



## FACTUAL BACKGROUND<sup>2</sup>

In 1996, ██████████ purchased the ██████████ (a vessel he had operated as a captain for the prior ten years), and began his business.

██████████ remained active in the charter halibut fishing business for the next ten years. In 2004 and 2005, he reported 76 and 68 halibut logbook trips respectively.<sup>3</sup>

In early 2006, ██████████ changed the name of his business (from ██████████ ██████████) to emphasize to his clients that his business specialized in halibut fishing. Also, he paid more than \$38,000 to have the engines in the ██████████ replaced.<sup>4</sup>

██████████ explained to RAM that he was diagnosed with ██████████ “During the 2006 season, [he] experience[ed] more pain than usual. . . . for the first time in . . . 23 years as a charter boat operator out of Homer, [he] hired a crew member, [and he] . . . survived the season but could not work [his] winter job as a CNA (Certified Nurse’s Aide) and was diagnosed with ██████████.”<sup>5</sup>

The severity of ██████████ is amply demonstrated in the record. On September 19, 2006, ██████████, wrote on a prescription pad: ██████████ will be off work due to illness indefinitely.”<sup>6</sup> ██████████, Director of Human Resources for ██████████: “Unfortunately, after the 2006 summer charter season, ██████████ health became so compromised he was forced to resign his position at ██████████.”<sup>7</sup> On December 16, 2006, the U.S. Social Security Administration informed ██████████ in a “Notice of Award” that he was entitled to “. . . monthly disability benefits beginning March 2007. . . . We found that you became disabled on September 11, 2006.”<sup>8</sup>

Over the winter of 2006/2007, ██████████ decided that he could not continue to run his charter

<sup>2</sup> Unless I note otherwise, I have based these facts on ██████████ letters to RAM (March 24, 2010), and ██████████ letters to OAA (July 22, 2010, and September 14, 2010). I found the statements in these documents credible, detailed, consistent with documentary evidence in the record and consistent with ██████████ testimony at the hearing.

<sup>3</sup> Official Charter Halibut Record of ██████████ participation (January 27, 2010). See 50 C.F.R. § 300.67(f)(5) [“Official charter halibut record means the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.”].

<sup>4</sup> Invoice from ██████████ (May 3, 2006); letter from ██████████ ██████████ (August 2, 2010).

<sup>5</sup> Letter from ██████████ to RAM (March 24, 2010).

<sup>6</sup> ██████████; Prescription Pad note (September 19, 2006).

<sup>7</sup> Letter from ██████████ ██████████ (September 13, 2010).

<sup>8</sup> Social Security Administration, “Notice of Award” (December 16, 2006).

business and decided to sell his boat.<sup>9</sup>

In the spring of 2007, the vessel was sold to [REDACTED] owned by [REDACTED] friend, [REDACTED]. In 2007, [REDACTED] went on halibut fishing trips with [REDACTED] on the [REDACTED]. He was along to serve as the licensed captain and to teach the new owner how to run the vessel, but in mid-season it became “too much for [REDACTED] to get on and off the boat,” so, in early July, [REDACTED] hired another captain.<sup>10</sup> [REDACTED] put their home up for sale and, in August 2007, they left Homer [REDACTED].

In the penultimate paragraph in his March 24, 2010, letter, [REDACTED] stated:

In early 2008 I had a conversation with [REDACTED] and he mentioned that they reconfigured the interior of the [REDACTED]. Fine, it’s his boat but to me call me silly, some do, but that burst my bubble of a return. At that point I gave up – the straw that broke the camel’s back. . . .

#### ISSUE

Did [REDACTED] have a specific intent to operate a charter halibut fishing business in the recent participation period?

#### ANALYSIS

To qualify for a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License that authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>11</sup> The charter halibut regulation specifies a minimum participation requirement in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,<sup>12</sup> and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>13</sup> The regulation specifies two levels of minimum participation: one for a non-transferable permit and one for a transferable permit.

To receive a non-transferable charter halibut permit, the ADF&G license holder must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period

<sup>9</sup> Testimony of [REDACTED] Administrative Hearing (September 21, 2010).

<sup>10</sup> Testimony of [REDACTED], Administrative Hearing (September 21, 2010).

<sup>11</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>12</sup> 50 C.F.R. § 300.67(c)(6) (“*Qualifying period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005”).

<sup>13</sup> 50 C.F.R. § 300.67(c)(7) (“*Recent participation period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008.”).

(2004 or 2005),<sup>14</sup> and a minimum of five halibut logbook fishing trips in the recent participation period (2008).<sup>15</sup>

To receive a transferable charter halibut permit, the license holder must have reported a minimum of fifteen logbook fishing trips with the same vessel in the qualifying period (2004, 2005)<sup>16</sup> and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).<sup>17</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirements in one, but not both, participation periods.<sup>18</sup> If an applicant meets a minimum participation trip level in the qualifying period (2004/2005), but not in the recent participation period, the applicant may seek to meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).<sup>19</sup> If the applicant meets the unavoidable circumstance regulation for the recent period, the applicant may be treated as though the applicant participated in the recent period.

Similarly, if the applicant meets the minimum participation trip level in the recent participation period (2008), but not in the qualifying period (2004, 2005), the applicant may seek to meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period (2004, 2005). If the applicant meets the unavoidable circumstance regulation for the qualifying period, the applicant may be treated as though the applicant participated in the qualifying period.

**The unavoidable circumstance regulation.** The unavoidable circumstance regulation that applies to applicants who participated in the qualifying period but not in the recent participation period, 50 C.F.R. § 300.67(g)(1), provides:

(1) *Recent participation period.* 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, may receive one or more permits if the applicant proves paragraphs (g)(1)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation period;

(ii) The applicant's specific intent was thwarted by a circumstance that was:

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<sup>14</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A).

<sup>15</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

<sup>16</sup> 50 C.F.R. § 300.67(d)(1)(i).

<sup>17</sup> 50 C.F.R. § 300.67(d)(1)(ii). All fifteen trips within each period must be with one vessel but the applicant can have used a different vessel in the qualifying period and the recent participation period.

<sup>18</sup> 50 C.F.R. § 300.67(g).

<sup>19</sup> 50 C.F.R. § 300.67(g)(1).

- (A) Unavoidable;
  - (B) Unique to the owner of the charter halibut fishing business;
- and
- (C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;
  - (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 at last one year of the recent participation period.
  - (v) If the applicant proves the foregoing (*see* paragraphs (g)(1)(i) through (iv) of this section), the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in paragraphs (b), (c), (d), (e) and (f) of this section.

An applicant must satisfy each requirement of the unavoidable circumstance regulation for NMFS to treat the applicant as though the applicant participated in 2008.

**Did [REDACTED] have a specific intent to operate a charter halibut fishing business in the recent participation period? No.**

If an applicant did not hold a specific intent to operate a charter halibut business in a specific year, the applicant cannot meet the remaining requirements of the regulation. That is, if an applicant did not have a specific intent to participate, the applicant cannot show that a circumstance with particular characteristics – unavoidable, unique, unforeseen and reasonably unforeseeable – thwarted the applicant’s specific intent.

With respect to [REDACTED]’s intention before the 2008 season, it is clear that he had not formed the intent to operate a charter halibut fishing business. Because of his health, he abandoned the fishery following the conclusion of the 2006 season. He sold his boat. There is no evidence in the record that he took any steps to obtain another vessel (or the return of the [REDACTED] [REDACTED]) and reopen his business before the 2008 season. In fact, in his March 24, 2010, letter to RAM (quoted above), [REDACTED] stated that when he learned the vessel’s new owner had reconfigured the interior of the [REDACTED], he gave up any desire he may have had to return to the fishery, saying: “. . . that burst my bubble of a return. At that point I gave up – the straw that broke the camel’s back.” Under these circumstances, it is clear that [REDACTED] did not form a specific intent to participate in 2008.

I therefore conclude that [REDACTED] does not meet the other requirements of the unavoidable circumstance regulation because if he did not have a specific intent, he cannot show that his specific intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable.

As a result, [REDACTED] does not satisfy the requirements in the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1), with respect to his lack of participation in the charter halibut fishery in 2008, and does not meet the minimum qualifications for a charter halibut permit

#### FINDINGS OF FACT

1. [REDACTED] made no reports of halibut logbook fishing trips during the recent participation period (2008).
2. [REDACTED] had effectively abandoned the fishery by the beginning of the 2007 sport halibut season.
3. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2008.

#### CONCLUSIONS OF LAW

1. An applicant must satisfy all the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in 2008 in order for NMFS to treat the applicant as though the applicant participated in the fishery in 2008.
2. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2008 within the meaning of 50 C.F.R. § 300.67(g)(1).
3. [REDACTED] does not satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(1) with respect to his lack of participation in the charter halibut fishery in 2008.
4. [REDACTED] does not satisfy the minimum qualifications for a charter halibut permit.

#### DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This decision takes effect on January 3, 2011, unless by that date the Regional Administrator orders review of the Decision.

The 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 Time, on the tenth day after the date of this Decision, December 13, 2010. 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.

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[Redacted]

Philip J. Smith  
Administrative Judge

Reviewed and approved:

[Redacted]

Eileen Jones  
Chief Administrative Judge