

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0045

DECISION [corrected\*]

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STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA Headquarters in Silver Spring, Maryland, and maintains an office in the NMFS Alaska Region. NAO is the successor to the Office of Administrative Appeals, Alaska Region (OAA), and is charged with deciding appeals that were filed with OAA. NAO decides these appeals pursuant to the procedure established in federal regulation 50 C.F.R. § 679.43.

On September 7, 2010, [REDACTED] (Appellant) filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on July 16, 2010.<sup>1</sup> [REDACTED] (Husband) and [REDACTED] (Wife) operate the business together.

In the IAD, RAM evaluated Appellant's application for a permit under the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup> RAM is the administrative unit within the NMFS Alaska Region that initially evaluates applications for limited access permits. Appellant seeks a permit for International Pacific Halibut (IPHC) Regulatory Area 2C, which is roughly Southeast Alaska.<sup>3</sup> All trips in support of this application occurred in Area 2C.

In the IAD, RAM denied Appellant's application for a charter halibut permit. RAM determined that Appellant met the minimum participation requirement for a transferable permit during the qualifying period (2004, 2005) because Appellant reported fifteen or

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<sup>1</sup> Letter from Appellant to OAA (received Sep. 7, 2010).

<sup>2</sup> The Charter Halibut Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67. These regulations and the appeal regulation at 50 C.F.R. § 679.43 are available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/reggs/summary.htm>.

<sup>3</sup> For precise coordinates of Area 2C, see 50 C.F.R. § 300.61.

\* The correction is in the Order on page 10. Consistent with Analysis in Issue 3 and Conclusion of Law 4, RAM is ordered to issue Appellant a transferable permit endorsed for four anglers, not six.

more bottomfish logbook fishing trips with one vessel in either 2004 or 2005.<sup>4</sup> Appellant actually reported more than fifteen trips in both 2004 (twenty-three trips) and 2005 (thirty-four trips) with [REDACTED] (VESSEL).<sup>5</sup> RAM determined that Appellant did not meet the minimum participation requirement in the recent period (2008) for a transferable or non-transferable permit because he did not report five or more halibut logbook fishing trips in 2008.

Appellant states he is eligible for a permit based on the unavoidable circumstance regulation because he specifically intended to operate a charter halibut fishing business in 2008 but was thwarted from doing that by an unavoidable circumstance, namely Wife's elderly mother had a recurrence of [REDACTED] and Husband and Wife needed to assist Wife's mother and be available to assist her. A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.<sup>7</sup> Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

The prior administrative judge held a hearing on February 18, 2011.<sup>8</sup> I have listened to a recording of the hearing and have carefully considered the entire record in this appeal. I conclude that the record contains sufficient information upon which to decide this appeal.<sup>9</sup> I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant meets the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1), with respect to his insufficient participation in 2008, and should be awarded a transferable charter halibut permit for use in IPHC Area 2C with an angler endorsement of four.

## ISSUES

1. Does Appellant satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), which is the unavoidable circumstance regulation for persons that did not participate in the charter halibut fishery in the recent participation period (2008)?
2. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), should his permit be designated as transferable or non-transferable?
3. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), what is the proper angler endorsement on the permit?

<sup>4</sup> 50 C.F.R. § 300.67(d)(1)(i)(participation requirement in qualifying period for a transferable permit).

<sup>5</sup> Summary of Official Record (dated created Jan. 27, 2010).

<sup>6</sup> Statement of Appellant with Application (Feb. 28, 2010); Letter from Appellant to Philip Smith (prior administrative judge) (March 10, 2011); Testimony of Appellant (Feb. 18, 2011).

<sup>7</sup> 50 C.F.R. § 300.67(g) ("Unavoidable circumstances claims must be made pursuant to paragraph (h)(6) of this section . . ."); 50 C.F.R. § 300.67(h)(6) ("An applicant that receives an IAD may appeal to the Office of Administrative Appeals (OAA) pursuant to § 679.43 of this title."). See Final Rule, 75 Fed. Reg. 554, 597 (Jan. 5, 2010)(Change 19 from Proposed Rule).

<sup>8</sup> Order Scheduling Hearing (Jan. 31, 2011).

<sup>9</sup> 50 C.F.R. § 679.43(g)(2).

## FINDINGS OF FACT

1. Husband and Wife began operating a charter fishing business in Southeast Alaska with VESSEL in 2003.<sup>10</sup> They reside in California and operate their charter business in the summer months out of [REDACTED] (Community), a very small community in Southeast Alaska located on Chichagof Island. Husband and Wife own a home there.<sup>11</sup>
2. Husband and Wife primarily get clients for their charter trips through reservations from lodges in the area.<sup>12</sup>
3. In 2004, Husband reported twenty-three bottomfish logbook fishing trips to ADF&G with VESSEL pursuant to the ADF&G Business Owner License issued to him for that year.<sup>13</sup>
4. In 2005, Husband reported thirty-four bottomfish logbook fishing trips to ADF&G with VESSEL pursuant to the ADF&G Business Owner License issued to him for that year.<sup>14</sup>
5. The highest number of anglers that Husband reported on a bottomfish logbook fishing trip in 2004 and in 2005 was four.<sup>15</sup>
6. In 2006, Husband took a total of fifty-two trips, which consisted of halibut charters, salmon charters, whale watching, nature watching – with VESSEL.<sup>16</sup> The record does not contain the precise number that were charter halibut trips but a substantial number of those trips were charter halibut trips.<sup>17</sup>
7. In 2007, Husband took twenty-one halibut logbook fishing trips with VESSEL.<sup>18</sup>
8. On March 20, 2008, Husband obtained a combined ADF&G Business Owner/Guide License. This ADF&G license authorized him to operate a sport fish charter

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<sup>10</sup> Testimony of Husband (Feb. 18, 2011); State of Alaska Commercial Fisheries Entry Commission (CFEC) Public Lookup Database, <http://www.cfec.state.ak.us/plook> visited Oct. 15, 2011. The database has charter vessel information up until 2004 and shows Husband had a charter vessel beginning in 2003.

<sup>11</sup> Testimony of Husband (Feb. 18, 2011).

<sup>12</sup> Testimony of Husband (Feb. 18, 2011).

<sup>13</sup> Summary of Official Record (created Jan. 27, 2010).

<sup>14</sup> Summary of Official Record (created Jan. 27, 2010).

<sup>15</sup> Summary of Official Record (created Jan. 27, 2010).

<sup>16</sup> Statement of Appellant (June 3, 2010) with list of Charter operations by year with total number of trips, by total number of anglers and gross receipts; Testimony of Appellant (Feb. 18, 2011).

<sup>17</sup> Statement of Appellant (June 3, 2010). Appellant's pattern of bottomfish and halibut logbook fishing trips in 2004, 2005, 2007 and 2008 supports his testimony regarding 2006.

<sup>18</sup> Official Record List of Trips by Appellant, attached to Memo from NMFS Computer Specialist to Mary Alice McKeen (Oct. 17, 2011).

business in Alaska in 2008 and to offer guide services to anglers.<sup>19</sup> Husband also had a United States Coast Guard (USCG) Operator's License authorizing him to operate a charter vessel, which was valid until April 28, 2011.<sup>20</sup>

9. As of March 20, 2008, Husband had a liability insurance policy in effect for the operation of his charter halibut fishing business. On Husband's application for his ADF&G Business Owner License for 2008, Husband identified the insurance policy in effect at the time of application by providing the name of his insurance company, the number, and the effective dates of the policy.<sup>21</sup>
10. Wife is the primary family person to help care for her mother and her mother's finances and to assist mother with medical issues. Mother [REDACTED] in 2000, [REDACTED] Mother's condition was stabilized [REDACTED]
11. In January 2008, [REDACTED]  
[REDACTED] Mother was ninety years old in 2008.
12. Mother had lived with Husband and Wife at times in the past. [REDACTED]  
[REDACTED] Wife was assisting Mother and her health providers with medical decisions and medical issues.<sup>24</sup>
13. Husband and Wife usually come to Alaska at the end of May/early June to prepare to operate their charter business for the season. Husband and Wife decided not to come to Alaska at that time in 2008 so they could assist Mother and be available to provide more assistance to her, if that became necessary.<sup>25</sup>

<sup>19</sup> License 12395, ADF&G Sport Fish Business Owner/Guide License (Issued 3/20/2008), attached to an email from Dora Sigurdsson, ADF&G Sport Fish Research and Technical Services, to Appellant (Nov. 23, 2010).

<sup>20</sup> Application for ADF&G Sport Fish Business Owner/Guide License 12395 (March 19, 2008), attached to an email from Dora Sigurdsson, ADF&G Sport Fish Research and Technical Services, to Appellant (Nov. 23, 2010). The application and the license are part of the same document.

<sup>21</sup> Application for ADF&G Sport Fish Business Owner/Guide License 12395 (March 19, 2008). Proof of this insurance is required by the State of Alaska before it will issue a Sport Fish Business Owner License. AS (Alaska Statutes) 16.40.260(a)(2).

<sup>22</sup> Testimony of Husband (Feb. 18, 2011).

<sup>23</sup> Testimony of Husband (Feb. 18, 2011); Submission by Appellant: Medical records of mother (Jan. 29, 2008)(records confirm mother's date of birth, [REDACTED])

Testimony of Husband (Feb. 18, 2011).

<sup>25</sup> Testimony of Husband (Feb. 18, 2011); Official Record List of Trips (first trip in 2004 was June 11, 2004; first trip in 2005 was June 4, 2005).

14. By the end of July, Mother's condition had stabilized to the point where Husband and Wife felt they could try to operate their business for some of the 2008 season. They flew to Juneau on July 26, 2008, went to Community and obtained an ADF&G Saltwater Charter Logbook and Vessel Registration (Logbook [REDACTED]) for VESSEL.<sup>26</sup>
15. Husband and Wife took a party whale watching on August 1. They received some bookings from local lodges and took four halibut logbook fishing trips in August on August 6, 8, 13 and 15. They had bookings for trips on August 9, 10, 11 and 12 but those trips were cancelled.<sup>27</sup>
16. Appellant timely applied for a charter halibut permit on March 10, 2010.<sup>28</sup>

### PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the Charter Halibut Limited Access Program (CHLAP), which is codified at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67. The Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.<sup>29</sup>

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>30</sup>

An applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,<sup>31</sup> and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>31</sup>

An applicant must prove different levels of participation for a non-transferable permit and for a transferable permit. To receive a non-transferable charter halibut permit, an applicant must have 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 recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License for that year.<sup>32</sup>

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in one year in

<sup>26</sup> Testimony of Husband (Feb. 18, 2011); Official Record List of Trips by Appellant (Oct. 17, 2011)(shows ADF&G Logbook number).

<sup>27</sup> Official Record List of Trips by Appellant (Oct. 17, 2011); Testimony of Husband (Feb. 18, 2011).

<sup>28</sup> Application (dated Feb. 28, 2010, received Mar. 10, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

<sup>29</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

<sup>30</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>31</sup> 50 C.F.R. § 300.67(f)(6)-(7).

<sup>32</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B); 50 C.F.R. § 300.67(f)(2)(definition of bottomfish logbook fishing trip); 50 C.F.R. § 300.679(f)(3)(definition of halibut logbook fishing trip).

the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License.<sup>33</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.<sup>34</sup> If an applicant meets a minimum participation trip level in the qualifying period (2004 or 2005), but not the recent participation period (2008), the applicant may claim to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).<sup>35</sup>

Similarly, if an applicant meets a minimum participation trip level in the recent participation period (2008), but neither year in the qualifying period (2004 or 2005), the applicant may seek to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period.<sup>36</sup>

For an applicant that did not participate in the recent period, section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), the unavoidable circumstance regulation, requires that the applicant prove the following:

Section (i): the applicant had a specific intent to operate a charter halibut fishing business in the recent period (2008);

Section (ii): the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, unforeseen and reasonably unforeseeable;

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

Section (iv): the applicant took all reasonable steps to overcome the circumstance.

## ANALYSIS

### **1. Does Appellant satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), which is the unavoidable circumstance regulation for persons that did not participate in the charter halibut fishery in the recent participation period (2008)?**

I analyze the requirements in sections (i) through (iv).

<sup>33</sup> 50 C.F.R. § 300.67(d)(1).

<sup>34</sup> 50 C.F.R. § 300.67(g).

<sup>35</sup> 50 C.F.R. § 300.67(g)(1).

<sup>36</sup> 50 C.F.R. § 300.67(g)(2).

**Section (i). Did Appellant have a specific intent to operate a charter halibut fishing business in the recent participation period (2008)?**

A specific intent is more than a general desire or interest to operate a charter halibut fishing business. An applicant who had a specific intent to operate a charter halibut fishing business will typically have all the essential elements of a charter business in place, or a realistic plan to have all the essential elements of a charter business in place, by the charter halibut season. An applicant with a specific intent will usually have taken concrete steps to operate a charter halibut business for the period in question.

At the beginning of the 2008 season, Husband and Wife had everything in place to operate a charter fishing halibut business in 2008 as they had operated their business since 2003. They had the required ADF&G Business Owner License. They had procured the insurance legally required by the State of Alaska to operate a sport fishing business. Husband had an ADF&G Guide License and a USCG Operator's License and could provide guide services. Appellant's were returning to the same small community where they had run their charter halibut business since 2003. They had the same source of clients, namely referrals from local lodges. They had the same vessel. From these facts, I conclude that Appellant had a specific intent to operate a charter halibut business in 2008.

**Section (ii). Was Appellant's intent to operate a charter halibut fishing business thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable?**

The evidence in the record convinces me that Husband and Wife's intent to operate a charter halibut business in 2008 was thwarted by Wife's elderly mother's medical condition, specifically [REDACTED] the fragile and uncertain state of her mother's physical condition and their need to assist Wife's mother. The record contains evidence of no other circumstance that intervened and prevented Husband and Wife from going to Alaska at the end of May to operate their charter halibut business, as they had done in prior years. The physical condition of Wife's mother, and Husband and Wife's need to assist her mother and be available to assist her mother, is a circumstance that is unavoidable, unique, unforeseen and reasonably unforeseeable

**Section (iii). Did the circumstances that thwarted Appellant's intent to operate a charter halibut fishing business actually happen? Yes.**

Wife's mother experienced serious health problems and she could not deal with them without assistance from Wife. [REDACTED]

**Section (iv). Did Appellant take all reasonable steps to overcome the circumstances? Yes.**

I conclude that Husband and Wife took all reasonable steps to overcome the circumstance. After they could not come to Alaska in 2008 at the end of May, Husband and Wife maintained all the elements of the charter business in place: the required licenses, the required insurance, ownership of their vessel, their residence in Community. Since they did not know if they would be able to operate at all that season, they did not take any advance reservations.

As soon as wife's mother's condition appeared to stabilize, they flew to Juneau and went to Community to try to salvage the season. They took four halibut trips and took bookings for other trips but the other trips cancelled. I conclude they took all reasonable steps to overcome the circumstance of the serious illness of wife's mother and to operate a charter halibut business in 2008 at a level sufficient to receive a permit.

**2. Should Appellant's permit be designated as transferable or non-transferable?**

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1) with respect to why the applicant did not participate in the recent period, section (v) governs whether the applicant will receive a transferable or non-transferable permit. Section (v) states:

(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.

The criteria in paragraphs [50 C.F.R. § 300.67] (b), (c), (d), (e) and (f) are the criteria that applies to an applicant's actual participation. Since this type of applicant, by definition, did not participate in the recent period or participated at an insufficient level, NMFS can only apply this criteria to an applicant's participation in the qualifying period. Section (v) thus directs NMFS to award the applicant a transferable or non-transferable permit by substituting the applicant's actual participation in the qualifying period for the applicant's lack of participation in the recent period.<sup>37</sup>

The participation requirement for a transferable permit in the qualifying period is fifteen bottomfish logbook fishing trips with the same vessel in 2004 or 2005, whichever year

<sup>37</sup> Proposed Rule, 75 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009) ("Assuming that the applicant is able to successfully demonstrate that it meets the criteria for an unavoidable circumstance, NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that *substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.*") (emphasis added).

the applicant chooses as the applicant-selected year.<sup>38</sup> Appellant chose 2005.<sup>39</sup> Appellant took thirty-four bottomfish logbook fishing trips with VESSEL in 2005. NMFS substitutes Appellant's participation in the qualifying period for his participation in the recent period. I conclude Appellant's permit should be designated as transferable.

### 3. What is the proper angler endorsement on Appellant's permit?

If an applicant proves an unavoidable circumstance in the qualifying period, section (v) of 50 C.F.R. § 300.67(g)(1), quoted above, directs NMFS to determine the angler endorsement based on the highest number of anglers that the applicant took on any bottomfish logbook fishing trip in 2004 or 2005, except that no permit will have an angler endorsement of less than four.<sup>40</sup> Further, for the applicant that meets the actual participation requirement in both periods, the angler endorsement on the permit is the highest number of anglers that the applicant took on a bottomfish logbook fishing trip in the qualifying period (2004, 2005).<sup>41</sup> Finally, no permit can have an angler endorsement of less than four.<sup>42</sup>

Appellant's highest number of anglers on a bottomfish logbook fishing trip in 2004 or 2005 was four anglers.<sup>43</sup> Thus, whether by virtue of section (v), quoted above, or by the standard rule for angler endorsements or by the default rule, the proper angler endorsement on Appellant's permit is four.

## CONCLUSIONS OF LAW

1. Appellant meets the minimum participation requirement for a transferable charter halibut permit in the qualifying period in 50 C.F.R. § 300.67(d)(1)(i), namely he reported fifteen or more bottomfish logbook fishing trips from the same vessel in 2004 or 2005.
2. Appellant satisfies sections (i) through (iv) of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1).
3. If an applicant satisfies sections (i) through (iv) of the unavoidable circumstance regulation, 50 C.F.R. 300.67(g)(1), with respect to the applicant's lack of participation in the recent period, section (v) directs NMFS to award the applicant a non-transferable permit or a transferable permit based on the applicant's level of participation in the qualifying period.

<sup>38</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A).

<sup>39</sup> It would not matter if Appellant chose 2004 as the applicant-selected year because Appellant also took fifteen or more trips in 2004.

<sup>40</sup> 50 C.F.R. § 300.67(e)(5).

<sup>41</sup> 50 C.F.R. § 300.67(e)(1) (angler endorsement on applicant's first transferable permit). No permit, however, will have an angler endorsement less than four. 50 C.F.R. § 300.67(e)(5).

<sup>42</sup> 50 C.F.R. § 300.67(e)(5).

<sup>43</sup> Email from NMFS Computer Specialist to Mary Alice McKeen (Jan. 19, 2011).

4. The angler endorsement on Appellant's permit should be four.
5. Appellant qualifies for a transferable charter halibut permit, endorsed for four anglers, for use in IPHC Area 2C.

#### ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue a transferable charter halibut permit, endorsed for four anglers, for use in IPHC Regulatory Area 2C to Appellant. This decision takes effect on January 5, 2012, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(k), (o).

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 Standard Time on December 16, 2011, the tenth day after the date of this Decision. 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.

  

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Mary Alice McKeen  
Administrative Judge

Date issued: December 13, 2011