

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

In re application of )  
 ) Appeal No. 10-0093  
 )  
 [REDACTED] )  
 ) DECISION  
 )  
 )  
 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 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 November 8, 2010, [REDACTED] on behalf of his business [REDACTED] (Appellant), filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on October 28, 2010.<sup>1</sup> In the IAD, RAM evaluated Appellant's application for a permit under the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup>

RAM determined Appellant met the requirements for two transferable charter halibut permits (CHP), endorsed for International Pacific Halibut Commission (IPHC) Regulatory Area 3A. IPHC Regulatory Area 3A is roughly Southcentral Alaska.<sup>3</sup> One of the permits was endorsed for a maximum of eight charter vessel anglers and the other permit (Second Permit) was endorsed for a maximum of six charter vessel anglers.

RAM determined Appellant did not qualify for a third CHP and that the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g) did not apply to Appellant's

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<sup>1</sup> Letter from Appellant to OAA (received Nov. 8, 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/regs/summary.htm>.

<sup>3</sup> 50 C.F.R. § 300.61: "Area 3A means all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41'15" N. latitude, 155°35'00" W. longitude) to Cape Ikolik (57°17'17" N. latitude, 154°47'18" W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44'50" N. latitude, 154°08'44" W. longitude), then 140° true."

application. RAM also determined that the Second Permit should not be endorsed for a maximum of eight charter vessel anglers.

Appellant contends the Second Permit should receive an angler endorsement number of eight charter vessel anglers. He also requests a third permit under the unavoidable circumstance provision of the CHLAP regulations.

I have reviewed Appellant’s appeal and the case record, and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing.<sup>4</sup>

### ISSUES

1. Is the Second Permit eligible for an angler endorsement of eight?
2. May Appellant receive a third permit based on the unavoidable circumstance provision of the CHLAP regulations?

### FINDINGS OF FACT

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

1. Second Permit, issued based on the logbook entries of Appellant’s vessel [REDACTED] (Vessel) was endorsed by RAM for an angler endorsement of six.<sup>5</sup>
2. In 2005, Appellant’s applicant-selected year of the qualifying period, Appellant reported bottomfish logbook fishing trips to ADF&G. As is relevant to this decision and as specifically highlighted by Appellant in his letter to RAM, Appellant recorded the following information for Vessel<sup>6</sup>:

Date of trip	Number of clients	Number of crew	Number of rods fished
June 20, 2005	6	2	8
July 3, 2005	6	3	8
July 16, 2005	6	2	8

3. Appellant reported a maximum number of six clients on any bottomfish logbook fishing trip taken in 2005.<sup>7</sup>
4. Appellant submitted a timely application for charter halibut permits on March 11, 2010.<sup>8</sup>

<sup>4</sup> 50 C.F.R. § 679.43 (g)(2), (k).

<sup>5</sup> Proposed Revised Record Summary, Charter Halibut Permits (May 2010).

<sup>6</sup> Copies of Vessel’s 2005 logbook pages submitted by Appellant.

<sup>7</sup> Copies of Vessel’s 2005 logbook pages submitted by Appellant.

## PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the CHLAP, which is codified at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67.

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued a Business Owner License that authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>9</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>10</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, and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>11</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.<sup>12</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 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>13</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

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<sup>8</sup> Application for Charter Halibut Permit(s) (dated Mar. 22, 2010, received Mar. 23, 2010).

<sup>9</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>10</sup> 50 C.F.R. § 300.67(f)(4).

<sup>11</sup> 50 C.F.R. § 300.67(f)(6); 50 C.F.R. § 300.67(f)(7).

<sup>12</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>13</sup> 50 C.F.R. § 300.67(d)(1).

four.<sup>14</sup> A charter vessel angler is a person, paying or non-paying, who uses the services of a charter vessel guide.<sup>15</sup> A charter vessel guide is a person who holds an annual sport guide license issued by ADF&G or one who provides sport fishing guide services.<sup>16</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.<sup>17</sup> If an applicant meets a minimum participation trip level in the recent participation period (2008), but not the qualifying period (2004, 2005), the applicant may meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period (2004, 2005).<sup>18</sup> If the applicant meets the unavoidable circumstance regulation for the qualifying period, the applicant will be treated as though the applicant participated in the qualifying period.

Unavoidable circumstance claims will be limited to persons who would be excluded from the charter halibut fishery entirely. 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>19</sup>

## ANALYSIS

### **1. Is the Second Permit eligible for an angler endorsement of eight?**

According to the Official Charter Halibut Record, Appellant reported a maximum of six clients on Vessel's trips in 2005. The Official Charter Halibut Record is the information prepared by NMFS on participation in the charter halibut fishing industry that NMFS uses to evaluate applications for charter halibut permits.

Appellant is not disputing he reported a maximum number of six clients on Vessel's trips in 2005. Appellant is claiming his logbook entries for Vessel support his claim that Second Permit should be endorsed for eight charter vessel anglers. To support his claim, Appellant submitted pages from Vessel's 2005 ADF&G Saltwater Charter Logbook. These pages include the date of bottomfish trips, the number of clients, the number of crew, the statistical areas where fishing occurred, the maximum number of rods fished, and the number of boat hours Vessel engaged in bottomfish fishing.

Appellant points to the "maximum number of rods fished" data as the basis for his belief that Second Permit should be endorsed for eight anglers. He explains that on June 20, July 3, and July 16, 2005, the maximum number of rods fished on these bottomfish trips

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<sup>14</sup> 50 C.F.R. § 300.67(e)(1), (3) & (5). This is the rule for an applicant's first permit.

<sup>15</sup> 50 C.F.R. § 300.61 (Definitions).

<sup>16</sup> 50 C.F.R. § 300.61 (Definitions).

<sup>17</sup> 50 C.F.R. § 300.67(g).

<sup>18</sup> 50 C.F.R. § 300.67(g)(2).

<sup>19</sup> 50 C.F.R. § 300.67(g).

was eight, and that this information establishes his Second Permit should be endorsed for eight anglers.

Appellant's argument lacks merit. The number of rods fished does not determine a permit angler endorsement number. A permit angler endorsement is "the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area."<sup>20</sup> "Charter vessel anglers" is a regulatory term that means "a person, paying or non-paying, using the services of a charter vessel guide."<sup>21</sup> Essentially, clients are the charter vessel anglers because they are the individuals who use the services of a charter vessel guide. In contrast, charter vessel anglers cannot include crew members (or the rods crew members fished) because crew members are individuals working for and supervised by a charter vessel guide or operator, not those using a guide's services.<sup>22</sup>

Recently, NOAA released the Charter Halibut Limited Access Program: Small Entity Compliance Guide. This guide includes a question and answer section designed to address common questions about the Charter Halibut Limited Access Program. Question thirteen asks: "How did NMFS determine my angler endorsement number for my CHP?" NOAA answers: "To determine angler endorsements, NMFS used the greatest number of clients reported in logbooks submitted timely to ADF&G for each vessel used for the qualifying years (2004 and 2005)."<sup>23</sup>

Thus, the relevant unit for calculating a permit's angler endorsement number is not the number of rods fished or the sum of the crew members and clients on a particular trip. Rather, it is the maximum number of clients reported on a bottomfish fishing trip during one of the years of the qualifying period. Appellant's maximum number of clients for Vessel during his applicant-selected year of 2005 was six.

RAM's interpretation of the regulations on this matter is reasonable and is not a basis to overturn the IAD. I conclude the relevant data for determining a permit angler endorsement number is the largest number of clients reported in a logbook timely submitted to ADF&G during one year of the qualifying period. Appellant has not demonstrated he met the regulatory requirement to receive an angler endorsement of eight for Second Permit.

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<sup>20</sup> 50 C.F.R. § 300.67(e).

<sup>21</sup> 50 C.F.R. § 300.61 (Definitions). A charter vessel guide is, as explained in the Principles of Law section, "a person who holds an annual sport guide licensed issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services." 50 C.F.R. § 300.67.

<sup>22</sup> See 50 C.F.R. § 300.61 (Definitions). A crew member is defined as "an assistant, deckhand, or similar person who works directly under the supervision of, and on the same vessel as, a charter vessel guide or operator of a vessel with one or more charter vessel anglers on board."

<sup>23</sup> Charter Halibut Limited Access Program: Small Entity Compliance Guide (revised June 29, 2011), available at <http://alaskafisheries.noaa.gov/sustainablefisheries/halibut/charter/faq.pdf>.

## 2. May Appellant receive a third permit based on the unavoidable circumstance regulation?

Appellant claims his intent to use a third vessel in his charter fishing business was thwarted by an unavoidable circumstance. Appellant explains in 2005, the delivery of his third vessel was significantly delayed and that is why he only used two vessels during the qualifying year. Despite this delay, Appellant does not satisfy the unavoidable circumstance regulation.

Only applicants who will be entirely excluded from the charter halibut fishery may make an unavoidable circumstance claim.<sup>24</sup> The unavoidable circumstance regulation explicitly states: "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>25</sup> Appellant meets the requirements for two transferrable permits. Therefore, he cannot make a claim under the unavoidable circumstance regulation for a third permit. Appellant does not qualify for the unavoidable circumstance provision of the CHLAP regulations.

### CONCLUSIONS OF LAW

1. Appellant's Second Permit does not meet the requirements for a charter halibut permit with an angler endorsement of eight because Appellant's highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period was six.
2. Appellant cannot make a claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), for a third permit because he is qualified to receive two transferable permits.

### ORDER

The IAD dated October 28, 2010, is upheld. This decision takes effect thirty days from the date issued, December 19, 2011,<sup>26</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 reverse, modify, or remand this decision pursuant to 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 Standard Time on November 28, 2011, the tenth day after the date of this Decision. A Motion for Reconsideration must be in

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<sup>24</sup> 50 C.F.R. § 300.67(g).

<sup>25</sup> 50 C.F.R. § 300.67(g) (emphasis added).

<sup>26</sup> 50 C.F.R. § 679.43(k) and (o).

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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Steven Goodman  
Administrative Judge

Date Issued: November 18, 2011