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

In re Application of	)	
[redacted]	)	Appeal No. 10-0086
	)	DECISION [corrected]*
Appellant	)	

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 October 31, 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 August 31, 2010.[1] In the IAD, RAM evaluated Appellant's application for a permit under the Charter Halibut Limited Access Program (CHLAP).[2] RAM is the administrative unit within the NMFS Alaska Region that initially evaluates applications for limited access permits. Appellant seeks a permit for International Pacific Halibut (IPHC) Regulatory Area 3A, which is roughly Southcentral Alaska.[3]

In the IAD, RAM denied Appellant's application for a charter halibut permit. RAM determined that Appellant did not meet the minimum participation requirement of five bottomfish logbook fishing trips in the qualifying period (2004, 2005). RAM determined that Appellant met the minimum participation requirement of five halibut logbook fishing trips in the recent period (2008).

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[1] Letter from [redacted] to OAA (dated Oct. 28, 2010, received Oct. 31, 2010).
[2] 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.
[3] For precise coordinates of Area 3A, see 50 C.F.R. § 300.61.

* This Decision corrects two mistakes in the original Decision. I changed a reference to IPHC Area 2C to IPHC Area 3 on page 1. I added a page number to the citation on note 26.

On his application, Appellant claimed eligibility for one transferable and six non-transferable charter halibut permits based on an unavoidable circumstance claim.[4] Appellant bases his unavoidable circumstance claim on his purchase of [redacted] ADF&G [redacted] (VESSEL) from [redacted] (Seller) in January 2008.[5] A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.[6] Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

I have carefully considered the record and conclude that it contains sufficient information upon which to decide this appeal.[7] I did not order a hearing because Appellant has not alleged facts that, if true, authorize NMFS to issue a charter halibut permit.[8] I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant is not eligible to receive any charter halibut permits. Appellant's claim is based on his purchase of a vessel and the fishing history of the vessel. NMFS does not have authority to recognize the sale of a vessel as transferring the logbook fishing trip history of the vessel to the buyer, even if the parties to the sale intended to transfer the vessel's trip history from the seller to the buyer.

ISSUES

1. Does Appellant meet the participation requirement in the qualifying period for a charter halibut permit if he purchased a vessel that made five or more charter halibut trips in 2004 or 2005 and the parties to the sale intended to transfer the vessel's trip history to Appellant?

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

FINDINGS OF FACT

1. On January 19, 2008, Appellant purchased VESSEL from Seller for [redacted]. The purchase included all of the Vessel's logbooks and catch records.[9]

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[4] Application at 2.
[5] Vessel Purchase Agreement submitted with Application (received Mar. 3, 2010).
[6] 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), Changes from the Proposed Rule no. 19.
[7] 50 C.F.R. § 679.43(g)(2).
[8] 50 C.F.R. § 679.43(g)(3).
[9] Vessel Purchase and Sale Agreement (signed by parties, Jan. 19, 2008).

2. Appellant believed that he was purchasing all the fishing rights that VESSEL earned before 2008 and the trip history of VESSEL before 2008.[10]

3. Appellant took fourteen halibut logbook fishing trips with VESSEL under authority of Appellant's ADF&G Business Owner license in 2008.[11]

4. Appellant timely applied for a charter halibut permit on March 16, 2010.[12]

PRINCIPLES OF LAW

In March 2007, the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.[13] In January 2010, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP) pursuant to section 773c of The Halibut Act.[14]

The CHLAP regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67. NMFS must follow these regulations in evaluating applications for charter halibut permits.

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.[15]

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,[16] and a recent participation period, which is the sport fishing season for halibut in 2008.[17]

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.[18]

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[10] Statement by Appellant (Feb. 25, 2010); Vessel Purchase and Sale Agreement (signed by parties, Jan. 19, 2008).
[11] Official Record Print Summary (date created Jan. 26, 2010).
[12] Application (received March 16, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).
[13] Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). *See* Council Motion on Charter Halibut Moratorium in Area 2C and 3A, (Mar. 31, 2007), available on NMFS Alaska Region website, http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.
[14] Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).
[15] 50 C.F.R. § 300.67(b)(1)(ii).
[16] 50 C.F.R. § 300.67(f)(6)(definition of qualifying period).
[17] 50 C.F.R. § 300.67(f)(7)(definition of qualifying period).
[18] 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

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.[19]

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.[20] 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).[21]

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.[22]

To prove a claim under the unavoidable circumstance regulation with respect to lack of participation in the qualifying period, 50 C.F.R. § 300.67(g)(2), an applicant show the following:

> Section (i): the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period (2004, 2005);
>
> 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.

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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). *See* 50 C.F.R. § 300.67(f)(2)(definition of bottomfish logbook fishing trip); 50 C.F.R. § 300.67(f)(3) (definition of halibut logbook fishing trip).

[19] 50 C.F.R. § 300.67(d)(1).

[20] 50 C.F.R. § 300.67(g).

[21] 50 C.F.R. § 300.67(g)(1).

[22] 50 C.F.R. § 300.67(g)(2).

ANALYSIS

1. Does Appellant meet the participation requirement in the qualifying period for a charter halibut permit if he purchased a vessel that made five or more bottomfish logbook fishing trips in 2004 or 2005 and the parties to the sale intended to transfer the vessel's trip history to Appellant?

Appellant bases his appeal on his purchase of VESSEL and VESSEL's fishing history in January 2008. Appellant meets the participation requirement for a non-transferable permit in the recent period (2008). Appellant seeks to meet the participation requirement in the qualifying period (2004, 2005) based on logbook fishing trips by VESSEL that occurred when Seller owned the vessel and that occurred pursuant to Seller's ADF&G Business Owner License.

Through his purchase of VESSEL, and the inclusion in the contract of VESSEL's "logbooks [and] catch records," Appellant believed he was purchasing the trip history of VESSEL.[23] I did not make any finding as to whether this was a mutual understanding, namely whether Seller also agrees that the sale included the transfer of VESSEL's trip history to Appellant. The reason I do not make any finding on that point is that even if both parties intended to transfer VESSEL's trip 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.

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.]" [24] The minimum participation requirements are specified as reporting five trips or more in one year in the qualifying period and five trips or more in the recent period.[25] 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 number of trips in only the qualifying period or only the recent period.

The regulatory history is equally explicit that the regulation embodies a policy decision 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

[23] Finding of Fact 2.
[24] 50 C.F.R. § 300.67(b)(1)(ii). A non-individual entity would include a corporation or partnership.
[25] 50 C.F.R. § 300.67(b)(1)(ii)(A)(qualifying period) & (B)(recent participation period).

> 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 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.[26]

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 fishing history and purchase agreements drafted with the assistance of attorneys.[27] 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.[28]

I acknowledge Appellant's statement that, when he purchased the vessel in January 2008, he tried to determine whether the vessel's history would be transferable and he could not determine that: "Furthermore when we called the Fisheries Board not only could they not tell us if the moratorium and permits would for sure go through but also how the transfer of a permit from one party to another would work."[29] At that point, the proposed rule was not even published. That occurred in April 2009.[30] And, even with a proposed rule, a member of the public cannot be certain that a provision in the

[26] Proposed Rule, 75 Fed. Reg. 18,178, 18,182 – 18,183 (Apr. 21, 2009).
[27] Final Rule, 75 Fed. Reg. 554, 585 – 586 (Jan. 5, 2010) (Comment 105).
[28] Final Rule, 75 Fed. Reg. at 585. *Compare* 50 C.F.R. § 679.40(a)(2)(i)(definition of qualified person in IFQ Pacific halibut and sablefish program which requires the person own or lease the vessel that made qualifying landings) *with* 50 C.F.R. § 679.2 (definition of eligible applicant for License Limitation Program includes person who purchased fishing history of vessel with qualifying documented harvests).
[29] Letter from Appellant to RAM (May 27, 2010).
[30] Proposed Rule, 75 Fed. Reg. 18,178 (Apr. 21, 2009).

proposed rule will be in the final rule. Comment 151 in the Final Rule addressed the uncertainty issue:

> *Comment 151:* The public received insufficient information about the moratorium and its impact on recently started charter halibut businesses. Uncertainty over whether or when a fishery is going to be managed under a limited access system adversely affects business activity. Investment-backed expectations need to be protected. Council control dates and final action twice before (April 1997 and April 2001) but neither of these rules were signed into law. That is probably why charter businesses started in later years.
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> *Response:* A control date notice is not by itself a Federal rule. The control date notice published in advance of this action on February 8, 2006 (71 FR 6442), stated it did not commit the Council or the Secretary to any particular management regime or criteria for entry to the charter halibut fishery. All previous control dates notices also have language to this effect. Similarly, the public is not required by a control date notice to invest or not invest in a fishing business that may be affected by the development and implementation of a limited access rule in the future. That decision is left to the business owner. The primary purpose of a control date notice is to give notice to persons contemplating an investment in a business that may be affected by a future limited access system that such a system may be developed and implemented. Affected persons can then incorporate the risk of potentially not receiving an initial allocation of permit(s) into their investment decision making. Risk-averse persons may decide to delay their investment pending potential regulatory changes; risk-taking persons may not let this information affect their investment decisions. In either case, the control date notice provides the public with information that a limited access system may be developed for a fishery and, if so, that entering the fishery after the control date may not lead to an initial allocation of a limited access permit.[31]

I do not have authority to evaluate the reasons that the regulation did not recognize private agreements as a basis for eligibility. My responsibility is to interpret, and apply, the regulation that the Secretary of Commerce, acting through NMFS, did adopt. On that question, the regulation is clear. Appellant may not meet the participation requirement in the qualifying period because it did not hold the ADF&G Business Owner License that authorized five or more bottomfish logbook fishing trips in either year of the qualifying period. For NMFS to recognize private agreements as transferring the trip history of a vessel or the trip history of an ADF&G license, the regulation would have to be changed.

[31] Final Rule, 75 Fed. Reg. 554, 593 (Jan. 5, 2010).

I note that the IAD states that VESSEL did not take five or more bottomfish logbook fishing trips in 2004 or 2005.[32] In other words, the IAD is stating that the prior owner of the vessel also could not meet the participation requirement in the qualifying period for a charter halibut permit based on the trip history of this vessel standing alone. Appellant did not dispute this and even stated: "I cannot get [the prior vessel operator] to release the logbooks for the years 2004 and 2005 and even if he did I doubt he filled most of his trips out knowing his reputation."[33] Thus, according to the IAD, even if Appellant could, and did, purchase VESSEL's trip history, he still would not be eligible to receive a permit.

2. Is Appellant eligible for a permit based on the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)?

To satisfy the unavoidable circumstance regulation, Appellant must show that he had a specific intent to operate a charter halibut fishing business in 2004 or 2005, he was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable and that he took all reasonable steps to overcome the circumstance.[34] Appellant did not allege that he intended to operate a charter halibut fishing business in 2004 or 2005 and therefore did not allege that his intent was thwarted by any circumstance or that he took any steps to overcome the circumstance. On the record before me, Appellant's situation is that he did not enter, and did not intend to enter, the charter halibut fishery until he bought VESSEL in 2008. Appellant therefore is not eligible for a permit based on the unavoidable circumstance regulation.

I conclude that Appellant does not meet the participation requirement in the qualifying period for a charter halibut permit through actual logbook fishing trips or through an unavoidable circumstance claim. I therefore conclude that Appellant is not eligible to receive a charter halibut permit by initial issuance.[35]

CONCLUSIONS OF LAW

1. NMFS can only credit a logbook fishing trip to the applicant who held the ADF&G Business Owner License that authorized the trip.

2. Appellant did not meet the minimum participation requirement in the qualifying period for a charter halibut permit, namely five bottomfish logbook fishing trips in 2004 or 2005.

3. Appellant does not meet the participation requirement in the qualifying period for a charter halibut permit if he purchased a vessel that made five or more bottomfish

[32] IAD at 3 ("Furthermore, the Official Record does not show that this vessel met the minimum bottomfish logbook participation requirements in 2004 or 2005.")
[33] Statement by Appellant (Feb. 25, 2010).
[34] 50 C.F.R. § 300.67(g)(2)(i)(ii).
[35] Appellant can 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).

logbook fishing trips in 2004 or 2005 and the parties to the sale intended to transfer the vessel's trip history to Appellant.

4. Appellant is not eligible for a permit based on the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2).

5. Appellant is not eligible to receive a charter halibut permit through initial issuance.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on February 22, 2012, 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 February 2, 2012, 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.

[redacted]

Mary Alice McKeen
Administrative Judge

Date Issued: January 23, 2012