

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

(iv) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period.

50 C.F.R. § 300.67(g)(1) (emphases added).

It appears, although it is not entirely clear, that the NAO construed subsection 50 C.F.R. § 300.67(g)(1)(ii) as requiring that the alleged unavoidable circumstance must have thwarted completely the applicant from participating in the recent participation period at any point after the unavoidable circumstance occurred.¹ I, however, do not believe the regulations should be interpreted in this manner. Rather, I interpret the provision regarding whether one was thwarted from participation as creating a test under which the applicant must demonstrate that, but for the unavoidable circumstance, the applicant would have met the minimum requirements to obtain a permit, i.e., they would have conducted at least five halibut logbook fishing trips in 2008.

I reach this decision for three reasons. First, taken as a whole, the plain language of the regulation supports this interpretation. The requirement that the applicant took reasonable steps to overcome the circumstance, 50 C.F.R. § (g)(1)(iv), refers to preventing the applicant “from operating” its business “in” the recent participation period. It does not refer to preventing the applicant from operating its business entirely during, or at any particular point within, the recent participation period.

Second, in the preamble to the regulations, NMFS describes the thwarting element of the unavoidable circumstance exception as requiring proof that the “circumstance . . . thwarted the intended participation.” 74 Fed. Reg. 18178, 18187 (April 21, 2009). NMFS thus viewed this provision in terms of whether, absent the unavoidable circumstance, the applicant would have achieved a level of participation that would have qualified him for a permit.

Finally, any interpretation that the unavoidable circumstance exception cannot apply when the applicant manages to return to his business after the circumstance occurred could produce absurd results. Take, for example, the situation where someone has medical emergency or a vessel break-down that prevents him from operating for the entire season except the last three days. If that person meets the other conditions of the exception, there is no reason why he should not qualify simply because he returned to work after the unavoidable circumstance occurred. Consequently, here, the fact that

¹ See NAO Decision of November 15, 2011 at 6 (“In 2008, Appellants reported three halibut logbook fishing trips to ADF&G. It is not reasonable to conclude, therefore, that Appellants’ clients injuries in 2008 thwarted their specific intent to operate their charter halibut business that year”); see also NAO Order Denying Reconsideration of February 14, 2012 at 2 (“[I]n 2008 Appellants continued to operate their charter fishing business despite their clients’ injuries. It is not reasonable to conclude therefore that Appellants’ clients’ injuries in 2008 thwarted their specific intent to operate their charter halibut business that year”).

