



## ANALYSIS

To receive a charter halibut permit, an applicant must satisfy the requirements set out in federal regulation.<sup>4</sup> In sum, these require that the applicant is the “individual or non-individual entity to which the State of Alaska, Department of Fish and Game (ADF&G) issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements,”<sup>5</sup> and that, pursuant to that license, at least five groundfish logbook fishing trips were reported in 2004 or 2005, and at least five halibut logbook trips in 2008.<sup>6</sup> The years 2004 and 2005 are defined as the qualifying period,<sup>7</sup> and the year 2008 as the recent participation period.<sup>8</sup>

The regulations have an exception to meeting the participation requirements in both the qualifying period and the recent participation period. If a person demonstrates that s/he held a specific intent to participate during the qualifying period or during the recent participation period, and would have done so but for an unavoidable circumstance that thwarted that intent, the agency will provide credit to the applicant even though the actual log book trips were not taken.<sup>9</sup>

So it is with [REDACTED]. According to the official charter halibut record,<sup>10</sup> developed from data provided by ADF&G logbook records, [REDACTED] reported 16 groundfish logbook trips in 2004 and seven groundfish logbook trips in 2005. However, there is no record that [REDACTED] reported any halibut logbook trips in 2008. Therefore, [REDACTED] only regulatory option to qualify for a permit rests with satisfying the requirements of the unavoidable circumstance provision.

[REDACTED] claimed that, indeed, unavoidable circumstances had in fact thwarted his intent to participate in the charter halibut fishery during 2008. He stated: “While out on a test fishing trip in early June [REDACTED] blew the starboard engine that had to be replaced . . . [REDACTED] was in the water one day . . . and had be pulled out for repairs on the starboard shaft, coupler, and fiberglass shaft log. . . . [REDACTED] was not put back into the water until Sept. 19<sup>th</sup> 2008. . . .”<sup>11</sup>

The regulation providing for unavoidable circumstances claims [50 C.F.R. § 300.67(g)] can be characterized as setting a series of requirements for an applicant. Summarized, these are:

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<sup>4</sup> 50 C.F.R. §§ 300.61, 300.66, and 300.67.

<sup>5</sup> 50 C.F.R. § 300.67(b)(1)(ii).

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

<sup>7</sup> 50 C.F.R. § 300.67(b)(1)(ii)(f)(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>8</sup> 50 C.F.R. § 300.67(b)(1)(ii)(f)(7): “*Recent participation period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008.”

<sup>9</sup> 50 C.F.R. § 300.67(g).

<sup>10</sup> 50.C.F.R. § 300.67.(f)(5): “Official charter halibut record means the information prepared by NMFS on participation in Charter halibut fishing in Area 2C and Are 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.”

<sup>11</sup> [REDACTED] letter to RAM (March 11, 2010).

- The applicant must have had a specific intent to operate a charter halibut fishing business in the recent participation period [50 C.F.R. § 300.67(g)(1)(i)];
- the applicant’s specific intent must have been thwarted by a circumstance that was: unavoidable, unique to the owner of the halibut charter business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business [50 C.F.R. § 300.67(g)(1)(ii)(A) through (C)];
- the circumstance that prevented the applicant from operating a charter halibut fishing business must have actually occurred [50 C.F.R. § 300.67(g)(1)(iii)]; and
- the applicant must have taken all reasonable steps to overcome the circumstance [50 C.F.R. § 300.67(g)(1)(iv)].

As explained below, [REDACTED] satisfies all of the elements of the unavoidable circumstance requirement.

**1. Did [REDACTED] have a specific intent to participate in the 2008 charter halibut fishery? Yes.**

To demonstrate his intent to conduct charter activities during 2008, [REDACTED] submitted the following evidence:<sup>12</sup>

- An invoice from [REDACTED], dated January 24, 2008, for seasonal moorage (4/1/08 – 10/1/08) for [REDACTED]
- an invoice, dated May 28, 2008, from [REDACTED] indicating expenses for internet and yellow page advertisements;
- a copy of Alaska Business License [REDACTED] [REDACTED] valid from January 4, 2007, through December 31, 2008;
- a copy of the “2008 Saltwater Charter Logbook and Vessel Registration” for the vessel [REDACTED] issued by the ADF&G; and,
- a copy of the “Sport Fishing Guide and Business” license for [REDACTED] issued by the ADF&G, validated on April 30, 2008.

Taken together, this documentation demonstrates by that [REDACTED] had taken all necessary steps to conduct his charter business throughout 2008. If he had no such intent, he would have had no need for the moorage, licenses, and logbooks, and he would not have advertised for customers. I find by a preponderance of the evidence that [REDACTED] held a specific intent to participate in the charter halibut fishery in 2008.

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<sup>12</sup> Summarized herein; the complete documents are included in the written record.

**2. Was [REDACTED] intent to participate thwarted by an event, or series of events, that were unexpected, unforeseen, and reasonably unforeseeable? Yes.**

In support of his claim that unavoidable circumstances occurred that thwarted his specific intent to operate his halibut charter fishing business, [REDACTED] provided the following documentation:

- An invoice from [REDACTED] showing that the [REDACTED] vessel, the [REDACTED] was hauled out (removed from the water) on June 23, 2008, and re-launched on July 22, 2008;
- another invoice from [REDACTED] showing the [REDACTED] was again hauled out on July 24, 2008, and not re-launched until September 19, 2008;
- an invoice from [REDACTED] (# 2676), dated July 9, 2008, billing for a used [REDACTED] engine and associated parts, priority mail shipping charges, and labor for installation;
- an invoice from [REDACTED] (# 549), dated July 18, 2008, billing for parts and labor for wiring the batteries on the [REDACTED];
- another invoice from [REDACTED] (# 2838), dated September 8, 2008, billing for a shaft seal, bushing, sea cock, and engine alignment; and,
- an invoice from [REDACTED] (# 02950), dated August 25, 2008, billing for materials and labor costs associated with disassembling the starboard shaft log and replacing it with a new one.

[REDACTED] had taken the requisite steps to prepare to operate his charter halibut fishing business in early 2008. While engaging in a test fishing trip in early June of 2008, his starboard engine failed, a circumstance that surely thwarted his intent to operate his charter halibut fishing business. His vessel was hauled, a replacement engine was installed, and the vessel was re-launched on July 22, 2008.

But that did not end his woes. When the vessel was relaunched, it was discovered that it was necessary to effect repairs on the starboard shaft, coupler and shaft log. On July 24, after only one day in the water, the vessel was hauled once again. While out of the water, repairs were made and the shaft log was replaced. The vessel was not relaunched until September 19.

In consideration of the information in the record, I find by a preponderance of the evidence that the above circumstances, amply documented in the record, thwarted [REDACTED] intent to operate his halibut charter fishing business in 2008.

**3. Did the circumstances that thwarted [REDACTED] intention to participate in the charter halibut fishery actually occur? Yes.**

The documentation of the circumstances, as summarized above, is entirely consistent with [REDACTED] contention that these circumstances occurred. The documentation is derived from multiple sources and is consistent. Therefore, I find that the circumstances actually occurred.

**4. Did [REDACTED] take all reasonable steps to overcome the circumstance? Yes.**

When confronted with engine problems, [REDACTED] immediately had the vessel hauled and worked on. The engine was replaced and the vessel was re-launched. [REDACTED] had every reason to believe that the problem was solved; however, it became apparent almost immediately that there were serious problems with the starboard engine's shaft, coupler, and fiberglass shaft log. Again, [REDACTED] hauled the vessel and arranged for the necessary repairs to be accomplished. By arranging for the vessel to be hauled and repaired, I find that, [REDACTED] took all reasonable steps to overcome the circumstances that thwarted his intent to participate in the charter halibut fishing business during 2008.

Based on the above findings, I conclude that [REDACTED] meets all the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).

Because [REDACTED] satisfies the unavoidable circumstances requirements, he is to be issued a charter halibut permit. The regulation provides that a person that meets the participation requirement in the qualifying period (2004/2005), and the unavoidable circumstance requirements for the recent participation period (2008), will receive the number and type of permits, and the angler endorsement on the permit, that result from application of the participation criteria to the applicant's actual participation in the qualifying period.<sup>13</sup>

According to the official charter halibut record, [REDACTED] reported 15 or more groundfish logbook fishing trips to the Alaska Department of Fish and Game in 2004 with one vessel. This satisfies the participation requirement for a transferable charter halibut permit.<sup>14</sup> Additionally, the permit will be endorsed for the highest number of charter vessel anglers reported on any trips during the qualifying period, which, in [REDACTED] case, is six.<sup>15</sup> Finally, the permit will be endorsed for use in the halibut management area in which the qualifying charter halibut fishing activity occurred which, in [REDACTED] case, is Area 2C.<sup>16</sup>

I conclude that [REDACTED] qualifies for a transferable charter halibut permit, endorsed for six clients, for use in halibut management Area 2C.

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<sup>13</sup> 50 C.F.R. § 300.67(g)(1)(v). These criteria are in 50 C.F.R. § 300.67(b), (c) & (d).

<sup>14</sup> 50 C.F.R. § 300.67(d)(1)(i) & (2).

<sup>15</sup> 50 C.F.R. § 300.67(e).

<sup>16</sup> 50 C.F.R. § 300.61: "Area 2C includes all waters off Alaska that are east of a line running 340° true from Cape Spencer Light (58° 11' 54" N. lat., 136° 38' 24" W. long.) and south and east of a line running 205° true from said light."

### FINDINGS OF FACT

1. [REDACTED] held a specific intent to operate his charter halibut fishing business during the recent participation period (2008).
2. [REDACTED] intent was thwarted by two circumstances that were unique to his business (i.e., unique to his vessel), unavoidable, unforeseen and reasonably unforeseeable.
3. The unavoidable circumstances actually occurred.
4. [REDACTED] took all reasonable steps to overcome the circumstances.
5. But for the unavoidable circumstances he experienced, [REDACTED] would have operated his charter halibut fishing business during the recent participation period (2008).

### CONCLUSIONS OF LAW

1. [REDACTED] meets all the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).
2. [REDACTED] qualifies for a transferable charter halibut permit, endorsed for six clients, for use in halibut management Area 2C.

### DISPOSITION AND ORDER

The denial [REDACTED] application for a charter halibut permit, as set out in the IAD that is the subject of this appeal, is VACATED. RAM is ordered to issue a transferable charter halibut permit, endorsed for six clients, for use in halibut management Area 2C to [REDACTED]. This Decision takes effect on August 30, 2010, 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 by this Office not later than 4:30 p.m., Alaska time, on August 6, 2010, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more 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]  
Philip J. Smith  
Administrative Judge

Reviewed and Approved:

[REDACTED]  
Mary Alice Morken  
Chief Administrative Judge (acting)