



But RAM determined that Appellant did not meet the participation requirement for a charter halibut permit in the recent period: five halibut logbook fishing trips under his ADF&G Business Owner License in 2008.<sup>5</sup> According to the official charter halibut record, Appellant took no halibut logbook fishing trips in 2008.

Appellant acknowledges this but states he did not participate in 2008 due to an unavoidable circumstance, namely that he sold his vessel in April 2008 and was unable to find a replacement that he could afford for the 2008 season.<sup>6</sup> A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.<sup>7</sup> Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

The prior administrative judge held a hearing on February 16, 2011.<sup>8</sup> Appellant participated by telephone, as did [REDACTED] (Witness). After the hearing, Appellant obtained counsel.<sup>9</sup> I gave counsel the opportunity to submit additional evidence.<sup>10</sup> Appellant, through counsel, did not submit additional evidence or argument.<sup>11</sup>

I have carefully considered the record in this appeal and conclude that the record contains sufficient information upon which to decide this appeal.<sup>12</sup> I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant does not meet the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), because Appellant did not show that he held a specific intent to operate a charter halibut fishing business in 2008. Appellant therefore does not qualify to receive a charter halibut permit through initial issuance.

## ISSUE

Did Appellant show that he had a specific intent to operate a charter halibut fishing business in 2008?

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<sup>5</sup> 50 C.F.R. § 300.67(b)(1)(ii)(B).

<sup>6</sup> Statement of Appellant with Application (received Apr. 5, 2010); Hearing Testimony of Appellant (Feb. 16, 2011).

<sup>7</sup> 50 C.F.R. § 300.67(g) (“Unavoidable circumstances claims must be made pursuant to paragraph (h)(6) of this section . . . .”); 50 C.F.R. § 300.67(h)(6) (“An applicant that receives an IAD may appeal to the Office of Administrative Appeals (OAA) pursuant to § 679.43 of this title.”). See Final Rule, 75 Fed. Reg. 554, 597 (Jan. 5, 2010), Change 19 from the Proposed Rule.

<sup>8</sup> Order Scheduling Hearing (Jan. 25, 2011). The prior administrative judge, Philip Smith, was working on a contract with NMFS and the contract ended. The appeal was then assigned to the undersigned judge.

<sup>9</sup> Entry of Appearance (Aug. 18, 2011).

<sup>10</sup> Email from NMFS Appeals Specialist to Counsel (Aug. 26, 2011)(with copy of record); Order Establishing Deadline for Submission of Additional Evidence or Argument (Sep. 19, 2011).

<sup>11</sup> Email from Counsel for Appellant to Mary Alice McKeen (Oct. 3, 2011).

<sup>12</sup> 50 C.F.R. § 679.43(g)(2).

## FINDINGS OF FACT

1. Appellant purchased [REDACTED] (VESSEL) in the fall of 2003.<sup>13</sup>
2. Appellant took eleven bottomfish logbook fishing trips in 2004 with VESSEL under an Alaska Department of Fish and Game (ADF&G) Business Owner license issued to him for that year.<sup>14</sup> Appellant experienced engine problems with VESSEL.<sup>15</sup>
3. Appellant reported no bottomfish logbook fishing trips in 2005 under an ADF&G Business Owner license issued to him.<sup>16</sup> Appellant did not use VESSEL because it had motor and electrical problems and was very slow. It had a four horsepower motor and could not go faster than three knots. Appellant could not afford to put in a new motor to get the boat in a condition where he could reliably use it to take clients charter fishing.<sup>17</sup>
4. In 2005, Appellant worked as a captain for [REDACTED], a fellow charter fishing captain and longtime friend, who had been turned down for his United States Coast Guard license. They turned in logbooks under [REDACTED] ADF&G Business Owner license in 2005. Appellant might also have worked as a captain for [REDACTED] in 2006 and 2007.<sup>18</sup>
5. Appellant did not take any trips for [REDACTED] in 2008. [REDACTED] died in 2008.<sup>19</sup>
6. Appellant sold VESSEL in April 2008 for [REDACTED] to get money for a land lease payment to the State of Alaska and because he could not afford necessary repairs to VESSEL including [REDACTED] for a new motor. Appellant got [REDACTED] from the sale.<sup>20</sup>
7. Appellant sold the vessel to a buyer from Anchorage. The buyer was found by Witness, who is Appellant's friend and who lives in Anchorage.<sup>21</sup>

<sup>13</sup> Statement of Appellant in Application at 2.

<sup>14</sup> Official Charter Halibut Record Summary (date created Jan. 26, 2010); IAD at 2.

<sup>15</sup> Hearing Testimony of Appellant (Feb. 16, 2011).

<sup>16</sup> Official Charter Halibut Record Summary (date created Jan. 26, 2010).

<sup>17</sup> Statement by Appellant submitted with Application (received Apr 5, 2010); Hearing Testimony of Appellant and Witness (Feb. 16, 2011).

<sup>18</sup> Letter from Appellant to OAA (Sep. 1, 2010); Statement by Appellant submitted with Application (received Apr. 5, 2010). I do not resolve whether Appellant operated a vessel for [REDACTED] in 2006 or 2007 because, assuming he did, it does not change the outcome of the decision.

<sup>19</sup> Statement by Appellant submitted with Application (received Apr. 5, 2010).

<sup>20</sup> Hearing Testimony of Appellant (Feb. 16, 2011); Bill of Sale ([REDACTED] sale price; notation paid in full 4-26-08).

<sup>21</sup> Hearing Testimony of Appellant and Witness (Feb. 16, 2011).

8. In 2008, Appellant did not take any halibut logbook fishing trips under his own ADF&G Business Owner License or an ADF&G Business Owner License issued to anyone else.<sup>22</sup>
9. In 2008, when Appellant sold VESSEL, he did not have any other vessel in mind to use as a charter vessel. Appellant did not locate any vessel suitable for a charter vessel for less than \$40,000. Appellant could not afford to buy any vessel for the 2008 season that he or his friend in Anchorage heard about.<sup>23</sup>
10. In 2008, Appellant took clients salmon fishing from spots where they could wade or try to catch salmon from a boardwalk.<sup>24</sup>
11. Appellant never had a plan to obtain a charter vessel for use in the 2008 season or the ability to obtain a charter vessel for use in the 2008 season.<sup>25</sup>
12. In 2010, Appellant used a friend's boat, without charge, and operated a charter halibut business.<sup>26</sup>
13. For the 2011 season, Appellant obtained his own vessel and operated a charter halibut business with that vessel.<sup>27</sup>
14. Appellant timely applied for a charter halibut permit on April 5, 2010.<sup>28</sup>

#### PRINCIPLES OF LAW

NMFS may issue charter halibut permits only in accordance with the regulations implementing the Charter Halibut Limited Access Program. These regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. The Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.<sup>29</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>30</sup>

<sup>22</sup> Official Charter Halibut Record Summary (dated created Jan. 26, 2010).

<sup>23</sup> Hearing Testimony of Appellant (Feb. 16, 2011); Statement of Appellant submitted with Application (received Apr. 5, 2010).

<sup>24</sup> Hearing Testimony of Appellant (Feb. 16, 2011).

<sup>25</sup> I base this on the Findings of Fact 1 – 10 and the evidence supporting those findings.

<sup>26</sup> Hearing Testimony of Appellant and Witness (Feb. 16, 2011).

<sup>27</sup> Hearing Testimony of Appellant and Witness (Feb. 16, 2011). The record does not indicate the level of Appellant's participation in 2010 or 2011, that is, how many halibut logbook fishing trips Appellant took in those years. Those facts are not material to resolving any issue in the appeal. If they were, I would have informed Appellant and sought additional information on those years.

<sup>28</sup> Application (dated Apr. 3, 2010, received Apr. 5, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

<sup>29</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

<sup>30</sup> 50 C.F.R. § 300.67(b)(1)(ii).

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>31</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 for that year.<sup>32</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 for that year.<sup>33</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.<sup>34</sup> If an applicant meets a minimum participation trip level in the qualifying period (2004 or 2005), but not the recent participation period (2008), the applicant may claim to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).<sup>35</sup>

Similarly, if an applicant meets a minimum participation trip level in the recent participation period (2008), but neither year in the qualifying period (2004 or 2005), the applicant may seek to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period.<sup>36</sup>

Appellant meets the minimum participation requirement in the qualifying period for a non-transferable permit but not the minimum participation requirement in the recent period. To prove a claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), an applicant must meet each requirement of the regulation.

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<sup>31</sup> 50 C.F.R. § 300.67(f)(6)-(7)(definitions of qualifying period and recent participation period).

<sup>32</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>33</sup> 50 C.F.R. § 300.67(d)(1).

<sup>34</sup> 50 C.F.R. § 300.67(g).

<sup>35</sup> 50 C.F.R. § 300.67(g)(1).

<sup>36</sup> 50 C.F.R. § 300.67(g)(2).

For the applicant who did not participate in the recent period, but did participate in the qualifying period, section (i) through (iv) of 50 C.F.R. § 300.67(g)(1) requires that the applicant show the following:

Section (i): the applicant had a specific intent to operate a charter halibut fishing business in the recent period (2008);

Section (ii): the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, unforeseen and reasonably unforeseeable;

Section (iii): the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred;

Section (iv): the applicant took all reasonable steps to overcome the circumstance.

## ANALYSIS

### **Did Appellant show that he had a specific intent to operate a charter halibut fishing business in 2008?**

A specific intent is more than a general desire or interest to operate a charter halibut fishing business at some point in the future. An applicant who had a specific intent to operate a charter halibut fishing business in a particular season will typically have a realistic plan to put in place the essential elements of a charter halibut fishing business for that season when a circumstance intervenes to remove the applicant's ability to secure or maintain one or more essential element. As evidence of an applicant's specific intent, an applicant will typically have taken concrete steps to operate a charter halibut fishing business for that year. I conclude that Appellant did not show that he had a specific intent to operate a charter halibut fishing business in 2008.

The basis for my conclusion is that Appellant did not have a vessel from which he could operate a charter halibut fishing business for the 2008 season and did not show that he ever had a realistic plan to have a vessel for the 2008 season. An applicant can show that that he intended to operate a charter halibut business in a particular season with a vessel that the applicant owned, the applicant was having repaired, the applicant was having constructed, the applicant was going to buy, the applicant was going to lease or the applicant was going to use without charge, such as a vessel from a friend.

With respect to Appellant's situation, Appellant owned VESSEL until April 2008 but he had not used it since 2004, because it needed repairs and a new engine to be

sufficiently reliable and sufficiently fast to operate as a charter vessel. Appellant had no intention to repair VESSEL and use it for the 2008 season.

Appellant did not show that he ever had a vessel that he planned to buy, lease or have constructed for the 2008 season. Appellant was able to use a friend's boat in 2010, without charge, but the record contains no evidence that he made, or tried to make, a similar arrangement for 2008.

Appellant worked as a captain for a friend in 2005 and possibly 2006 and 2007. Appellant reported those trips under his friend's ADF&G Business Owner License.<sup>37</sup> Appellant cannot get credit for the trips reported under another person's ADF&G Business Owner License. NMFS credits the trips to the person who held the ADF&G Business Owner License that authorized the trips.<sup>38</sup> And, in any event, Appellant meets the participation requirement in the qualifying period with eleven trips in 2004. He is lacking trips in 2008 and did not take any trips for his captain friend in 2008.

The only evidence that Appellant took any steps to obtain a charter vessel for the 2008 season was Appellant's testimony that he looked for a vessel and Witness's testimony that he looked for a vessel for Appellant. Their testimony was general. They did not indicate the names of any vessels they looked at, the names of any potential sellers or any asking prices for potential vessels. Appellant stated that neither he nor his friend found any boats that Appellant could afford. The preponderance of evidence in the record convinces me that Appellant never had a plan, or the ability, to operate a charter halibut fishing business in 2008 because he never had a plan, or the ability, to obtain a charter vessel for the 2008 season.

I conclude that Appellant has not shown that he had a specific intent to operate a charter halibut fishing business in 2008. Since an applicant must meet each requirement of the unavoidable circumstance regulation to qualify for a permit based on the regulation, I do not analyze whether Appellant meets the other requirements of the regulation. I affirm the IAD that is the subject of this appeal.

#### CONCLUSIONS OF LAW

1. Appellant did not show that he had a specific intent to operate a charter halibut fishing business in 2008 within the meaning of the unavoidable circumstance regulation at section (i) of 50 C.F.R. § 300.67(g)(1).

<sup>37</sup> Statement of Appellant submitted with Application (received Apr. 5, 2010).

<sup>38</sup> 50 C.F.R. § 300.67(b)(1)(ii)(NMFS will issue a charter halibut permit to a person who is the "person . . . to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements [for a permit.]").

2. Appellant does not meet the participation requirement for a charter halibut permit in the recent period through actual participation or through the unavoidable circumstance regulation.
3. Appellant is not eligible to receive a charter halibut permit through initial issuance.

### ORDER

The IAD that is the subject of this appeal is upheld. This decision takes effect on November 28, 2011, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(k), (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 7, 2011, the tenth day after the date of this Decision. 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

Date issued: October 28, 2011