

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

In re Application of)
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████████████████████)
████████████████████)

Appellant)
)
_____)

Appeal No. 11-0024

DECISION

July 22, 2011

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, 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 January 28, 2011, ██████████ (Appellant), ██████████ filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on December 2, 2010.¹ RAM is the unit within the NMFS Alaska Region that implements limited access programs. RAM evaluated Appellant's application for a permit under the Charter Halibut Limited Access Program.²

In the IAD, RAM determined that Appellant met the minimum participation requirements for one non-transferable charter halibut permit for International Pacific Halibut Commission (IPHC) Regulatory Area 3A,³ with an angler endorsement of six. This means that RAM determined that Appellant reported at least five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and at least five halibut logbook fishing trips in the recent participation period (2008),⁴ and that the highest number of anglers that Appellant reported on any trip in the qualifying period (2004, 2005) was six.⁵

In the IAD, RAM determined that Appellant did not meet the minimum participation requirements for a transferable charter halibut permit. The minimum participation requirement

¹ Letter from Appellant to RAM (dated Jan. 28, 2011, received Jan. 28, 2011). Although addressed to RAM, Appellant clearly intended it as an appeal.

² The Charter Halibut Limited Access 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/regs/summary.htm>.

³ IPHC Regulatory Area 3A is roughly Southcentral Alaska. For the coordinates of Area 3A, see 50 C.F.R. § 300.61.

⁴ 50 C.F.R. § 300.67(b)(1)(ii)(A) - (B) (participation requirements for a non-transferable permit).

⁵ 50 C.F.R. § 300.67(e) (angler endorsement requirement).

in the qualifying period (2004, 2005) for a transferable permit is fifteen bottomfish logbook fishing trips reported under the applicant's Alaska Department of Fish and Game (ADF&G) 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 eleven halibut logbook fishing trips with the same vessel,⁸ which is less than the fifteen required for a transferable permit. Appellant does not dispute that he reported eleven halibut logbook fishing trips to ADF&G in 2008.⁹

Appellant argues that he should receive a transferable permit because he would have taken fifteen halibut trips in 2008, but for severe weather, which made him cancel four or more trips because it was not safe to take the trips at the scheduled times. Appellant also states that he took three trips where he fished halibut with family and friends and did not log these trips in his logbook. Finally, he states that he is elderly (seventy-seven years old); his family has been making a living on the water, fishing in Alaska, for four generations; and he should be able to transfer the permit to his son and grandsons so they can continue doing that.¹⁰

Appellant can file this appeal because the IAD directly and adversely affected his interests, 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.¹¹ 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.

ISSUES

1. 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)?
2. May an applicant receive credit for non-revenue charter halibut trips he took with family and friends in 2008 but did not report in a logbook to ADF&G?
3. May an applicant receive a transferable charter halibut permit based on factors that are not specified in the charter halibut regulation?

⁶ 50 C.F.R. § 300.67(d)(1)(i).

⁷ 50 C.F.R. § 300.67(d)(1)(ii).

⁸ Summary of Official Charter Halibut Record (Jan. 27, 2010).

⁹ Letter from Appellant to RAM (Feb. 22, 2011). Unless otherwise noted, the date of a document is the date on the document, not the date NMFS received it.

¹⁰ Letter from Appellant to RAM (Feb. 22, 2011).

¹¹ 50 C.F.R. § 679.43(g)(3)(iv).

SUMMARY

The IAD is affirmed. Appellant does not qualify for a transferable permit. First, Appellant qualifies for 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). Second, a trip that an applicant did not report to ADF&G is not a halibut logbook fishing trip, as defined in 50 C.F.R. § 300.67(f)(3). Third, as an administrative judge, I cannot recommend that an applicant receive a permit based on factors that are not specified in the regulation. Appellant does not meet the participation requirement in the recent period (2008) for a transferable permit, namely fifteen halibut logbook fishing trips with one vessel, specified in 50 C.F.R. § 300.67(d)(1)(ii). NMFS therefore may not award him a transferable permit.

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 approximately 1996.¹²
2. In 2004, Appellant took twenty-four bottomfish logbook fishing trips with one vessel.¹³
3. In 2005, Appellant reported twenty-six bottomfish logbook fishing trips with one vessel.¹⁴
4. In 2008, Appellant reported eleven halibut logbook fishing trips with one vessel.¹⁵
5. Appellant cancelled at least four halibut logbook fishing trips in 2008 due to severe weather, which made it unsafe to take out clients at the scheduled times.¹⁶ Appellant submitted his own statement listing the dates of four trips in 2008 that he had to cancel for weather and the written statement from a tour broker that listed trips on two other dates in 2008 when the broker cancelled trips with Appellant due to bad weather.¹⁷
6. Appellant filed a timely application for a charter halibut permit on March 4, 2010.¹⁸

¹² Letter from Appellant to OAA (Jan. 28, 2011).

¹³ Summary of Official Record (Jan. 27, 2010). When I say that Appellant took a bottomfish or logbook fishing trip, I also mean that the Appellant took the trip and timely reported the trip to ADF&G in their Saltwater Charter Logbook, because the definition of logbook fishing trip includes that the trip was reported to ADF&G in accord with the time limit for reporting the trip. 50 C.F.R. § 300.67(f)(4).

¹⁴ Summary of Official Record (Jan. 27, 2010).

¹⁵ Summary of Official Record (Jan. 27, 2010).

¹⁶ Letter from Appellant to RAM (Aug. 1, 2010).

¹⁷ Letter from Appellant to RAM (Feb. 22, 2011); Statement of Vice President, [REDACTED] (Feb. 21, 2011).

¹⁸ Application for Charter Halibut Permit (dated Mar. 3, 2010, received Mar. 4, 2010).

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.¹⁹ 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.²⁰

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.²¹ A person can be an individual, a corporation, firm or association.²²

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.²³

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.²⁴

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.²⁵

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 2005,²⁶ and a recent participation period, which is the sport fishing season for halibut in 2008.²⁷

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

¹⁹ 50 C.F.R. § 300.67(f)(5).

²⁰ Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010).

²¹ 50 C.F.R. § 300.67(b)(1)(ii).

²² 50 C.F.R. § 300.61 (definitions).

²³ 50 C.F.R. § 300.67(f)(4).

²⁴ 50 C.F.R. § 300.67(f)(2).

²⁵ 50 C.F.R. § 300.67(f)(3).

²⁶ 50 C.F.R. § 300.67(f)(6).

²⁷ 50 C.F.R. § 300.67(f)(7).

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).²⁸

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).²⁹

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.³⁰

If an applicant would not receive any permit, transferable or non-transferable, 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.³¹

ANALYSIS

1. 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)?

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).³² Appellant does not meet the participation requirement in the recent period for a transferable permit: fifteen halibut logbook fishing trips.³³ Appellant seeks to receive a transferable permit because, but for the severe weather which forced him to cancel at least four trips, he would taken at least fifteen halibut logbook fishing trips in 2008, instead of the eleven trips he did take.

Appellant cannot receive a transferable permit under the unavoidable circumstance regulation 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:

²⁸ 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).

²⁹ 50 C.F.R. § 300.67(d)(1)(i) - (ii).

³⁰ 50 C.F.R. § 300.67(e).

³¹ 50 C.F.R. § 300.67(g).

³² 50 C.F.R. § 300.67(b)(1)(ii)(A) - (B).

³³ 50 C.F.R. § 300.67(d)(1)(ii).

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 permit³⁴

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 states that NMFS cannot do that.³⁵

2. May an applicant receive credit for non-revenue charter halibut trips he took with family and friends in 2008 but did not report in his logbook to ADF&G?

Appellant states that he took three trips with family and friends in 2008 “and since it was a non revenue trip I did not log these trips into the logbook.”³⁶ I take this as an argument by Appellant that he should be credited with three additional trips toward a transferable charter halibut permit. Even if Appellant were credited with three additional trips, he would only have fourteen trips, still one trip less than fifteen.

But NMFS cannot credit these trips toward a transferable or non-transferable charter halibut permit. To receive a transferable charter halibut permit, the charter halibut regulation specifically requires that an applicant have *reported* fifteen halibut logbook fishing trips in 2008.³⁷ To receive a non-transferable charter halibut permit, the regulation requires that an applicant have *reported* five halibut logbook fishing trips in 2008.³⁸ The regulation expressly defines halibut logbook fishing trips as “a logbook fishing trip *that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip.*”³⁹

Appellant did not report these trips to the State of Alaska. I conclude, therefore, that these trips are not halibut logbook fishing trips and an applicant may not receive credit for these trips toward a charter halibut permit.

³⁴ 50 C.F.R. § 300.67(g).

³⁵ In light of this finding, I do not address whether Appellant meets the other requirements of the unavoidable circumstance regulation. 50 C.F.R. § 300.67(g)(1).

³⁶ Letter from Appellant to RAM (Feb. 22, 2011).

³⁷ 50 C.F.R. § 300.67(d)(1)(ii).

³⁸ 50 C.F.R. § 300.67(b)(ii)(B).

³⁹ 50 C.F.R. § 300.67(f)(3) (emphasis added). The trip must have been reported with specified information that shows the applicant caught, or tried to catch, halibut: the number of halibut kept or released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.

3. May an applicant receive a transferable charter halibut permit based on factors that are not specified in the charter halibut regulation?

Appellant states that he is elderly (seventy-seven years old); that his family has been making a living on the water, fishing in Alaska, for four generations; and that he should be able to transfer the permit to his son and grandsons so they can continue doing that.⁴⁰

In deciding an appeal, I have the responsibility to interpret and apply the charter halibut regulations, as adopted by the Secretary of Commerce.⁴¹ The charter halibut regulations do not give me the authority to consider equitable factors – such as an age, an applicant’s overall length of participation in the charter halibut fishery, an applicant’s desire to pass the permit to his sons and grandson – in deciding whether NMFS erred in denying an applicant a transferable charter halibut permit.

The charter halibut regulations do give me the authority to decide whether NMFS correctly applied the requirements for a transferable permit that are contained in the regulations that implemented the CHLAP. Those requirements are a timely application⁴² and the applicant’s participation at the fifteen-trip level in two periods: the qualifying period (2004, 2005) and the recent participation period (2008).⁴³ I conclude that NMFS correctly applied the requirements for a transferable permit. 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 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. 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. If an applicant took a non-revenue trip with family and friends that he did not report to ADF&G, the trip is not a halibut logbook fishing trip, as defined in 50 C.F.R. § 300.67(f)(3), for two reasons. First, the trip was not reported to ADF&G. Second, ADF&G had no time limit for reporting the trip because there were no paying clients on the trip.
4. As an administrative judge, I must interpret and apply the regulations, as adopted, to decide an appeal.

⁴⁰ Letter from Appellant to RAM (Feb. 22, 2011).

⁴¹ 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.

⁴² 50 C.F.R. § 300.67(b)(1)(i).

⁴³ 50 C.F.R. § 300.67(d)(1)(i) - (ii).

5. The regulations do not give me the authority to consider equitable factors, such as an applicant's age, the applicant's number of years of participation in the fishery, and his desire to pass the permit on to his family, in deciding whether NMFS erred in denying an application for a transferable charter halibut permit.
6. 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 22, 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, 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 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