

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

In re Application of )  
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 ) Appeal No. 11-0015  
 )  
 ) DECISION  
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 Appellant )  
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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's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.

The appeal under review was filed by [REDACTED] doing business as [REDACTED] (Appellant). Appellant is appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (permit or CHP).

On March 18, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).<sup>1</sup> The application was filed with RAM, who is responsible for reviewing and determining whether an applicant will receive a permit or permits.

In response to Appellant's application, on July 27, 2011, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>2</sup> In the Notice, RAM advised Appellant that the Official Record showed he met the CHLAP requirements for 2008 by reporting sixteen charter halibut logbook trips to the Alaska Department of Fish and Game (ADF&G). However, RAM also stated in the Notice that Appellant did not meet the CHLAP requirements for 2004 or 2005, since he did not have at least five properly reported logbook trips in 2004 or 2005. RAM set a August 26, 2010 deadline for Appellant to submit evidence to show he met participation requirements in 2004 or

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<sup>1</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>2</sup> Original File Tab.

2005. On August 18, 2011, Appellant responded to the Notice. Appellant stated he did not have enough time to produce additional evidence but that he was researching historical data.<sup>3</sup>

On November 30, 2010, RAM sent Appellant the IAD which is the subject of this appeal. In the IAD RAM denied Appellant a CHP. RAM reasoned that Appellant did not meet the basic participation requirements for one of two periods of participation, namely five or more qualifying charter trips in 2004 or 2005. RAM reiterated that Appellant did meet the participation requirements for 2008. RAM noted that Appellant had the right to appeal the IAD to OAA.

On January 24, 2011, Appellant timely filed his appeal of the IAD with OAA.<sup>4</sup> In his appeal, Appellant does not dispute that he does not meet the basic or general participation requirements for 2005; rather he argues that due to unavoidable circumstances in 2005 he was unable to fully engage in charter fishing operations. Appellant explained in his appeal that in 2005 his mother was quite ill and that because of the care he provided to her and other events involving the breakdown of his boat and historically poor weather in 2005 and 2006, he could not fully operate his business.

NAO sent Appellant a written notice of hearing. Pursuant to that Notice, on June 9, 2011, the oral hearing commenced and concluded.<sup>5</sup> At the hearing Appellant and a witness he called on his behalf, a local lodge owner (Lodge Owner), testified. At the conclusion of the hearing I set June 30, 2011 as the deadline for Appellant to submit any additional documentation in support of his appeal. On June 24, 2011, Appellant sent in a brief-style letter and testimonial letter dated June 24, 2011 in support of his appeal. On July 7, 2011, I closed the record. I have determined that the information in the record is sufficient to render a decision.<sup>6</sup>

## ISSUES

There is no factual or legal dispute in this appeal but the unavoidable circumstance claim. In this case, the unavoidable circumstance claim involves five basic questions:

1. Did Appellant prove by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business during 2005?

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<sup>3</sup> Original File Tab, Charter Halibut Permit Application, Instructions for Processing Response, 30 Day Notice of Opportunity to Submit Evidence, signed and dated August 18, 2010.

<sup>4</sup> Original File, Pleadings Tab, letter dated January 19, 2011 with attachments.

<sup>5</sup> Notice of Hearing dated February 11, 2011.

<sup>6</sup> See 50 C.F.R. § 679.43(g)(2).

2. If the answer to Question 1 is “yes,” did Appellant prove by a preponderance of the evidence that in 2005 he suffered an “unavoidable circumstance” that “actually occurred?”

3. If the answer to Question 2 is “yes,” did Appellant prove by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance?

4. If the answer to Question 3 is “yes,” did Appellant prove by a preponderance of the evidence that he took all reasonable steps to overcome the unavoidable circumstance?

5. If the answer to Question 4 is “yes,” then I must determine the type (transferable or nontransferable) of permit for which Appellant is eligible and the angler endorsement on the permit by answering the following:

- a. Did Appellant prove he would have taken at least fifteen logbook trips in 2005 and did in fact take at least fifteen logbook trips in 2008 and therefore is eligible for a transferable permit?
- b. Did Appellant prove that the largest number of anglers he would likely have taken on charter fishing trips in 2005 was five, and therefore his transferable permit should be endorsed for five anglers?

#### FINDINGS OF FACT (FOF)

1. In 2004, Appellant started a lodging business in Alaska.<sup>7</sup>
2. In 2004, Appellant started to promote his business in Alaska, including advertising charter fishing trips, by an internet presence, dropping off business cards at lodges, and by word-of-mouth in the community.<sup>8</sup>
3. In 2005, Appellant bought a vessel suitable for charter fishing.<sup>9</sup>
4. In 2005, Appellant obtained his license (commonly known as a six-pack license) to captain his boat.<sup>10</sup>

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<sup>7</sup> Appellant's hearing testimony.

<sup>8</sup> Appellant's hearing testimony.

<sup>9</sup> Appellant's hearing testimony.

<sup>10</sup> Appellant's hearing testimony.

5. In 2005, Appellant held an Alaska state business license.<sup>11</sup>
6. In 2005, Appellant started providing charter halibut fishing trips.<sup>12</sup>
7. In 2005, Appellant reported one halibut logbook fishing trip to ADF&G.<sup>13</sup>
8. For the 2005 charter fishing season, Lodge Owner had eight charter halibut trips he wanted to or in fact referred to Appellant, but all of those trips were cancelled or re-scheduled with another charter halibut operation; Appellant was not able to captain those trips because he was caring for his elderly, sick mother.<sup>14</sup>
9. Of the eight trips identified in FOF 8, some were trips extending to two to three days.<sup>15</sup>
10. In addition to the trips identified in FOFs 8 and 9, Appellant had also arranged to captain two or three fishing charters with a different lodge's guests.<sup>16</sup>
11. In 2005, the Chamber of Commerce would have referred at least two charter trips to Appellant.<sup>17</sup>
12. In February 2005, Appellant's mother was diagnosed with [REDACTED] at that point in time Appellant's mother was approximately 87 years old.<sup>18</sup> Prior to the diagnosis, Appellant's mother was in good health.<sup>19</sup>
13. At all times relevant to the events in this appeal, Appellant's mother lived in Minnesota.<sup>20</sup>
14. In 2005, Appellant was his mother's only living, close blood relative.<sup>21</sup>
15. After Appellant's mother's diagnosis, Appellant provided daily care to her. Said care included changing the bed; preparing and serving meals; daytime supervision; arranging and attending medical appointments, and; administering medication. Medication compliance was a significant concern for Appellant since his

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<sup>11</sup> Appellant's hearing testimony.

<sup>12</sup> Appellant's hearing testimony.

<sup>13</sup> Appellant's hearing testimony.

<sup>14</sup> Lodge owner's hearing testimony; Appellant's hearing testimony.

<sup>15</sup> Lodge owner's hearing testimony.

<sup>16</sup> Appellant's hearing testimony.

<sup>17</sup> Original File, Pleadings Tab, letter dated January 19, 2011 with attachments.

<sup>18</sup> Appellant's hearing testimony.

<sup>19</sup> Appellant's hearing testimony.

<sup>20</sup> Appellant's hearing testimony.

<sup>21</sup> Appellant's hearing testimony.

mother was prescribed approximately ten medications, which if not taken properly could have fatal consequences.<sup>22</sup>

16. Appellant provided the care described in FOF 15 between February 2005 and January 2006. In January 2006, Appellant's mother [REDACTED] and her condition worsened. Appellant continued to take care of his mother in the summer of 2006.<sup>23</sup>

17. Because of the care Appellant provided to his mother as described in FOFs 15 and 16, Appellant was unable to attend to his charter fishing business in the manner he had intended. Specifically, he did not have the time to market his business as he would have liked, nor could he commit to charter trips as he did not know when he would be in Alaska.<sup>24</sup>

19. In 2005, Appellant considered paying for professional care for his mother but thought it was cost prohibitive.<sup>25</sup>

20. In July 2005, an oil line on Appellant's boat broke, resulting in at least three charter trip cancellations. The oil line was repaired by August 2005.<sup>26</sup>

21. Appellant usually takes four anglers on charter fishing trips.<sup>27</sup> The greatest number of anglers Appellant has taken chartering is five, although his boat capacity is six.<sup>28</sup>

22. Appellant's boat was approximately a \$100,000 investment for him.<sup>29</sup>

23. Appellant did not think it prudent to let another captain use his charter boat because of the relatively large investment he had made in it.<sup>30</sup>

24. There are only approximately five active charter captains in Appellant's community.<sup>31</sup>

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<sup>22</sup> Appellant's hearing testimony.

<sup>23</sup> Appellant's hearing testimony; Original File, Pleadings Tab, Physician's letter dated January 18, 2011, attached to appeal.

<sup>24</sup> Appellant's hearing testimony.

<sup>25</sup> Appellant's hearing testimony.

<sup>26</sup> Appellant's hearing testimony; Original File, Pleadings tab, letter dated January 17, 2011 and letter dated January 29, 2011, both of which are attached to Appellant's appeal; Original File, Evidence tab, Testimonial letter dated June 24, 2011.

<sup>27</sup> Lodge owner's hearing testimony.

<sup>28</sup> Appellant's hearing testimony.

<sup>29</sup> Appellant's hearing testimony.

<sup>30</sup> Appellant's hearing testimony.

<sup>31</sup> Appellant's hearing testimony.

25. Appellant did not use another captain to charter his boat for him because he believed that could jeopardize the quality of the experience for the anglers, including safety, and Appellant's relationship with the lodges who channeled clients to him.<sup>32</sup>

26. In 2006, Appellant captained less than five charter fishing trips.<sup>33</sup>

27. In 2006, the area in which Appellant fishes experienced historical storms.<sup>34</sup>

28. In 2007, Appellant took about fourteen charter halibut fishing trips.<sup>35</sup>

29. In 2008, Appellant took sixteen halibut logbook fishing trips and properly reported those trips to ADF&G.

30. On March 18, 2010, Appellant applied for a CHP to provide charter halibut fishing trips in Area 3A;<sup>36</sup> RAM denied Appellant's application on November 30, 2010 and the instant appeal followed.

#### PRINCIPLES OF LAW

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).<sup>37</sup>

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP, including evaluating applications for Charter Halibut Permits.<sup>38</sup>

"Applicant-selected year means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant's number of transferable and nontransferable permits."<sup>39</sup>

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<sup>32</sup> Appellant's hearing testimony.

<sup>33</sup> Appellant's hearing testimony.

<sup>34</sup> Appellant's hearing testimony.

<sup>35</sup> Appellant's hearing testimony; Notes/Memos/Internal Correspondence Tab, ADF&G logbook data for 2007 provided to OAA by email transmission.

<sup>36</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

<sup>37</sup> 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

<sup>38</sup> See 50 C.F.R. § 300.67(f)(5); 75 Fed.Reg. 554, 556 (2010).

<sup>39</sup> 50 C.F.R. § 300.67(f)(1).

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. Further, the participation must have occurred in the International Pacific Halibut Commission (IPHC) regulatory area (either 2C or 3A) for which the applicant seeks the permit. This threshold criteria may be referred to as the participation requirements.<sup>40</sup>

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2005, but does meet the participation requirements for the other period, 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule.<sup>41</sup>

Under the unavoidable circumstances rule as it applies to this case, an applicant for a CHP may be eligible for a permit if:

- (1) he met the participation requirements for 2008, but not for 2005;
- (2) he specifically intended to operate a charter halibut fishing business in 2005;
- (3) his intent was thwarted by an unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred, and;
- (4) he took all reasonable steps to overcome the unavoidable circumstance.<sup>42</sup>

If Appellant proves the requirements of an unavoidable circumstance claim as outlined above, then he will receive a CHP.<sup>43</sup> Whether the CHP is designated as transferable depends on how many logbook fishing trips Appellant proves he would have taken in 2005 but for the unavoidable circumstance.<sup>44</sup> If the applicant proves he would likely have taken fifteen or more trips in the qualifying year (2005) and did in fact take fifteen or more trips in the participation year (2008), then his permit will be transferable.<sup>45</sup> Further, the number of anglers for which the permit will be endorsed depends on the highest number of anglers that would have been on the trips Appellant would have taken in 2005 but for the unavoidable circumstance.<sup>46</sup>

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<sup>40</sup> See 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed.Reg. 554, 554-555 (2010).

<sup>41</sup> See 50 C.F.R. § 300.67(g)(2).

<sup>42</sup> See 50 C.F.R. § 300.67(g)(2).

<sup>43</sup> 50 C.F.R. § 300.67(g)(2)(v).

<sup>44</sup> See 50 C.F.R. § 300.67(g)(2)(v)(B).

<sup>45</sup> See 50 C.F.R. § 300.67(d).

<sup>46</sup> See 50 C.F.R. § 300.67(e)(1) and (g)(2)(v)(B). See also 74 Fed. Reg. 18178, 18187 (2009).

A logbook fishing trip is either a bottomfish logbook trip or a halibut logbook fishing trip that meet certain criteria. That criteria is that the trip was reported to ADF&G as a trip within state time limits. For a multi-day trip, the number of trips equals the number of days of that trip; for example, a two-day trip counts as two trips.<sup>47</sup>

## ANALYSIS

In analyzing this case, I considered the entire record, including the hearing testimony and the documents submitted by Appellant in support of his appeal. Since Appellant does not dispute the substantive basis for the denial of his Application articulated in the IAD, i.e., that he did not have sufficient logbook trips in 2005, I will address the only issue raised in this appeal, namely Appellant's unavoidable circumstance claim. The first criterion I consider is whether Appellant held the specific intent to operate a charter halibut business during 2005.

### **Did Appellant prove by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business during 2005?**

The evidence shows that Appellant was properly licensed and had a logbook to record his charter trips during the 2005 season. Appellant had booked clients for the 2005 season and promoted his business. Further, Appellant took a short trip to Alaska during which time he would have taken charter trips but for the breakdown of his boat. In any event, he was able to complete one charter halibut trip in 2005.

Given the totality of the evidence and facts I have drawn therefrom, I conclude that Appellant held the specific intent to operate a charter halibut fishing business in 2005. I turn, then, to the next inquiry in the unavoidable circumstances analysis.

### **Did Appellant prove by a preponderance of the evidence that in 2005 he suffered an "unavoidable circumstance" that "actually occurred?"**

Appellant's mother became seriously ill and needed full-time care throughout most of 2005. As her only kin and out of concern for her well-being, Appellant decided it was his duty to care for her. The care was indeed a full-time job. Appellant changed her bed, made and served meals, administered a complicated medication regime (ten medications, some of which could prove fatal if not taken correctly), and transported his mother and attended medical appointments. I found Appellant's testimony credible on this point, and under the circumstances, I conclude that Appellant met his burden of proving that he suffered from an unavoidable circumstance that actually occurred. Further, Appellant has also convinced me that he suffered from a secondary

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<sup>47</sup> See 50 C.F.R. § 300.67(f)(5).

unavoidable circumstance inasmuch as his boat was broken down for about three to six weeks in July/August 2005.

**Did Appellant prove by a preponderance of the evidence his specific intent was thwarted by a unique, unforeseen, and reasonably unforeseeable circumstance?**

Appellant's mother's illness and care as well as Appellant's boat breaking down only happened to him; therefore, both events were unique to Appellant. Further, the record does not contain evidence that mother's illness and the boat breaking could have been anticipated; indeed, the boat was practically new. Under the circumstances, I find both events were unforeseen and reasonably unforeseeable.

**Did Appellant prove by a preponderance of the evidence that he took all reasonable steps to overcome the unavoidable circumstance?**

Appellant felt he had no option but to care for his mother as her only kin and given the cost of professional care. Indeed, given the level and type of care required to care for Appellant's mother, full-time attendance by somebody was necessary. Under the circumstances, I find there was little, if anything else, Appellant could have reasonably done to provide the level and type of care his mother needed. I therefore conclude that Appellant took all reasonable steps to overcome the unavoidable circumstance of his Mother's illness and need for care.

With respect to the unavoidable circumstance of the broken oil line on his charter fishing vessel, Appellant had it repaired within weeks of discovering that it was broken. Given that fact, I conclude that Appellant took all reasonable steps to overcome the unavoidable circumstance of the broken oil line.

Appellant has proven the four prongs of his unavoidable circumstance claim. Therefore, I now will decide the type (transferable or nontransferable) of permit for which Appellant eligible and the angler endorsement on the permit.

**Did Appellant prove he would have taken at least fifteen logbook trips in 2005 and did in fact take at least fifteen logbook trips in 2008 and therefore is eligible for a transferable permit?**

To qualify for a transferable CHP, among the requirements is that the applicant prove he took fifteen or more qualifying trips during both the qualifying year and participation year.<sup>48</sup> RAM and Appellant are in agreement that in 2008 Appellant recorded sixteen halibut logbook trips. Therefore, I find he exceeds the number of trips needed in 2008 to qualify for a transferable permit. I turn then to the number of trips Appellant would likely have taken in 2005.

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<sup>48</sup> See 50 C.F.R. § 300.67(d) and (g)(2).

The record shows that 2005 was Appellant's first year operating a charter halibut business. In 2005 Appellant took one charter halibut trip, even though he faced challenges, including the two unavoidable circumstances described above. Despite the fact that 2005 was his first year in operation, there is sufficient evidence that he would likely have been successful in that year. Most compelling is the evidence showing the number of clients or trips he had arranged or were reasonably going to be reserved. Further, since there are limited active charter captains in his community, that also weighs in favor of Appellant being successful in his first year.

Appellant has shown by a preponderance of the evidence and I find that in 2005, but for the unavoidable circumstances, Appellant would have taken fifteen charter halibut trips. I base that conclusion on the limited availability of captains and the testimony and other evidence of the actual number of trips planned with Appellant. That is, Appellant actually took one qualifying trip in 2005 (FOF 1). Lodge Owner had eight trips arranged for Appellant (FOF 8). Lodge Owner testified that some of those trips were multi-day from which I infer that at least two more trips would have been credited to Appellant had he actually fully operated his business in 2005 (FOF 9).<sup>49</sup> In addition, Appellant testified and I find credible that other than Lodge Owner, he had also arranged with another lodge to refer clients for two or three trips; I find from that testimony that Appellant likely would have taken two additional trips. I also find (FOF 11) that the Chamber of Commerce referrals would likely resulted in at least two trips. The sum total of trips Appellant likely would have taken in 2005 is fifteen trips.

The conclusion that Appellant would likely have taken at least fifteen trips is also supported by his subsequent charter fishing history. Appellant explained that 2006 was a very bad year for his business because of the historically poor weather. Also, in the summer of 2006, Appellant was still taking care of his mother. In 2007, Appellant took fourteen trips and in 2008 sixteen trips. I conclude from all the evidence concerning Appellants charter fishing trips between 2005 and 2008, that generally he did or it was his intent to take around fifteen trips. And in fact, in 2005, as stated previously I find he would likely have taken fifteen charter halibut trips. Thus, Appellant is eligible for a transferable permit.<sup>50</sup>

**Did Appellant prove that the largest number of anglers he would likely have taken on charter fishing trips in 2005 was five, and therefore his transferable permit should be endorsed for five anglers?**

An applicant can be awarded a transferable permit with an angler endorsement for the highest number of anglers he likely would have taken had it not been for the

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<sup>49</sup> See 50 C.F.R. § 300.67(f)(5).

<sup>50</sup> See 50 C.F.R. § 300.67(d) and (g)(2)(v).

unavoidable circumstances.<sup>51</sup> The record shows that the highest number of anglers Appellant in this case would have taken on charter halibut trips in 2005 is five (FOF 21). Therefore, Appellant's permit shall be endorsed for five anglers.

### CONCLUSIONS OF LAW

Appellant held the specific intent to operate a charter halibut business during 2005.

In 2005 Appellant suffered two "unavoidable circumstances" that "actually occurred."

Appellant's specific intent was thwarted by the unavoidable, unique, unforeseen, and reasonably unforeseeable circumstances.

Appellant took all reasonable steps to overcome the unavoidable circumstances.

Appellant proved he would have taken at least fifteen logbook trips in 2005 and took at least fifteen logbook trips in 2008 and therefore is eligible for a transferable permit.

Appellant proved that the largest number of anglers he would likely have taken on charter fishing trips in 2005 was five, and therefore his transferable permit should be endorsed for five anglers.

### ORDER

The IAD dated November 30, 2010 is Vacated. RAM is directed to issue Appellant a transferable CHP for Area 3A with an angler endorsement of five.

This decision takes effect (30) days from the date issued, August 19, 2011,<sup>52</sup> and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to

<http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

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<sup>51</sup> 50 C.F.R. § 300.67(g)(2)(v)(B). In the Proposed Rule NMFS explained that in a section 300.67(g)(2) situation, if an appellant proves his unavoidable circumstances claim, then NMFS could not use logbook data to determine the number or type (transferable or nontransferable) of permits and the number of anglers for which the permit would be endorsed. Thus, NMFS created a default provision of one nontransferable permit with an angler endorsement of four, or, if an applicant can so prove a different permit(s) based on the number of vessels, number of trips and highest number of anglers an applicant can prove he likely would have taken in 2004 or 2005. "For example, if an applicant states that it should receive one transferable charter halibut permit with an angler endorsement of six, then the applicant must show that the applicant likely would have reported at least 15 logbook fishing trips with a vessel in 2004 or 2005 and would have taken six anglers on one of those trips." 74 Fed. Reg. 18178, 18187 (2009).

<sup>52</sup> 50 C.F.R. § 679.43(k) and (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 Time, on the tenth day after the date of this Decision, August 1, 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 in support of the motion.



~~Eileen G. Jones~~  
Chief Administrative Judge

Date Issued: July 20, 2011