on May 10, 2005, [REDACTED] signed an Employment Agreement with [REDACTED].<sup>4</sup> The Agreement called for [REDACTED] to work as a charter boat captain, carrying client anglers identified and booked by [REDACTED]. The contract could be terminated by either party “at any time with or without notice and with or without cause.” However, the Agreement also contained a non-competition clause, which prohibited [REDACTED] for a period of two years after the termination of the Agreement, from

<sup>2</sup> 50 C.F.R. § 679.43(n)(8): “The appellate officer will close the record and issue a decision after determining that the information on the record is sufficient to render a decision.”

<sup>3</sup> Unless I note otherwise, I have based these facts on [REDACTED] letters to RAM (March 24, 2010), and [REDACTED] letters to OAA (received on August 17, 2010, and September 27, 2010). I found the statements in those documents credible.

<sup>4</sup> [REDACTED] was directly associated with [REDACTED]

“own(ing), manage(ing), operate(ing) . . . any charter fishing business (within sixty miles from Sitka) that is similar to or competes with [REDACTED] or any charter operator with which [REDACTED] contracts, including [REDACTED]. . .”<sup>5</sup>

Following the end of the 2005 season, and the expiration of his Employment Agreement, [REDACTED] states that “I proceeded to buy a boat in 2006 and have been running it every season since.”<sup>6</sup>

## ANALYSIS

To qualify for a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License. Once issued, the license would have authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>7</sup> The charter halibut regulation specifies a minimum participation requirement in two periods: a qualifying period, which is the sport fishing season for halibut in either 2004 or 2005,<sup>8</sup> and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>9</sup> There are both non-transferable permits and transferable permits available, both of which have distinct regulatory requirements for eligibility.

To receive a non-transferable charter halibut permit, the ADF&G license holder must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005),<sup>10</sup> and a minimum of five halibut logbook fishing trips in the recent participation period (2008).<sup>11</sup>

To receive a transferable charter halibut permit, the license holder must have reported a minimum of fifteen logbook fishing trips with the same vessel in the qualifying period (2004, 2005)<sup>12</sup> and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).<sup>13</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirements in either (but not both) participation period.<sup>14</sup> If an applicant meets a minimum participation trip level in the qualifying period (2004/2005), but not in the recent participation

<sup>5</sup> Employment Agreement – [REDACTED] (May 10, 2005).

<sup>6</sup> Letter, [REDACTED] to NMFS (RAM) (March 24, 2010).

<sup>7</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>8</sup> 50 C.F.R. § 300.67(c)(6) (“*Qualifying period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005”).

<sup>9</sup> 50 C.F.R. § 300.67(c)(7) (“*Recent participation period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008.”).

<sup>10</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A).

<sup>11</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

<sup>12</sup> 50 C.F.R. § 300.67(d)(1)(i).

<sup>13</sup> 50 C.F.R. § 300.67(d)(1)(ii).

<sup>14</sup> 50 C.F.R. § 300.67(g).

period, the applicant may seek to meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008),<sup>15</sup> and if the applicant satisfied the requirements of the unavoidable circumstance regulation for the recent period, the applicant may be treated as though the applicant participated in the recent period.

Similarly, if the applicant meets the minimum participation trip level in the recent participation period (2008), but not in the qualifying period (2004, 2005), the applicant may still qualify for a permit if the applicant can meet the requirements of the unavoidable circumstance regulation.

**The unavoidable circumstance regulation.** The unavoidable circumstance regulation that applies to applicants who participated in the recent participation period but not in the qualifying period, 50 C.F.R. § 300.67(g)(2), provides:

(2) *Qualifying period.* An applicant for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period, may receive one or more permits if the applicant proves paragraphs (g)(2)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period;

(ii) The applicant's specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

(iii) The circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(iv) 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.

(v) If the applicant proves the foregoing ( *see* paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:

(A) One non-transferable permit with an angler endorsement of four (4); or

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have

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<sup>15</sup> 50 C.F.R. § 300.67(g)(1).

taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

For an applicant's claim to be successful, the applicant must satisfy each requirement of the unavoidable circumstance regulation.

**50 C.F.R. § 300.67(g)(2)(i): Did [REDACTED] have a specific intent to operate a charter halibut fishing business in the recent participation period? No.**

If an applicant did not hold a specific intent to operate a charter halibut business in the year for which the applicant claims that an unavoidable circumstance thwarted such intent (in this case, 2005), the applicant cannot meet the remaining requirements of the regulation. That is, if an applicant did not have a specific intent to participate, the applicant cannot show that a circumstance with particular characteristics – unavoidable, unique, unforeseen and reasonably unforeseeably – thwarted the applicant's specific intent.

With respect to [REDACTED] intention before the 2005 season, it is clear that he had a desire to operate his own charter halibut fishing business in 2005. However, because of his lack of seniority with [REDACTED], he did not have the opportunity to purchase a vessel and enter the fishery as an owner/operator. Additionally, in May 2005, he voluntarily signed an Employment Agreement by which he agreed to work as a charter captain for [REDACTED]. One clause of the Agreement provided that he could not start his own business and operate it within sixty miles of Sitka for a period of two years following the termination of the Agreement.

Under these circumstances, I conclude that [REDACTED] did not form a specific intent to participate in the charter halibut fishing business as a business owner in 2005.

I therefore conclude that [REDACTED] does not meet the other requirements of the unavoidable circumstance regulation. This is because, absent a specific intent to participate, he cannot show that such intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable.

As a result, [REDACTED] does not satisfy the requirements in the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2). Therefore, he does not meet the minimum qualifications for a charter halibut permit

#### FINDINGS OF FACT

1. [REDACTED] made no reports of halibut logbook fishing trips as a halibut charter fishing business owner during the qualifying period (2004, 2005).

2. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2005.

#### CONCLUSIONS OF LAW

1. An applicant must satisfy all the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in 2005 in order for NMFS to treat the applicant as though the applicant participated in the fishery in 2005.
2. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2005 within the meaning of 50 C.F.R. § 300.67(g)(2).
3. [REDACTED] does not satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of participation in the charter halibut fishery in 2005.
4. [REDACTED] does not satisfy the minimum qualifications for a charter halibut permit.

#### DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This decision takes effect on January 3, 2011 unless by that date the Regional Administrator orders review of the Decision.

The 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, December 13, 2010. 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]  
Philip J. Smith  
Administrative Judge

Reviewed and Approved:

[REDACTED]  
Eileen Jones  
Chief Administrative Judge