



Business Owner License in 2004 or 2005 with the same vessel.<sup>5</sup> 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 the same vessel in 2008.<sup>6</sup>

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 took twelve halibut logbook fishing trips with the same vessel, which is less than fifteen.<sup>7</sup> In his application, Appellant also claimed twelve trips in 2008.<sup>8</sup>

In his appeal statement, Appellant stated that, since 1999, he no longer ran day charters but rather conducted multiday trips.<sup>9</sup> I added to the record on appeal a printout of the twelve trips, by date, that NMFS credited to the Appellant for 2008 and a statement by a NMFS Computer Specialist. I provided copies to Appellant.<sup>10</sup> The NMFS Computer Specialist stated that, in constructing the official charter halibut record, if a trip lasted more than one day, NMFS counted the trip as the number of days of the trip.<sup>11</sup> Appellant stated that he did not have any evidence or argument to submit, in response to these documents, that he took more than twelve halibut logbook fishing trips in 2008.<sup>12</sup>

Appellant argues that he should receive a transferable permit because he would have taken fifteen halibut trips in 2008, but for the following events, which Appellant documented with four written statements that he submitted with his Application.<sup>13</sup> Appellant contracted to lease a vessel for the 2008 season, the vessel was not ready by the 2008 season and, because of that, he had to cancel bookings. Although Appellant located another vessel, it was only available for part of the summer, and Appellant could not recoup his lost bookings.

Appellant can file this appeal because he is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that he 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 him a transferable charter halibut permit.<sup>14</sup> I conclude that the record contains sufficient information

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<sup>5</sup> 50 C.F.R. § 300.67(d)(1)(i).

<sup>6</sup> 50 C.F.R. § 300.67(d)(1)(ii).

<sup>7</sup> Summary of Official Record, [REDACTED] (Business Name 2) (Jan. 26, 2010). RAM determined that Appellant was the individual who owned and operated Business Name 1 and Business Name 2. Revised Notice of Opportunity to Submit Evidence at 1 (June 30, 2010).

<sup>8</sup> Application for Charter Halibut Permit at 3 (Mar. 5, 2010).

<sup>9</sup> Letter from Appellant to OAA (Jan. 10, 2011).

<sup>10</sup> Order Adding Document to Appeal Record (June 13, 2011) with Email from NMFS Computer Specialist to Mary Alice McKeen, with Excel attachment of trips in 2008 contained in the official charter halibut record (June 13, 2011).

<sup>11</sup> Email from NMFS Computer Specialist to Mary Alice McKeen (June 13, 2011).

<sup>12</sup> Email from Mary Alice McKeen to Appellant (June 17, 2011).

<sup>13</sup> Letter from Appellant to RAM (Mar. 6, 2009); Letter from [REDACTED] to RAM (received Mar. 26, 2009); Letter from [REDACTED] (Mar. 6, 2010); Statement by [REDACTED] (Mar. 5, 2010); Letter from [REDACTED] to RAM (Mar. 18, 2010).

<sup>14</sup> 50 C.F.R. § 679.43(g)(3)(iv).

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

May an applicant who qualifies for a non-transferable charter halibut permit receive a transferable charter halibut permit based on the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)?

#### SUMMARY

The IAD is affirmed. Appellant qualifies to receive a non-transferable charter halibut permit. Appellant therefore cannot receive a transferable charter halibut permit based on a claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).

#### FINDINGS OF FACT

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

1. Appellant has operated a charter fishing business since 1986.<sup>15</sup>
2. In 2004, Appellant reported twelve bottomfish logbook fishing trips with [REDACTED] (VESSEL 1).<sup>16</sup>
3. In 2005, Appellant reported twenty-four bottomfish logbook fishing trips with VESSEL 1.<sup>17</sup>
4. In 2008, Appellant reported twelve halibut logbook fishing trips with [REDACTED] (VESSEL 2).<sup>18</sup> In November 2007, Appellant contracted to lease [REDACTED] (VESSEL 3) for the 2008 season. VESSEL 3 was larger than the vessel Appellant had used in 2004 and 2005. The contract provided that the owner of VESSEL 3 would make specified renovations to the vessel, and it would be ready by April 15, 2008. Unforeseeably, and through no fault of Appellant's, the vessel was not ready by April 15 and was not ready in time for Appellant to use for the 2008 season. Appellant had to cancel bookings he had made. Appellant located another vessel, VESSEL 2, and operated his charter business with that vessel for part of the 2008 season, but despite his best efforts, he was not able to recoup the lost bookings.<sup>19</sup>

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<sup>15</sup> Letter from Appellant to OAA (Jan. 10, 2011).

<sup>16</sup> Summary of Official Record, Business Name 1 (Jan. 26, 2010); Application for Charter Halibut Permit at 3 (Mar. 5, 2010).

<sup>17</sup> Summary of Official Record, Business Name 1 (Jan. 26, 2010); Application for Charter Halibut Permit at 3 (Mar. 5, 2010).

<sup>18</sup> Summary of Official Record for Business Name 2 (Jan. 26, 2010); Application for Charter Halibut Permit at 3 (Mar. 5, 2010).

<sup>19</sup> Documents Appellant submitted with Application, listed at note 13 of this Decision.

5. In 2008, Appellant would have taken fifteen or more halibut logbook fishing trips if he had received VESSEL 3 by the contractual deadline.<sup>20</sup>
7. Appellant filed a timely application for a charter halibut permit on March 26, 2010.<sup>21</sup>

#### 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 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.<sup>22</sup> 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.<sup>23</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>24</sup> A person can be an individual, a corporation, firm or association.<sup>25</sup>

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.<sup>26</sup>

A bottomfish logbook fishing trip 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.<sup>27</sup>

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.<sup>28</sup>

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<sup>20</sup> Documents Appellant submitted with Application, listed at note 13 of this Decision.

<sup>21</sup> Application for Charter Halibut Permit (dated Mar. 5, 2010, received Mar. 26, 2010).

<sup>22</sup> 50 C.F.R. § 300.67(f)(5).

<sup>23</sup> Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010).

<sup>24</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>25</sup> 50 C.F.R. § 300.61 (definitions).

<sup>26</sup> 50 C.F.R. § 300.67(f)(4). Appellant stated that he took multiday trips. Letter from Appellant to OAA (Jan. 10, 2011).

<sup>27</sup> 50 C.F.R. § 300.67(f)(2).

<sup>28</sup> 50 C.F.R. § 300.67(f)(3).

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>29</sup> and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>30</sup>

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, 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).<sup>31</sup>

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).<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup>

#### ANALYSIS

In resolving this appeal, I am bound by the regulations that the Secretary of Commerce adopted to implement the Charter Halibut Limited Access Program (CHLAP).<sup>35</sup> Appellant meets the participation requirements, in those regulations, 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).<sup>36</sup> Appellant qualifies for a non-transferable charter halibut permit.

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<sup>29</sup> 50 C.F.R. § 300.67(f)(6).

<sup>30</sup> 50 C.F.R. § 300.67(f)(7).

<sup>31</sup> 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).

<sup>32</sup> 50 C.F.R. § 300.67(d)(1)(i)-(ii).

<sup>33</sup> 50 C.F.R. § 300.67(e).

<sup>34</sup> 50 C.F.R. § 300.67(g).

<sup>35</sup> The Secretary adopted these regulations pursuant to section 773c 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.

<sup>36</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

Appellant does not meet the participation requirement in the recent period for a transferable permit: fifteen halibut logbook fishing trips.<sup>37</sup> Appellant seeks to receive a transferable permit under the unavoidable circumstance regulation because, but for the delay in the delivery of his vessel, he would have reported fifteen halibut logbook fishing trips in 2008, instead of the twelve trips he did take and report.

Appellant cannot do this because the unavoidable circumstance regulation is only available to applicants that do not qualify for a transferable or non-transferable charter halibut permit. The 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 permit . . . .<sup>38</sup>

Appellant will not be excluded from the charter halibut fishery entirely if his unavoidable circumstance claim is not recognized. He 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 an applicant receive a transferable permit rather than a non-transferable permit.

Therefore, with respect to Appellant's participation in the recent period (2008), I conclude that Appellant does not meet the requirements for a transferable charter halibut permit: either based on his actual participation in the recent period (2008) or based on a claim under the unavoidable circumstance regulation.

#### CONCLUSIONS OF LAW

1. Appellant does not meet the participation requirement in the recent period (2008) for a transferable charter halibut permit in 50 C.F.R. § 300.67(d)(1)(ii), namely fifteen halibut logbook fishing trips with the same vessel.
2. 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).
3. Appellant does not qualify for a transferable charter halibut 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.

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<sup>37</sup> 50 C.F.R. § 300.67(d)(1)(ii).

<sup>38</sup> 50 C.F.R. § 300.67(g).

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

