



on which to decide his appeal, that the appeal met the requirements for a hearing in 50 C.F.R. § 679.43(g)(3), and that, pursuant to 50 C.F.R. § 679.43(n)(1)(ii), an oral hearing was the best way to resolve the appeal.

A prehearing conference was held with [REDACTED] on July 23, 2010, which resulted in an order scheduling a hearing for September 1, 2010.

I conducted the hearing. At the hearing, [REDACTED] testified in person. At the end of the hearing, I closed the record. I conclude that the record has sufficient information on which to reach final judgment as required by 50 C.F.R. § 679.43(g).

#### STATEMENT OF FACTS

An applicant must prove a fact by a preponderance of evidence in the record. I find, by a preponderance of evidence in the record, the following facts.

On December 1, 1999, [REDACTED]

[REDACTED] continued his charter fishing business throughout 2004 and 2005, reporting 43 bottomfish logbook trips in 2004 and 16 such trips in 2005.<sup>8</sup> During this time, and for three years afterward, [REDACTED] however, those efforts were not successful, even though [REDACTED]

Following the 2005 season, [REDACTED] essentially abandoned his business. He testified that he “turned over” his business to another guide, including his client list and his future bookings. In

<sup>5</sup> Letter to [REDACTED] D. (December 1, 1999).

<sup>6</sup> Letter “To Whom it May Concern” from [REDACTED] D. (October 7, 2003).

<sup>7</sup> Letter to [REDACTED] from Aetna Insurance Patient Management Department (October 15, 2003)

<sup>8</sup> Official Charter Halibut Record, 50 C.F.R. § 300.67(f)(5) (“*Official charter halibut record* means the information prepared by NMFS on charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.”)

<sup>9</sup> Medical Records [REDACTED] (January 2, 2004).

addition to transfer of the business and its inventory of clients, his vessel was also included in the arrangement.<sup>10</sup> He did not renew his business license in 2006 – 2008 because of his condition and associated illnesses.<sup>11</sup>

researched surgical possibilities throughout 2005 and 2006, e.<sup>12</sup> On April 13, 2008, wrote another letter, stating “ ” On April 30, 2008, was informed that an insurance claim for the surgery would be approved. The operation was performed

Following his surgery, As a result,

In 2009, returned to the charter business, serving as a captain for another charter business for a period of five days. He has not yet reactivated his own business, as he is awaiting a decision on this appeal.<sup>14</sup>

#### ISSUES

1. Does satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(1) with respect to his lack of participation in the charter halibut fishery in 2008?
2. Does meet the minimum qualifications for a charter halibut permit?

#### 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 that authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>15</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 2004 and 2005,<sup>16</sup> and a recent

<sup>10</sup> Testimony of Administrative Hearing (September 1, 2010).

<sup>11</sup> Letter to Office of Administrative Appeals from (June 17, 2010).

<sup>12</sup> Letter to NMFS from (March 18, 2010).

<sup>13</sup> *Id.*

<sup>14</sup> Letter to NMFS Office of Administrative Appeals from (June 17, 2010).

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

<sup>16</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”).

participation period, which is the sport fishing season for halibut in 2008.<sup>17</sup> The regulation specifies two levels of minimum participation: one for a non-transferable permit and one for a transferable permit.

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>18</sup> and a minimum of five halibut logbook fishing trips in the recent participation period (2008).<sup>19</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>20</sup> and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).<sup>21</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirements in one, but not both, participation periods.<sup>22</sup> If an applicant meets a minimum participation trip level in the qualifying period (2004/2005), but not in the recent participation 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>23</sup> If the applicant meets 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 seek to meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period (2004, 2005). If the applicant meets the unavoidable circumstance regulation for the qualifying period, the applicant may be treated as though the applicant participated in the qualifying period.

**The unavoidable circumstance regulation.** The unavoidable circumstance regulation that applies to applicants who participated in the qualifying period but not in the recent participation period, 50 C.F.R. § 300.67(g)(1), provides:

(1) *Recent participation period.* An applicant for a charter halibut permit that meets the participation requirement for the

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<sup>17</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>18</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A).

<sup>19</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

<sup>20</sup> 50 C.F.R. § 300.67(d)(1)(i).

<sup>21</sup> 50 C.F.R. § 300.67(d)(1)(ii). All fifteen trips within each period must be with one vessel but the applicant can have used a different vessel in the qualifying period and the recent participation period.

<sup>22</sup> 50 C.F.R. § 300.67(g).

<sup>23</sup> 50 C.F.R. § 300.67(g)(1).

qualifying period, but does not meet the participation requirement for the recent participation period, may receive one or more permits if the applicant proves paragraphs (g)(1)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation 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 recent participation period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(1)(i) through (iv) of this section), the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in paragraphs (b), (c), (d), (e) and (f) of this section.

To satisfy the requirements of the unavoidable circumstance regulation, an applicant must meet each requirement in the regulation with respect to the applicant's lack of participation in 2008. Put another way, an applicant must satisfy each requirement of the unavoidable circumstance regulation for NMFS to treat the applicant as though the applicant participated in 2008.

**50 C.F.R. § 300.67(g)(1)(i). Did [REDACTED] have a specific intent to operate a charter halibut fishing business in the recent participation period? No.**

The "specific intent" clause is the linchpin of the unavoidable circumstance regulation. If an applicant did not hold a specific intent to operate a charter halibut business in a specific year, the applicant cannot meet the remaining requirements of the regulation. 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 2008 season, it is clear that he had not formed an intent to operate a charter halibut fishing business. [REDACTED] health caused him to effectively abandon the fishery following the conclusion of the 2005 season. As [REDACTED] stated in his June 17, 2010, letter to NMFS: "I did not renew my business license in 2006 – 2008, because of

these health problems.” Additionally, he sold his business, including his boat. There is no evidence in the record that he took any steps at all to prepare to reopen his business before the 2008 season. It was not until April 2008 that he discovered that his insurance would cover the costs [REDACTED]. Under these circumstances, it would simply not have been possible for him to have formed a specific intent to participate in 2008.

I find and conclude that [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2008. I therefore conclude that [REDACTED] does not meet the other requirements of the unavoidable circumstance regulation because if he did not have a specific intent, he cannot show that his specific intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable. Similarly, he cannot show that the circumstance that thwarted his specific intent actually occurred or that he took all reasonable steps to overcome the circumstance that thwarted his specific intent.

As a result, [REDACTED] does not satisfy the requirements in the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1), with respect to his lack of participation in the charter halibut fishery in 2008, and does not meet the minimum qualifications for a charter halibut permit

#### FINDINGS OF FACT

1. [REDACTED] made no reports of halibut logbook fishing trips during the recent participation period (2008).
2. [REDACTED] had effectively abandoned the fishery by the beginning of the 2006 sport halibut season.
3. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2008.

#### CONCLUSIONS OF LAW

1. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2008 within the meaning of 50 C.F.R. § 300.67(g)(1).
2. An applicant must satisfy all the requirements of the unavoidable circumstance regulation with respect to the applicant’s lack of participation in 2008 in order for NMFS to treat the applicant as though the applicant participated in the fishery in 2008.
3. [REDACTED] does not satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(1) with respect to his lack of participation in the charter halibut fishery in 2008.
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 November 8, 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 at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, October 18, 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.

  
Philip J. Smith/  
Administrative Judge

Reviewed and approved:

  
Mary Alice McKeen  
Administrative Judge