

Business Owner License in 2004 or 2005 with one vessel.⁶ The minimum participation requirement in the recent participation period is fifteen halibut logbook fishing trips reported under the applicant's ADF&G Business Owner License with one vessel in 2008.⁷

RAM determined that Appellant met the participation requirement in the qualifying period for a transferable permit but not the participation requirement in the recent period. In the recent period (2008), according to the official charter halibut record, Appellant reported seven halibut logbook fishing trips with the same vessel,⁸ which is less than the fifteen required for a transferable permit.

Appellant argues that it should receive a transferable permit because it would have taken fifteen halibut trips in 2008, but for the regulation that NMFS adopted on May 28, 2008, which changed the daily bag limit for halibut for anglers on charter halibut trips to one halibut per day. Appellant further states that NMFS should award permits based on an applicant's average number of trips between 1998 to 2008 and that, over that period, Appellant averaged fifteen trips a year.⁹

Appellant can file this appeal because the IAD directly and adversely affected its interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that it meets the requirements for a transferable charter halibut permit. I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue a transferable charter halibut permit.¹⁰ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision.

ISSUE

Has Appellant alleged grounds that would authorize NMFS to award it a transferable charter halibut permit instead of a non-transferable charter halibut permit?

SUMMARY

The IAD is affirmed. Appellant qualifies to receive a non-transferable charter halibut permit. Appellant has not stated grounds that would authorize NMFS to award it a transferable charter halibut permit. Appellant cannot receive a transferable charter halibut permit based on a claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g). Appellant cannot receive a transferable charter halibut permit based on its average participation in the charter halibut fishery from 1998 to 2008 because the charter halibut regulation, at 50 C.F.R. § 300.67(d), requires NMFS to issue transferable charter halibut permits based on an applicant's participation in the qualifying period (2004, 2005) and the recent participation period (2008).

⁶ 50 C.F.R. § 300.67(d)(1)(i).

⁷ 50 C.F.R. § 300.67(d)(1)(ii).

⁸ IAD at 3 (Oct. 8, 2010).

⁹ Letter from Appellant to RAM (Dec. 3, 2010).

¹⁰ 50 C.F.R. § 679.43(g)(3)(iv).

FINDINGS OF FACT

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

1. Appellant has operated a charter halibut fishing business since 1994.¹¹
2. In 2005, Appellant took fifteen or more bottomfish logbook fishing trips with [REDACTED] (VESSEL).¹²
3. In 2008, Appellant took seven halibut logbook fishing trips with VESSEL. According to the official charter halibut record, Appellant took seven halibut fishing trips.¹³ Appellant stated that he took eight logbook fishing trips in 2008, but did not submit the ADF&G printout for 2008, although he did submit it for other years.¹⁴
4. Appellant filed a timely application for a charter halibut permit on March 26, 2010.¹⁵

CHARTER HALIBUT LIMITED ACCESS PROGRAM REGULATIONS

NMFS must issue charter halibut permits in accord with the regulations implementing the Charter Halibut Limited Access Program (CHLAP). These regulations are found at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67.

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.¹⁶ NMFS based the official charter halibut record on data from ADF&G that linked each logbook fishing trip reported to ADF&G with the ADF&G Business Owner License that authorized the trip.¹⁷

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁸ A person can be an individual, a corporation, firm or association.¹⁹

¹¹ Letter from Appellant to RAM (Mar. 25, 2010).

¹² IAD at 2 – 3 (Oct. 8, 2010)(Appellant reported more than fifteen trips in 2005). Appellant states that it took seventeen trips in 2008, but did not attach Logbook Data from that year. Letter from Appellant to RAM (Mar. 25, 2010). Since RAM acknowledges that Appellant took at least fifteen trips in 2005, I did not make a finding as to the exact number of trips that Appellant took in 2005.

¹³ IAD at 2 – 3 (Oct. 8, 2010) (refers to the contents of the official charter halibut record).

¹⁴ Letter from Appellant to RAM (received June 21, 2010) with ADF&G printout for Logbook Data from 1999, 2000, 2001, 2002, 2003, 2004, 2006, 2007. If this was a material point, I would have allowed Appellant to submit further evidence on this point. But since both seven trips and eight trips are less than fifteen, it made no difference in the outcome of the Decision.

¹⁵ Application for Charter Halibut Permit (dated Mar. 5, 2010, received Mar. 26, 2010).

¹⁶ 50 C.F.R. § 300.67(f)(5).

¹⁷ Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010).

¹⁸ 50 C.F.R. § 300.67(b)(1)(ii).

¹⁹ 50 C.F.R. § 300.61 (definitions).

The relevant unit of participation is a logbook fishing trip. A logbook fishing trip is either a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip except that for multi-day trips, the number of trips will be equal to the number of days of the multi-day trip, e.g., a two-day trip will be counted as two trips.²⁰

A bottomfish logbook fishing is a logbook fishing trip that was reported 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.²¹

A halibut logbook fishing trip is a logbook fishing trip that was reported with one of the following pieces of information: the number of halibut kept, the number of halibut released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.²²

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 2005,²³ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁴

An applicant must prove different levels of participation to receive a non-transferable and 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).²⁵

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004, 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).²⁶

The angler endorsement number on a charter halibut permit is the highest number of anglers reported on any trip in the qualifying period (2004, 2005), unless the highest number is less than four. If that is the case, the angler endorsement number will be four.²⁷

²⁰ 50 C.F.R. § 300.67(f)(4).

²¹ 50 C.F.R. § 300.67(f)(2).

²² 50 C.F.R. § 300.67(f)(3).

²³ 50 C.F.R. § 300.67(f)(6).

²⁴ 50 C.F.R. § 300.67(f)(7).

²⁵ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B). In 2004 and 2005, ADF&G did not require participants in the charter halibut fishery to report halibut specifically but did require participants to report halibut effort as bottomfish effort. Therefore, for 2004 and 2005, the regulation evaluates an applicant's participation by bottomfish logbook fishing trips, not halibut logbook fishing trips. Beginning in 2006, ADF&G required participants to report halibut specifically. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

²⁶ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

²⁷ 50 C.F.R. § 300.67(e).

If an applicant would not receive a transferable or non-transferable permit because the applicant did not meet a participation requirement in the qualifying period (2004, 2005) or the recent participation period (2008), an applicant can seek to meet the requirements of the unavoidable circumstance provision with respect to the period where the applicant had no, or insufficient, participation.²⁸

ANALYSIS

Has Appellant stated grounds that would authorize NMFS to award it a transferable charter halibut permit instead of a non-transferable charter halibut permit?

Appellant meets the participation requirements for a non-transferable permit, namely five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and five halibut logbook fishing trips in the recent participation period (2008).²⁹ Appellant does not meet the participation requirement in the recent period for a transferable permit: fifteen halibut logbook fishing trips.³⁰

Appellant states it should receive a transferable permit for two reasons. First, it states that it was prevented from meeting the fifteen-trip requirement in the recent period by the one-halibut rule. Second, Appellant states that it took an average fifteen halibut trips a years from 1998 to 2008 and that NMFS should award permits based on the average of an applicant's trips from 1998 to 2008, rather than requiring fifteen trips in 2008. I conclude that NMFS is not authorized to issue a transferable charter halibut permit for either reason.

A. Appellant cannot receive a transferable permit under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).

Appellant took seven halibut logbook fishing trips in 2008. Appellant states that it would have met the fifteen-trip participation requirement but for cancelled bookings that resulted from NMFS's adoption of the one-halibut per day rule in May 2008.³¹ Although NMFS was enjoined from enforcing the one-halibut rule in June 2008 and NMFS withdrew the rule,³² Appellant submitted two sworn statements from clients that they cancelled trips in 2008 because of the one-halibut rule, while the rule was in effect. One client stated that he would have taken a seven day trip in the first week of June 2008.³³ Another client stated that he cancelled a trip scheduled for Father's Day weekend.³⁴ Appellant states this would have been a two-day trip.

²⁸ 50 C.F.R. § 300.67(g).

²⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

³⁰ 50 C.F.R. § 300.67(d)(1)(ii).

³¹ Letter from Appellant to RAM (Dec. 3, 2010). NMFS adopted the one-halibut per day rule on May 28, 2008, with an effective date of June 1, 2008. Final Rule, 73 Fed. Reg. 30,504 (May 28, 2008). A federal district court enjoined NMFS from enforcing the rule and NMFS withdrew it for the 2008 fishing season. NMFS proposed, and adopted, a new rule on the same subject in 2009. Proposed Rule, 73 Fed. Reg. 78,276, 78,276 (Dec. 22, 2008); Final Rule, 74 Fed. Reg. 21,194 (May 6, 2009).

³² Proposed Rule, 73 Fed. Reg. 78,276, 78,276 (Dec. 22, 2008).

³³ Notarized Statement, President, [REDACTED]

[REDACTED] to Appellant (Dec. 2, 2010).

³⁴ Notarized Statement, [REDACTED] (received Mar. 18, 2011).

Although Appellant does not state explicitly, I interpret Appellant to be claiming that, under the unavoidable circumstance regulation, it should receive a transferable permit. The Charter Halibut Limited Access Program does have an unavoidable circumstance provision that allows an applicant, who did not meet the participation requirement in the recent period, to prove that it did not meet the participation requirement because of a circumstance that meets the requirements of the unavoidable circumstance regulation.³⁵

But Appellant cannot make a claim under the unavoidable circumstance provision because it *does* meet the participation requirement for a permit in the recent period, albeit a non-transferable permit. The unavoidable circumstance regulation is only available to applicants that do not qualify for a transferable or non-transferable charter halibut permit. The unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), explicitly states:

Unavoidable circumstance claims . . . will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. This unavoidable circumstance provision cannot be used to upgrade the number of permits issued or to change a non-transferable permit to a transferable permit³⁶

Appellant will not be excluded from the charter halibut fishery entirely if its unavoidable circumstance claim is not recognized. It will receive a non-transferable permit.

Appellant is seeking to use the unavoidable circumstance provision to change a non-transferable permit to a transferable permit. The unavoidable circumstance regulation expressly denies me the authority to order, based on an unavoidable circumstance claim, that any applicant receive a transferable permit rather than a non-transferable permit.³⁷

B. NMFS does not have authority to award a transferable permit based on an applicant's average participation from 1998 to 2008.

Appellant stated that 2008 was an arbitrary year to use to measure participation in the charter halibut fishery.³⁸ Appellant states: "We provide custom charter fishing excursions and the customer requests determine the type of fish they target and we have no control over what they request. Some years they request salmon fishing over bottom fish and the customer controls how many halibut trips we have in any given year even though we are prepared for halibut fishing all of the time."³⁹ Appellant provided the following numbers for halibut fishing trips that it took: 1998 – 20 trips; 2000 – 38 trips; 2001 – 33 trips; 2005 – 17 trips; 2006 – 13 trips; 2007 – 12

³⁵ 50 C.F.R. § 300.67(g)(1).

³⁶ 50 C.F.R. § 300.67(g).

³⁷ In light of this, I do not address whether the one-halibut rule would have met the other requirements of the unavoidable circumstance regulation, in particular whether it was a circumstance that was unique to the Appellant. 50 C.F.R. § 300.67(g)(1)(ii)(B).

³⁸ Letter from Appellant to RAM (received June 21, 2010).

³⁹ Letter from Appellant to RAM (received June 21, 2010).

trips; 2008 – 8 trips.⁴⁰ I accept, for purposes of evaluating this argument, that these numbers are correct.⁴¹

In deciding this appeal, I must apply the regulations that the Secretary of Commerce adopted to implement the Charter Halibut Limited Access Program.⁴² If NMFS followed the regulations, I must affirm the action that NMFS took. If NMFS did not follow the regulations, I must order NMFS to take different action.

To receive a transferable charter halibut permit, the regulations clearly and unequivocally embody the policy decision, and impose the requirement, that an applicant must meet a participation requirement of fifteen halibut logbook fishing trips in the recent period.⁴³ The regulations clearly define the recent participation period as 2008.⁴⁴ NMFS does not have authority to award a permit based on an applicant's average participation over a number of years, rather than participation in the qualifying period (2004, 2005) and the recent participation period (2008). Therefore, I do not have authority to order NMFS to do that.

I have read carefully Appellant's description of its efforts to reduce the impact of its charter activities on the halibut and rockfish stock.⁴⁵ Appellant does not encourage halibut or rock fishing on a half-day cruises because this has a greater effect on stocks close to the city. Appellant generally does not fish in the same area where there is an abundance of rock fish. If a client hooks a halibut that appears to be over 150 pounds, Appellant takes a picture and tries to measure it in the water and, if the guest will release it, Appellant presents them an engraved plaque with the picture.

While these steps seem creative and thoughtful, I do not have authority to take them into account in deciding whether NMFS erred in determining that Appellant does not meet the requirements, in federal regulation, for a transferable charter halibut permit. I conclude that NMFS did not err in reaching that conclusion.

CONCLUSIONS OF LAW

1. Appellant does not meet the participation requirement in the recent period for a transferable permit in 50 C.F.R. § 300.67(d)(1)(ii), namely fifteen halibut logbook fishing trips with the same vessel in 2008.
2. NMFS does not have authority to award an applicant a transferable charter halibut permit based on whether the applicant averaged fifteen charter halibut trips over a number of years.

⁴⁰ Letter from Appellant to RAM (Mar. 25, 2010).

⁴¹ I have found that Appellant took seven trips in 2008, not eight, based on the contents of the official charter halibut record. Finding of Fact # 3. For purposes of this argument, I assume that Appellant could show it took eight trips in 2008.

⁴² The Secretary adopted these regulations pursuant to section 773c(c) of The Halibut Act. Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010). As noted, the regulations are codified at 50 C.F.R. §§ 300.61, 300.66 and 300.67.

⁴³ 50 C.F.R. § 300.67(d)(1)(ii).

⁴⁴ 50 C.F.R. § 300.67(f)(7).

⁴⁵ Letter from Appellant to RAM (Mar. 25, 2010).

3. An applicant who qualifies for a non-transferable charter halibut permit may not receive a transferable charter halibut permit based on the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).
4. Appellant has not stated grounds under which NMFS could award it a transferable permit rather than a non-transferable permit.
5. Appellant does not qualify for a transferable permit through initial issuance.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on August 8, 2011, unless by that date the Regional Administrator orders review of the Decision.

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 the tenth day after the date of this Decision, July 18, 2011. 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.



Mary Alice McKeen
Administrative Judge