

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0088

DECISION

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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 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 November 3, 2010, [REDACTED] doing business as (dba) [REDACTED] (Appellant), filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on September 8, 2010.<sup>1</sup> I refer to [REDACTED] interchangeably as Appellant. In the IAD, RAM evaluated Appellant's application for a permit under the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup>

In the IAD, RAM determined that Appellant did not meet the minimum participation requirement for a charter halibut permit in the qualifying period (2004, 2005). The minimum participation requirement for a non-transferable permit is five bottomfish logbook fishing trips during one year in the qualifying period (2004, 2005) and five halibut logbook fishing trips during the recent participation period (2008).<sup>3</sup> The minimum participation requirement for a transferable permit is fifteen bottomfish logbook fishing trips with one vessel in 2004 or 2005 and fifteen halibut logbook fishing trips with one vessel in 2008.<sup>4</sup>

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<sup>1</sup> Letter from Appellant to OAA (dated Oct. 30, 2010, received Nov. 3, 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. § 300.67(b)(1)(ii).

<sup>4</sup> 50 C.F.R. § 300.67(d)(1).

According to the official charter halibut record, Appellant had no bottomfish logbook fishing trips in the qualifying period, but he took fifty-two halibut logbook fishing trips with one vessel in the recent participation period.<sup>5</sup> Thus, according to the official record, Appellant did not meet the minimum participation requirement in the qualifying period for a non-transferable or transferable permit but did meet the minimum participation requirement in the recent period for a transferable permit.

Appellant stated that he met the participation requirements in the qualifying period (2004, 2005) through his purchase of the assets of Halibut King Charters, Inc., (Seller 1), a corporation, including Seller 1's two vessels, [REDACTED] (VESSEL 1) and [REDACTED] (VESSEL 2) and the logbook fishing history of those vessels. In the IAD, RAM stated that the charter halibut regulation does not provide for the issuance of charter halibut permits based on a private agreement to sell the logbook fishing history of vessels.<sup>7</sup>

Appellant stated that he is a successor-in-interest to Seller 1. In the IAD, RAM stated that Appellant did not provide any documentation that he was the legal successor-in-interest to a dissolved entity, as required by the regulation.<sup>8</sup>

On his application, Appellant made an unavoidable circumstance claim because VESSEL 2 sank in 2007, and Appellant was financially unable to replace it for the 2008 fishing season.<sup>9</sup> Appellant explains that without this circumstance, he would have used two vessels in 2008. 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>10</sup> Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.<sup>11</sup>

On appeal, Appellant stated that he also purchased the assets of another business, Jerry's Charters, from Jerry Montgomery (Seller 2), and is also the successor-in-interest to Seller 2.<sup>12</sup> Seller 2 took fifteen or more trips in 2004 and 2005 and therefore meets the minimum participation requirement in the qualifying period for a transferable permit.

I have carefully considered the record in this appeal and conclude that the record contains sufficient information upon which to decide this appeal.<sup>13</sup> I did not order a

<sup>5</sup> Official Record Summary for Appellant (date created Jan. 26, 2010).

<sup>6</sup> Letter from Appellant submitted with application (received Mar. 4, 2010).

<sup>7</sup> IAD at 2 – 3.

<sup>8</sup> IAD at 4 – 5 relying on 50 C.F.R. § 300.67(b)(1)(iii).

<sup>9</sup> Letter submitted with Application (received Mar. 4, 2010).

<sup>10</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>11</sup> IAD at 5 – 6.

<sup>12</sup> Letter from Appellant to OAA (Oct. 30, 2010).

<sup>13</sup> 50 C.F.R. § 679.43(g)(2).

hearing because Appellant has not alleged facts that, if true, authorize NMFS to issue a charter halibut permit.<sup>14</sup> I therefore close the record and issue this decision.

As an appellate officer, my responsibility is to evaluate whether an applicant meets the requirements in federal regulation to receive a charter halibut permit. For the reasons that follow, I conclude that Appellant is not eligible to receive a charter halibut permit because Appellant did not meet the participation requirement in the qualifying period. Appellant did not meet the participation requirement in the qualifying period through direct participation, through a private agreement to purchase vessels' fishing history in the qualifying period, through the seller's meeting the participation requirement in the qualifying period or through the unavoidable circumstance regulation.

### ISSUES

1. Does Appellant meet the participation requirement in the qualifying period for a charter halibut permit if the parties to a sale intended to transfer the seller's logbook fishing history to Appellant and the seller met the participation requirement in the qualifying period?
2. Is Appellant eligible for a permit as a successor-in-interest to Seller 1 or Seller 2?
3. Is Appellant eligible for a permit pursuant to the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)?

### FINDINGS OF FACT

1. In 2004, Seller 1 used VESSEL 1 and VESSEL 2 (collectively VESSELS) to complete eighty-nine bottomfish logbook fishing trips.<sup>15</sup>
2. On January 3, 2007, [REDACTED] with two other persons purchased assets of a charter fishing business from Seller 1. The purchase included the business's customer lists, VESSELS, and fishing rights by the following language: "All Fishing rights, Limited Entry status or IFQ's [individual fishing quotas] for past present or future use shall be conveyed to Buyers at time of issuance from Federal Government, State or any other Agency."<sup>16</sup>

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

<sup>15</sup> Official Record Print Summary (date created Jan. 27, 2010).

<sup>16</sup> Purchase and Sale Agreement at ¶22 (fishing rights language)(Dec. 12, 2006); Addendum or Amendment to the Purchase and Sale Agreement (Dec. 13, 2006). The sale was finalized on January 3, 2007. Escrow Instructions (Jan, 3, 2007); Bill of Sale of VESSEL 1 (Jan. 3, 2007); Bill of Sale of VESSEL 2 (Jan, 3, 2007); Letter from Appellant submitted with Application (received Mar. 4, 2010). Appellant submitted the purchase documents with his application. The documents show that the two other persons that purchased the assets of the charter halibut fishing business were [REDACTED]

3. [REDACTED] with the same two other persons formed [REDACTED] simultaneously with the purchase of VESSELS and the other assets from Seller 1.<sup>17</sup> In 2009, [REDACTED] bought the interests of the other persons in [REDACTED].
4. [REDACTED] believed that the parties to the January 2007 sale intended to transfer the logbook fishing history of Seller 1 to Appellant. [REDACTED] intended the agreement to have that effect.<sup>19</sup>
5. On April 25, 2007, VESSEL 1 sank after it had been inspected by the United States Coast Guard in March 2007 and no deficiencies were noted.<sup>20</sup> Appellant's insurance company did not cover the loss due to its interpretation of the coverage of the policy for at least two years.<sup>21</sup> Due to this, and other financial constraints, Appellant has not been able to replace VESSEL 1 as of March 4, 2010.<sup>22</sup>
6. In 2008, Appellant used VESSEL 2 to complete fifty-two halibut logbook fishing trips under authority of Appellant's ADF&G Business Owner License.<sup>23</sup>
7. On appeal, Appellant stated that he also purchased the assets of another charter fishing business from Seller 2 including any fishing rights that could result from charter fishing done by Seller 2.<sup>24</sup> Appellant submitted a statement from Seller 2 that this sale occurred in December 2006 and that Seller 2 did not purchase or renew an Alaska business license since that date.<sup>25</sup> Seller 2 took sixty-five bottomfish logbook fishing trips in 2004 with one vessel and sixty-four logbook fishing trips in 2005 with one vessel.
8. Appellant submitted a timely application for a permit on March 4, 2010.<sup>26</sup>

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<sup>17</sup> State of Alaska , Corporations Section website (Certificate of Incorporation, Jan. 1, 2007), <http://commerce.alaska.gov/CBP/Main/CBPLSearch.aspx?mode=Corp>.

<sup>18</sup> Letter from [REDACTED] to NMFS (June 3, 2010); State of Alaska, Corporations Section website, Notice of Change (shows [REDACTED] as all the officers of Appellant corporation and 100% shareholder) (Jan. 3, 2009), <http://commerce.alaska.gov/CBP/Main/CBPLSearch.aspx?mode=Corp>.

<sup>19</sup> Letter from Appellant submitted with Application (received Mar. 4, 2010).

<sup>20</sup> Fax Transmittal Sheet from Wells Fargo Insurance Services of Alaska to St Paul/Travelers Insurance (Apr. 26, 2007).

<sup>21</sup> Letter from Appellant with Application (received Mar. 4, 2010); Letter from St. Paul Travelers to [REDACTED] (May 7, 2007). It is not clear from the record whether the insurance company ever paid for the loss.

<sup>22</sup> Letter from Appellant with Application (received Mar. 4, 2010).

<sup>23</sup> Official Record Print Summary (date created Jan. 27, 2010).

<sup>24</sup> Letter from Appellant to OAA (Nov. 18, 2010).

<sup>25</sup> Letter from Seller 2 to OAA (Dec. 30, 2010).

<sup>26</sup> Application (received Mar. 4, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

## PRINCIPLES OF LAW

The issuance of charter halibut permits are governed by regulations implementing the Charter Halibut Limited Access Program. Those regulations are codified at federal regulations 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>27</sup>

Under the charter halibut regulations, NMFS may only issue a charter halibut permit to the individual or entity to which ADF&G issued the ADF&G Business Owner License that authorized the logbook fishing trips that met the minimum participation requirements for a charter halibut permit.<sup>28</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,<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 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>31</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>32</sup>

NMFS may issue a permit to an applicant who is a successor-in-interest to the individual or legal entity, such as a corporation or partnership, if the individual or legal entity met the participation requirements in both the qualifying period *and* the recent participation period.<sup>33</sup> An applicant may be a successor-in-interest to an individual

<sup>27</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

<sup>28</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<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. Therefore, for 2008, the regulation evaluates an applicant's participation by halibut logbook fishing trips. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009). For the definition of logbook fishing trip, bottomfish logbook fishing trip and halibut logbook fishing trip, see 50 C.F.R. § 300.67(f)(2),(3),(4).

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

<sup>33</sup> 50 C.F.R. § 300.67(b)(1)(iii).

only if the individual has died.<sup>34</sup> An applicant may be a successor-in-interest to a legal entity, such as a corporation or partnership, only if the legal entity has been dissolved.<sup>35</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.<sup>36</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>37</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>38</sup>

Under the unavoidable circumstance regulation, the applicant must show that its intent to participate in the period that it missed was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable and that it took all reasonable efforts to overcome the circumstance.<sup>39</sup>

## ANALYSIS

### **1. Does Appellant meet the participation requirement in the qualifying period for a charter halibut permit if the parties to a sale intended to transfer the seller's logbook fishing history to Appellant and the seller met the participation requirement in the qualifying period?**

Appellant meets the participation requirement in the recent period (2008) for a transferable permit with fifty-two trips from VESSEL 2. Appellant seeks a way to meet the participation requirement in the qualifying period. Appellant based his application and initial appeal on his purchase of the charter halibut fishing business from Seller 1 in 2007. Appellant seeks to meet the participation requirement in the qualifying period (2004, 2005) based on logbook fishing trips taken by VESSELS that occurred when Seller 1 owned VESSELS and that occurred pursuant to the ADF&G Business Owner License issued to Seller 1.

Through his purchase of VESSELS and the inclusion in the contract of the fishing rights of Seller, Appellant believed he was purchasing the logbook fishing trip history

<sup>34</sup> 50 C.F.R. § 300.67(b)(1)(iii)(A).

<sup>35</sup> 50 C.F.R. § 300.67(b)(1)(iii)(B).

<sup>36</sup> 50 C.F.R. § 300.67(g).

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

<sup>38</sup> 50 C.F.R. § 300.67(g)(2).

<sup>39</sup> 50 C.F.R. § 300.67(g)(1)(i) – (iv); 50 C.F.R. § 300.67(g)(2)(i) – (iv).

of VESSELS.<sup>40</sup> However, even if both parties intended to transfer the seller's logbook fishing history to Appellant, NMFS does not have authority to do that. NMFS can only credit a logbook fishing trip to the applicant who held the ADF&G Business Owner License that authorized the trip.

Appellant faces the same problem with his claim that he also purchased the charter business and logbook fishing history of Seller 2. Like Seller 1, Seller 2 met the participation requirement in the qualifying period for a transferable permit: sixty-five trips in 2004 and sixty-four trips in 2005 under the ADF&G Business Owner Licenses of Seller 2 for those years.

Appellant did not provide details of the transaction, such as the terms of the sale, and did not provide contemporaneous documentation of the transaction, such as a purchase agreement. If it were material to resolving the appeal, I would have sought additional information from Appellant on this transaction. But assuming that Appellant and Seller 2 both intended to transfer the logbook fishing history of Seller 2 to Appellant, again, NMFS does not have authority to do that.

The charter halibut regulation is quite explicit. NMFS will issue a charter halibut permit to "***the individual or non-individual entity 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.]"<sup>41</sup> The minimum participation requirements are five bottomfish logbook fishing trips in one year in the qualifying period and five halibut logbook fishing trips in the recent period.<sup>42</sup> The language of the regulation does not suggest that NMFS can issue a charter halibut permit to an applicant who held the ADF&G Business Owner License that authorized the required trips in only the qualifying period or only the recent period.

The regulatory history is equally explicit that NMFS shall not recognize private agreements as a basis for eligibility. NMFS stated in the proposed rule:

Charter halibut permits would not be awarded to persons who purchased a charter fishing business that met some or all of the participation requirements but who themselves do not meet the participation requirements. The Council did not recommend that NMFS award permits based on business purchase agreements and therefore it did not analyze criteria to recognize such agreements. Hence, NMFS does not propose to recognize private agreements for the following reasons: (a) the council did not recommend this policy; (b) a person who met all the participation requirements for a transferable permit could apply for the permit and transfer it to another person, if that is required by their private agreement; (c) a person who meets only the

<sup>40</sup> Finding of Fact 4. OAA (dated Oct. 30, 2010, received Nov. 3, 2010).

<sup>41</sup> 50 C.F.R. § 300.67(b)(1)(ii). A non-individual entity would include a corporation or partnership.

<sup>42</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A)(qualifying period) & (B)(recent participation period).

requirements for a nontransferable permit should not be able to transfer that permit; and (d) awarding a permit based on one person meeting the participation requirements in the qualifying period and another person meeting the participation requirements in the recent period would increase the total number of permits which would be contrary to the Council's intent. NMFS concluded that if one person did not participate in both periods – the qualifying period and the recent participation period – that person should not receive a charter halibut permit in the initial award of permits. To enter the fishery, that person would have to buy a permit from a person that met the participation requirements in both periods.<sup>43</sup>

In the final rule, NMFS published a lengthy comment from several members of the public describing the same problem faced by Appellant, namely purchase of a business between the qualifying period and the recent period. The comment described purchase agreements that expressly included the sale of a business's charter fishing history.<sup>44</sup> NMFS responded:

NMFS did not propose to recognize private agreements for several reasons that were stated in the proposed rule preamble. Prominent among these was that the Council did not recommend this policy. The Council has expressed its intent to recognize private agreements that transfer participation history in the establishment of other limited access systems, but not for this action. Because the Council did not recommend to recognize private agreements for this action, NMFS did not include such a provision in the rule implementing this program.<sup>45</sup>

I am bound by the regulation that was adopted. Under the charter halibut regulation, Appellant may not meet the participation requirement in the qualifying period through Seller 1 or Seller 2 meeting the participation requirement in the qualifying period. I do not have authority to order that NMFS issue a permit based on a private sale agreement between Appellant and Seller 1 or Seller 2. For NMFS to recognize private agreements as transferring the trip history of a vessel or the trip history of an ADF&G license holder, the charter halibut regulation would have to be changed.

## **2. Is Appellant eligible for a permit as a successor-in-interest to Seller 1 or Seller 2?**

I conclude that Appellant is not eligible for a permit as a successor-in-interest to Seller 1 or Seller 2 because neither Seller 1 nor Seller 2 met the recent participation requirement for a permit. Both Seller 1 and Seller 2 stopped charter halibut fishing before 2008.

<sup>43</sup> Proposed Rule, 75 Fed. Reg. 18,178 (Apr. 21, 2009).

<sup>44</sup> Final Rule, 75 Fed. Reg. 554, 585 – 586 (Jan. 5, 2010) (Comment 105).

<sup>45</sup> Final Rule, 75 Fed. Reg. at 585.

I conclude that an applicant can only receive a charter permit as a successor-in-interest if the applicant is a successor-in-interest to an individual or a non-individual entity that met the participation requirements for a permit in both the qualifying period and the recent participation period. I base this conclusion on the language of the regulation reinforced by NMFS’s description of the provision in the proposed rule and the overall structure of the regulation.

The successor-in-interest provision begins by stating: “If the person is applying as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet **the participation requirements described in paragraphs (b)(1)(ii) of this section**, NMFS will require the following written documentation: . . .”<sup>46</sup> The participation requirements in paragraphs (b)(1)(ii) are the participation requirements in the qualifying period and the recent period.<sup>47</sup>

In the proposed rule, NMFS explained the successor-in-interest provision:

Generally, the entity that applies for one or more charter halibut permits would be the same entity that held the ADF&G business owners license that authorized the trips **that met the participation requirements in the qualifying period and in the recent participation period**. The only exception to this requirement is if the entity that held these licenses is an individual who has died, or a non-individual entity, such as a corporation or partnership, that has dissolved.

. . . .

**If a non-individual entity, such as a corporation or partnership, met the requirements for a permit that that entity has dissolved**, the successors-in-interest to the entity may apply for that permit or permits.<sup>48</sup>

The basic structure of the charter halibut regulation is that NMFS awards permits to the person that held the ADF&G Business Owner Licenses, which authorized the required number of trips that occurred in the qualifying period and the recent period.<sup>49</sup> The successor-in-interest provision is a limited exception to the basic structure for eligibility because the person that held the ADF&G Business Owner License holder has either died, if the license holder was an individual, or has been

<sup>46</sup> 50 C.F.R. § 300.67(b)(1)(iii)(emphasis added).

<sup>47</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) (qualifying period) & (B) (recent period).

<sup>48</sup> Proposed rule, 74 Fed. Reg. 18,178, 18,186 – 18,187 (Apr. 21, 2009) (emphasis added). In the final rule, NMFS reorganized the rule but made no changes to the language of the successor-in-interest provision. Compare 50 C.F.R. § 300.67(b)(3)(iii), Proposed Rule, 74 Fed. Reg. at 18,194 with 50 C.F.R.

§ 300.67(b)(1)(iii), Final Rule, 75 Fed. Reg. 554, 600 (Jan. 5, 2010).

<sup>49</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) (qualifying period) & (B) (recent period). A “person” in this context can be an individual, a corporation, firm, or association. 50 C.F.R. § 300.61 (definitions).

dissolved, if the license holder was a legal entity, such as a corporation.<sup>50</sup> The person that earned the permit, literally, cannot apply for the permit and cannot receive the permit.

The successor-in-interest enables someone to stand in the shoes of the deceased individual or dissolved entity, apply for a permit and receive the permit, if the deceased individual or dissolved entity would have received a permit. The successor-in-interest provision does not enable an applicant to receive a permit if the deceased individual or dissolved entity did not meet the participation requirements for a permit and therefore would not have received a permit, if they had been able to apply.<sup>51</sup>

Appellant has submitted evidence to show that Seller 1 and Seller 2 were corporations that have been dissolved.<sup>52</sup> I do not reach the question of whether these corporations have been dissolved within the meaning of the charter halibut regulation because neither Seller 1 nor Seller 2 met the recent participation requirement for a permit. Thus, even if Seller 1 and Seller 2 are corporations that have been dissolved, Appellant could not receive a permit as a successor-in-interest to Seller 1 or Seller 2 because neither Seller 1 nor Seller 2 could have received a permit if they had applied.

### **3. Is Appellant eligible for a permit pursuant to the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)?**

Since Appellant is not eligible for a permit under the general participation requirements or the successor-in-interest provision, I will evaluate whether the unavoidable circumstance provision of the charter halibut regulation provides a basis for Appellant to receive a permit. Appellant is claiming that an unavoidable circumstance occurred to him because VESSEL 1 sank in 2007 and he was not able to replace it for the recent participation season in 2008.

To qualify for a permit under this provision, an applicant must show, as a threshold matter, that he met the requirements in either the qualifying period or the recent participation period. An applicant must show he either had five or more logbook fishing trips in 2004 or 2005, but an unavoidable circumstance thwarted his specific intent to operate a charter fishing business in 2008. Or the applicant had five or more halibut logbook fishing trips in 2008, but an unavoidable circumstance thwarted his

<sup>50</sup> 50 C.F.R. § 300.67(b)(1)(iii)(A)(individual has died); 50 C.F.R. § 300.67(b)(1)(iii)(B)(non-individual entity has been dissolved).

<sup>51</sup> I do not address whether a successor-in-interest applicant could prove that the deceased individual or dissolved corporation met the actual participation requirement in one period and met the requirements of the unavoidable circumstance regulation with respect to the other period. These facts are not present in this appeal. Seller 1 and Seller 2 participated in the qualifying period (2004, 2005) and exited the charter halibut fishery in 2006 before the recent period (2008).

<sup>52</sup> Letter from Appellant to OAA with attachments re Seller 1 (Jan. 21, 2011); Letter from Appellant to OAA with attachments re Seller 2 (Jan. 25, 2011).

specific intent to operate a charter fishing business in 2004 or 2005.<sup>53</sup> An applicant must have participated in either the qualifying period or the recent period.

With respect to VESSEL 1, Appellant has not established that he met the participation requirements for the qualifying period or the recent participation period. Although VESSEL 1 made fifteen or more trips in 2004, VESSEL 1 did not make those trips pursuant to an ADF&G Business Owner License held by Appellant. NMFS therefore cannot credit those trips to Appellant. Appellant did not meet the participation requirement in 2008 with VESSEL 1. Granted, it was a valid reason – the vessel sank a month after it had passed a Coast Guard inspection – and that reason would qualify as a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable. But Appellant did not meet the participation requirement in the qualifying period or the recent period with trips by VESSEL 1. And an applicant cannot claim an unavoidable circumstance in the recent period and the qualifying period.

It is true that Appellant did meet the recent participation requirement: he made fifty-two halibut logbook fishing trips with VESSEL 2 in 2008 under the authority of his ADF&G Business Owner License. But Appellant has not presented any argument or evidence that he meets the requirements of the unavoidable circumstance regulation with respect to his lack of participation in 2004 or 2005, namely that he specifically intended to participate in either of those years; that he was thwarted from participating by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable; and that he took all reasonable steps to overcome the circumstance.<sup>54</sup> The documentation in the record is that Seller 1 sold Appellant a charter halibut business in January 2007 and Appellant began operating it. I conclude that Appellant does not meet the unavoidable circumstance regulation with respect to his lack of participation in the qualifying period and is not eligible for a permit based on that regulation.

Appellant describes the difficulties he has encountered. Appellant purchased two vessels in January 2007, lost one vessel in April 2007, the vessel had been inspected in March 2007 by the Coast Guard and no deficiencies were noted, the vessel was insured but his insurance company did not compensate him for the loss for at least two years and possibly not at all.<sup>55</sup> Appellant stated that he needs to operate with two vessels for his business to be economically viable.<sup>56</sup> I simply do not have the authority to order that NMFS issue a permit based on an applicant's financial situation and the effect on an applicant from not receiving a permit. For me

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<sup>53</sup> See 50 C.F.R. § 300.67 (g)(1)&(2) (“An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period” or “[a]n application for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period,” may nevertheless receive a permit if he or she meets the unavoidable circumstance exception requirements.).

<sup>54</sup> 50 C.F.R. § 300.67(g)(2)(i) – (iv).

<sup>55</sup> Finding of Fact 5.

<sup>56</sup> Letter from Appellant to NMFS (Nov. 23, 2010).

to consider that, the regulation would have to specify that as a factor in issuing a permit.

I can only determine whether NMFS correctly applied the regulations as adopted by the Secretary of commerce. To receive a permit under those regulations, an applicant must meet the participation requirement in the qualifying period: the years 2004 and 2005. I have concluded that Appellant does not meet the participation requirement in the qualifying period through actual logbook fishing trips, through the purchase of logbook fishing history, through the successor-in-interest provision or through an unavoidable circumstance claim. I therefore conclude that Appellant is not eligible to receive a charter halibut permit by initial issuance.<sup>57</sup>

### CONCLUSIONS OF LAW

1. Appellant did not meet the minimum participation requirement in the qualifying period, namely five bottomfish logbook fishing trips in 2004 or 2005 taken under authority of an ADF&G Business Owner License issued to Appellant.
2. Appellant does not meet the participation requirement in the qualifying period for a charter halibut permit if the parties to a sale intended to transfer the seller's logbook fishing history to Appellant and the seller met the participation requirement in the qualifying period.
3. NMFS does not have authority to transfer the logbook history of one person to another person based on their private agreement to do that.
4. Appellant is not eligible to receive a permit as a successor-in-interest to Seller 1 or Seller 2 because neither Seller 1 nor Seller 2 met the participation requirement in the recent period.
5. Appellant is not eligible to receive a permit pursuant to the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).
6. Appellant is not eligible to receive a charter halibut permit through initial issuance.

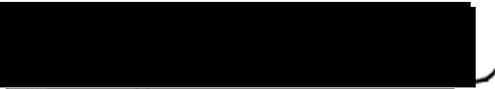
### ORDER

The IAD dated September 8, 2010 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).

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<sup>57</sup> A person may obtain a charter halibut permit by transfer from a person who holds a transferable charter halibut permit. See 50 C.F.R. § 300.67(i)(transfer provisions).

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