

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL APPEALS OFFICE

In Re Application of )  
 ) Appeal No. 10-0010  
 )  
 ) DECISION  
 )  
 Appellant ) April 29, 2011  
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 \_\_\_\_\_ )

STATEMENT OF PROCEEDINGS

This appeal is before the National Appeals Office (NAO), a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, Maryland, and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with processing appeals that are on file with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and recommend a decision on this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On July 6, 2010, Appellant prepared a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on June 30, 2010. RAM is the administrative unit within the Alaska Region of the National Marine Fisheries Service (NMFS) that implements federal regulations that limit access to fisheries. RAM denied Appellant's application for a charter halibut permit under the Charter Halibut Limited Access Program (CHLAP).<sup>1</sup> Appellant may appeal the IAD because it directly and adversely affects his interest, as required by 50 C.F.R. § 679.43(b).

Appellant stated in his application, and in his appeal, that he was not able to meet the participation requirements for a charter halibut permit in the qualifying years (2004, 2005) because his clients fished for halibut and salmon simultaneously, presumably by trolling, and not by bottom fishing.<sup>2</sup> According to the Appellant, the logbook provided no way to record and

<sup>1</sup> The Charter Halibut Limited Access Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67, available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/regs/summary.htm>.

<sup>2</sup> The term "Trolling" refers to a method of fishing in which a line with a baited hook is moved slowly through the water, with the bait set at a certain depth in order to catch pelagic fish in the water column (see: [http://www.how-to-fish.com/trolling\\_for\\_salmon\\_how\\_to.htm](http://www.how-to-fish.com/trolling_for_salmon_how_to.htm)). "Bottom Fishing" is a technique for catching bottom-feeding fish (halibut, ling cod, etc.) by which the baited hook is lowered to the bottom of the water column from a stationery vessel and is generally immobile. A third technique, "Mooching," refers to lowering a baited hook to the ocean bottom, then slowly retrieving it through the water column before lowering it again; this is done while the vessel is moving slowly from

report the halibut that were caught while fishing simultaneously for salmon. Appellant consulted with personnel from the Alaska Department of Fish and Game (ADF&G), who allegedly informed him that he did not need to record the halibut effort on saltwater logbook fishing reports. Appellant characterized this situation as an unavoidable circumstance within the meaning of the charter halibut unavoidable circumstance regulation. Appellant did not request a hearing on his claim, and no hearing was held. I did not hold a hearing to determine whether Appellant was misadvised by ADF&G because, even assuming the facts as stated by Appellant are true, he does not meet the requirements in federal regulation for a charter halibut permit.<sup>3</sup>

Subsequent to his initial written appeal, Appellant submitted a video presentation (DVD) showing halibut rising to the surface pursuing bait set and trolled (or, perhaps, “mooched”), as if to target salmon. Following receipt of the video, I closed the record on September 27, 2010. The record contains sufficient information on which to reach a final judgment, as required by 50 C.F.R 679.43(g)(2).

### ISSUES

1. Does Appellant’s situation satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of reported participation in the charter halibut fishery in the qualifying period (2004, 2005)?
  - a) Did Appellant hold a specific intent to operate a charter halibut fishing business in the qualifying period?
  - b) Was Appellant’s specific intent to operate a charter halibut fishing business in the qualifying participation period thwarted by a circumstance that was unavoidable?

### SUMMARY OF DECISION

The IAD is AFFIRMED. An applicant’s receipt of inappropriate advice from the Alaska Department of Fish and Game (ADF&G) to not report his fishing trips as bottomfish logbook fishing trips in 2004 and 2005 is not an unavoidable circumstance within the meaning of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(2)(ii)(A).

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tidal or surface wind action, and is (for instance) a technique used when fishing simultaneously for halibut and salmon (*see*: [http://www.how-to-fish.com/mooching\\_for\\_salmon\\_how\\_to.htm](http://www.how-to-fish.com/mooching_for_salmon_how_to.htm)).

<sup>3</sup> 50 C.F.R. § 679.43(g)(3)(iv).

## FINDINGS OF FACT<sup>4</sup>

I find, by a preponderance of evidence in the record, the following facts:

1. During the qualifying period (2004, 2005), Appellant's clients caught many halibut while charter fishing with Appellant.<sup>5</sup>
2. Appellant's method of fishing was unusual, in that he used the trolling technique while pursuing both halibut and salmon simultaneously. Appellant's clients did not bottomfish for halibut.
3. Appellant intended to comply with all reporting requirements in 2004 and 2005.
4. To do that, Appellant sought guidance from ADF&G personnel. Appellant stated that he was told that, under the circumstances, he was not required to report his halibut harvest or effort on his ADF&G Salt Water Logbook.
5. Appellant did not report his halibut fishing activities in bottomfish logbooks supplied by ADF&G in either 2004 or 2005.
6. Appellant reported twenty-six halibut logbook fishing trips during the recent participation period (2008).<sup>6</sup>

## CHARTER HALIBUT LIMITED ACCESS PROGRAM

Under the Charter Halibut Limited Access Program [CHLAP], NMFS will award permits to applicants based on their reported charter fishing trips during two periods: [1] the *qualifying* period, which is the sport fishing period for halibut in 2004 and 2005,<sup>7</sup> and [2] the *recent participation* period, which is the sport fishing period for halibut in 2008.<sup>8</sup>

NMFS will issue two types of charter halibut permits: transferable and non-transferable. A transferable permit may be transferred to another person, upon NMFS's approval of an application to transfer. A non-transferable permit becomes invalid upon the demise of the permit holder.

If the applicant reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the

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<sup>4</sup> Unless otherwise noted, these findings are derived from Appellant's letter to RAM (May 17, 2010) and his appeal to OAA (July 6, 2010).

<sup>5</sup> Appellant's letter to RAM (February 22, 2010); Appellant's letter to OAA (July 6, 2010); and, Appellant's DVD showing halibut harvest using trolling gear (received August 31, 2010).

<sup>6</sup> Official Charter Halibut Record [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 Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits].

<sup>7</sup> 50 C.F.R. § 300.67(c)(6).

<sup>8</sup> 50 C.F.R. § 300.67(c)(7).

recent participation period (2008), the applicant will receive a non-transferable charter halibut permit.<sup>9</sup> The trips must have been reported under the applicant's Alaska Department of Fish & Game [ADF&G] Business Owner Licenses.

If the applicant reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in one year in the qualifying period (2004, 2005), and a minimum of fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008), the applicant will receive a transferable charter halibut permit.<sup>10</sup> The trips must have been reported under the applicant's ADF&G Business Owner Licenses.

The regulations provide another way for an applicant to meet the minimum reporting requirements. Under the unavoidable circumstance provision [50 C.F.R. § 300.67(g)], if an applicant can show that an unavoidable circumstance thwarted the applicant's specific intent to participate (i.e., to submit bottomfish or halibut logbook fishing trip reports) during either the qualifying period or the recent participation period (but not both), NMFS may treat the applicant as though the applicant had actually participated and made such reports.

Appellant premises his claim on 50 C.F.R. § 300.67(g)(2), the section that applies to applicants who participated during the recent participation period, but not the qualifying period. To prevail, he must prove: [1] that he held a specific intent to operate a charter halibut fishing business during the qualifying period; [2] that his intent was thwarted by a circumstance that was unique to him, unexpected, unforeseen and reasonably unforeseeable; [3] that the circumstance actually occurred; and, [4] that he took all reasonable steps to overcome the circumstance.

**1. Does Appellant satisfy the first requirement of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2), with respect to his lack of reported participation in the charter halibut fishery during the CHLAP qualifying period? Yes.**

The first requirement of the unavoidable circumstance regulation sets out the precondition for claiming an unavoidable circumstance in the qualifying period; namely, that the applicant "meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period."<sup>11</sup>

According to the official charter halibut record, Appellant reported twenty-six halibut logbook fishing trips in 2008. Appellant therefore meets the participation requirements for a transferable permit in the recent participation period. However, he reported no bottomfish logbook fishing trips in either 2004 or 2005; therefore, Appellant did not meet the participation requirements for the qualifying period. Thus, Appellant may be eligible for a permit under the unavoidable circumstance provisions of the regulation. His claim is analyzed below.

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<sup>9</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

<sup>10</sup> 50 C.F.R. § 300.67(d)(1)(i) & (ii). All fifteen trips within each period must be with one vessel but the applicant may have used a different vessel in the qualifying period and the recent participation period.  
50 C.F.R. § 300.67(d)(1)(iii).

<sup>11</sup> 50 C.F.R. 300.67(g)(2).

**a) 50 C.F.R § 300.67(g)(1)(i): Did Appellant hold a specific intent to operate his charter halibut fishing business during the qualifying period (2004, 2005)? Yes.**

Appellant demonstrated his specific intent to operate his charter halibut fishing business during the 2004 and 2005 sport halibut fishing seasons by actually fishing for, and harvesting, halibut during those seasons. In support of that fact, Appellant submitted a petition, as follows: “The following people and charter business’s saw [REDACTED] with up to six clients catch and retain halibut in the 2004 and 2005 seasons, or bring them in for processing.” The petition was signed by fifty witnesses.<sup>12</sup> Based on the evidence of record, I conclude that Appellant had a specific intent to operate his charter halibut fishing business in both years in the qualifying period, 2004 and 2005.

**b) 50 C.F.R. 300.67(g)(2)(ii)(A): Was Appellant’s intent to operate a charter halibut fishing business thwarted by a circumstance that was unavoidable? No.**

Although Appellant took clients out halibut fishing in 2004 and 2005, he did not report those trips as bottomfish logbook fishing trips to ADF&G. The minimum participation requirement is not merely that the applicant was, in fact, charter halibut fishing but also that the applicant *reported* the charter halibut fishing in logbooks issued by ADF&G.<sup>13</sup>

The unavoidable circumstance claimed by Appellant is not an unavoidable circumstance that prevented him from actually charter halibut fishing but an unavoidable circumstance that he contends prevented him from reporting the charter halibut fishing.

Appellant thought the instructions for reporting his halibut harvests would not allow for accurately recording his halibut fishing activities. He then contacted ADF&G and asked how he should report his halibut fishing effort and harvest. In response, he states he was informed by an official of the State of Alaska that specifically reporting halibut caught and released was not required. He argues in this appeal that that advice constitutes an unavoidable circumstance.

Even if I assume Appellant’s statements about the content of the communication from ADF&G are true, erroneous advice from an ADF&G official is not an unavoidable circumstance within the meaning of 50 C.F.R. § 300.67(g)(2)(ii)(A). Instructions explaining how to complete the 2004 and 2005 Saltwater Charter Vessel Logbook<sup>14</sup> were provided to charter operators with the

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<sup>12</sup> Petition (2 pages) accompanying Appellant’s letter to the Restricted Access Management Program (May 17, 2010).

<sup>13</sup> Federal regulation 50 C.F.R. § 300.67(b)(1)(ii)(A) provides that NMFS will issue a charter halibut permit to a person who “[r]eported five (5) bottomfish logbook fishing trips or more during one year of the qualifying period.” (emphasis added). Bottomfish logbook fishing trips “means a logbook fishing trip in the qualifying period *that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information:* The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.” 50 C.F.R. § 300.67(f)(2)(emphasis added).

<sup>14</sup> ADF&G Saltwater Logbooks for the years 2001 through 2011 are displayed on the NMFS, Alaska Region, web site at: <http://alaskafisheries.noaa.gov/appeals/default.htm>

blank logbooks. With respect to recording halibut those instructions provided as follows (emphasis in original):

BOTTOMFISH	
Primary Stat Area <b>(Incl. Halibut)</b>	The 6-digit area code where you caught most of the bottomfish on this trip. If you fished for bottomfish, but caught none, write the 6-digit code for the location fished the most time on this date and trip.
Maximum Rods Fished	The maximum number of rods/lines fished when targeting bottomfish ( <b>incl. halibut</b> ) and targeting salmon and halibut simultaneously. . . .
No. Boat Hours Fished	The number of boat hours that at least one line was targeting bottomfish ( <b>incl. halibut</b> ) and targeting salmon and bottomfish simultaneously. . . .
Fish Kept & Released	The total number of fish kept and released by client and crew . . . Halibut kept and released is no longer being collected in logbooks, but <b>effort continues to be collected</b> . Halibut kept and released data is collected through established survey programs.
NOTES AND EXAMPLES – RODS, BOAT HOURS	
What species group was targeted?  <b>Example 3:</b> Two Targets Salmon <u>and</u> Bottomfish <b>(including halibut)</b> Simultaneously (i.e., mooching)	. . . record the maximum number of rods and boat hours spent fishing simultaneously for salmon and bottomfish in the appropriate columns in BOTH the salmon and bottomfish sections.
<b>Example 4:</b>  A combination of any of the above	. . . record the maximum number of rods and boat hours spent targeting salmon AND targeting both salmon and bottomfish ( <b>including halibut</b> ) simultaneously in the appropriate columns in the salmon section, and the maximum number of rod and boat hours spent bottomfish AND targeting both salmon and bottomfish simultaneously in the appropriate columns in the bottomfish section.
SPECIAL NOTES AND INSTRUCTIONS	
“Halibut”	The number of halibut kept and released is no longer requested in the logbook. However, we ask that you continue to record your effort.

When it published the Final Rule implementing the CHLAP, NMFS considered the issue of bottomfish reporting, and that some participants may have received confusing or conflicting advice from ADF&G officials. After due consideration of comments received on the Proposed Rule, NMFS stated:

If a business owner did not comply with specified reporting requirements, then the fishing trip will not be counted as either a bottomfish logbook fishing trip during the qualifying period or a halibut logbook fishing trip during the recent participation period for purposes of this rule. Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.<sup>15</sup>

If the Appellant had followed the written instructions supplied with the 2004 and 2005 ADF&G Saltwater Charter Vessel Logbooks, his charter halibut fishing business activity would have been properly recorded and reported. Under the circumstances, I conclude that Appellant's failure to properly report his halibut fishing business activities in 2004 and 2005 is not an unavoidable circumstance within the meaning of federal regulation 50 C.F.R. § 300.67(g)(2)(ii)(A).

#### CONCLUSIONS OF LAW

1. Appellant meets the participation requirements for a transferable permit in the recent participation period (2008).
2. Appellant held a specific intent to operate his charter halibut fishing business in both years in the qualifying period (2004, 2005).
3. Appellant's failure to submit bottomfish logbook fishing trip reports in 2004 and 2005 was not the result of an unavoidable circumstance within the meaning of 50 C.F.R. § 300.67(g)(2)(ii)(A).
4. Incomplete, or otherwise inappropriate, advice from an ADF&G official that deviated from the written instructions accompanying the ADF&G Saltwater Charter Vessel Logbooks is not an unavoidable circumstance within the meaning of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(2)(ii)(A).

#### DISPOSITION AND ORDER

The denial of Appellant's application for a charter halibut permit, as set out on the June 30, 2010, IAD that is the subject of this appeal, is **AFFIRMED**. Appellant is not qualified to receive a charter halibut permit by initial issuance. This Decision is effective on May 31, 2011, unless by that date the Regional Administrator orders review of the Decision.

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<sup>15</sup> Final Rule, 75 Fed. Reg. 554, 592 (January 5, 2010).

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 Standard Time, on May 9, 2011, the tenth day after the issuance of 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.<sup>16</sup>



Philip J. Smith/  
Administrative Judge

Reviewed and Approved:



Eileen G. Jones/  
Chief Administrative Judge

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<sup>16</sup> The NAO PROCEDURES FOR FILING MOTIONS FOR RECONSIDERATION are published on the NMFS Alaska Region web site: <http://alaskafisheries.noaa.gov/appeals/reconsiderationpolicy.htm>