

The record contains sufficient information on which to reach a final judgment, as required by 50 C.F.R. § 679.43(g)(2).

ISSUES

1. Does Appellant satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of participation in the charter halibut fishery in the qualifying period?
2. Did Appellant have a specific intent to operate a charter halibut fishing business in the qualifying period?

SUMMARY OF DECISION

The IAD is AFFIRMED. The Appellant did not demonstrate that he held a specific intent to operate a charter halibut fishing business in 2005; therefore, he cannot prevail on his unavoidable circumstance claim.

FINDINGS OF FACT

1. Appellant did not commence his charter fishing activities until 2007, some two years following the end of the CHLAP qualifying period (2004, 2005).²
2. Appellant operated his charter halibut fishing business in International Pacific Halibut Commission (IPHC) Administrative Area 2C.³
3. In 2008, Appellant reported forty-two halibut logbook fishing trips to the Alaska Department of Fish and Game (ADF&G).⁴
4. In the fall of 2004,⁵ Appellant was approached by a friend to operate a charter halibut fishing business in a remote lodge in Southeast Alaska,⁶ and he agreed to do so. To prepare,

² Testimony of Applicant at Oral Hearing (November 5, 2010).

³ 50 C.F.R. § 300.61: “Area 2C includes all waters off Alaska that are east of a line running 340° true from Cape Spencer Light (58° 11' 54" N. lat., 136° 38' 24" W. long.) and south and east of a line running 205° true from said light.”

⁴ Official Charter Halibut Record [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].

⁵ Or possibly in December 2004 or early January 2005; the testimony and written submissions are at variance. The discrepancy is not material.

⁶ The lodge was located on the shores of a bay in Southeast Alaska, [REDACTED] (Appellant’s testimony, Administrative Hearing, November 5, 2010).

Appellant had the engines on his 24-foot vessel rebuilt, at a cost of \$3,453.00.⁷ At a sportsman's show in February 2005, Appellant and the lodge owner recruited and booked clients for both the lodge and the charter fishing business. Because of delays related to lodge "Renovation, Purchases, and Finances," the lodge did not open in 2005 and Appellant was required to notify and refund deposits to those he had booked for the 2005 season.⁸

5. Appellant's prospective clients stated different times and reasons for Appellant's inability to provide charter halibut fishing experiences in 2005. One (Client #1) stated: "In April of 2005, (Appellant) let me know that due to financing problems with the lodge he would not be able to keep the contract that year . . ."⁹ Another (Client #2) stated: "In May of 2005, (Appellant) informed us that due to some family problems he would not be able to fill his part of the contract . . ."¹⁰ A third (Client #3) stated: "At the end of May 2005, (Appellant) contacted me and explained that due to unexpected family and financial problems he would not be able to fulfill his end of the contract . . ."¹¹ Appellant had a different recollection:

Administrative Judge: At what point in 2005 did you decide it just wasn't going to happen?

Appellant: Oh, it was probably the end of June, first part of July sometime, I can't remember exactly . . .¹²

6. Appellant offered his clients an alternative charter experience, which was to take halibut fishing charters from [REDACTED], which was nearer Appellant's residence; however, the prospective clients chose not to accept the offer, preferring to wait until they could fish in a "remote" environment.¹³
7. In 2005, Appellant did not hold, nor did he attempt to obtain, a charter vessel and guide license or a Saltwater Charter Vessel Logbook from the Alaska Department of Fish and Game,
8. In 2005, Appellant did not hold the requisite U.S. Coast Guard (USCG) license to carry passengers for hire (i.e., he did not hold the Operator of Uninspected Passenger Vessel (OUPV) or "6-Pack") license, nor had he taken a course to qualify for one.¹⁴ One of Appellant's prospective clients, at the time the charter agreement was reached, was unaware that Appellant was not authorized to provide the service for which he had contracted.¹⁵

⁷ Photocopy of invoice from a marine repair shop: "Remove and rebuild two . . . engines . . ." (February 15, 2005).

⁸ Letter from Lodge Owner "To whom it may concern" (Received by NMFS, March 31, 2010); and, Testimony of Appellant during Administrative Hearing (November 5, 2010).

⁹ Letter to NMFS from Client #1 (March 14, 2005 (*sic*)).

¹⁰ Letter "Too (*sic*) whom it concerns" from Client #2 (March 22, 2010).

¹¹ Letter to NMFS from Client #3 (undated, received by NMFS on March 31, 2010).

¹² Testimony of Appellant during Administrative Hearing (November 5, 2010).

¹³ Testimony of Appellant during Administrative Hearing (November 5, 2010).

¹⁴ Id.

¹⁵ Testimony of prospective client during Administrative Hearing (November 5, 2010).

Likewise, the Lodge Owner did not realize that Appellant did not hold the necessary licenses in 2005.¹⁶

9. Appellant lives in [REDACTED]; in 2005, although he stated that he intended to bring his vessel from [REDACTED] on the Alaska Marine Highway System (AMHS), he did not do so.¹⁷
10. In 2006, Appellant had still not acquired the “6-Pack” license to operate a charter fishing vessel. It was not until early 2007 that he took a special course to qualify for the license and took the examination. Thereafter, it took approximately six weeks before an audit of his claimed sea time was completed; the license was issued in late May 2007.¹⁸

CHARTER HALIBUT LIMITED ACCESS PROGRAM

Under the Charter Halibut Limited Access Program (CHLAP), NMFS will award permits to applicants based on their reported charter fishing trips during two periods: (1) the *qualifying* period, which is the sport fishing period for halibut in 2004 and 2005,¹⁹ and (2) the *recent participation* period, which is the sport fishing period for halibut in 2008.²⁰

NMFS will issue two types of charter halibut permits: transferable and non-transferable. A transferable permit may be transferred to another person, upon NMFS’s approval of an application to transfer. A non-transferable permit becomes invalid upon the demise of the permit holder.

If the applicant 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 applicant will receive a non-transferable charter halibut permit.²¹ The trips must have been reported under the applicant’s Alaska Department of Fish & Game [ADF&G] Business Owner Licenses.

If the applicant reported a minimum of fifteen bottomfish logbook fishing trips with the same vessel in one year in the qualifying period (2004, 2005), and a minimum of fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008), the applicant will receive a transferable charter halibut permit.²² The trips must have been reported under the applicant’s ADF&G Business Owner Licenses.

¹⁶ Testimony of Lodge Owner during Administrative Hearing (November 5, 2010).

¹⁷ Testimony of Appellant during Administrative Hearing (November 5, 2010).

¹⁸ Testimony of Appellant during Administrative Hearing (November 5, 2010).

¹⁹ 50 C.F.R. § 300.67(c)(6).

²⁰ 50 C.F.R. § 300.67(c)(7).

²¹ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

²² 50 C.F.R. § 300.67(d)(1)(i) & (ii). All fifteen trips within each period must be with one vessel but the applicant may have used a different vessel in the qualifying period and the recent participation period. 50 C.F.R. § 300.67(d)(1)(iii).

The regulations provide another way for an applicant to meet the minimum reporting requirements. Under an unavoidable circumstance provision [50 C.F.R. § 300.67(g)], if an applicant can show that an unavoidable circumstance thwarted the applicant's specific intent to participate (i.e., to submit bottomfish or halibut logbook fishing trip reports) during either the qualifying period or the recent participation period (but not both), NMFS may treat the applicant as though the applicant had actually participated and made such reports.

Appellant herein premises his claim on the provisions of the unavoidable circumstance rule that applies to applicants who participated during the recent participation period, but not during the qualifying period. To prevail, Appellant must prove: (1) that he held a specific intent to operate a charter halibut fishing business during at least one year of the qualifying period; (2) that his intent to do so was thwarted by a circumstance that was unique to him, unexpected, unforeseen, and reasonably unforeseeable; (3) that the circumstance actually occurred; and, (4) that he took all reasonable steps to overcome the circumstance.

ANALYSIS

1. Does Appellant satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(2) with respect to his lack of participation in the charter halibut fishery in the qualifying period? Yes.

The first requirement of the unavoidable circumstance regulation sets out the precondition for claiming unavoidable circumstance in the qualifying period; namely, that the Appellant "meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period."²³

According to the official charter halibut record, Appellant reported forty-two halibut logbook fishing trips in 2008. Appellant therefore meets the participation requirements for a transferable permit in the recent participation period. However, he did not participate in the halibut charter fishing business during either year of the qualifying period (2004, 2005). His claim that an unavoidable circumstance thwarted his intent to participate in 2005 allows him to pursue his permit application under the unavoidable circumstance provisions of the regulation.

Appellant's claim is analyzed below.

2. Did Appellant hold a specific intent to participate in the charter halibut fishery in 2005 as required under 50 C.F.R. § 300.67(g)(2)(i)? No.

If an applicant fails to prove, by a preponderance of evidence in the record, that the applicant held a specific intent to operate a charter halibut business in a specific year, the applicant cannot prevail. 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 such intent.

²³ 50 C.F.R. § 300.67(g)(2).

In late 2004, or early 2005, Appellant accepted an invitation to provide charter halibut fishing experiences to guests of a remote [REDACTED] lodge. To prepare for the business, he had the engines on his fishing vessel rebuilt and he went with the lodge owner to a sportsman's show to recruit clients for the lodge and for his expected charter business. The evidence of record does not show he made any other preparations.

But Appellant was not prepared to operate a charter halibut business in 2005. He did not hold a USCG "6-Pack" license, nor did he take any steps to obtain one. Likewise, he did not have the necessary ADF&G licenses, nor did he have an ADF&G charter vessel logbook for his vessel.

In 2005 Appellant made no arrangements for his vessel to be brought to the lodge so that he could use it in the charter halibut fishing business. Further, progress on preparing the lodge for guests was delayed by "Renovation, Purchases, and Finances," and the lodge did not open in 2005.

Appellant and some of his potential clients had different recollections regarding when in 2005 Appellant decided he could not provide the services he had contracted to provide. Three clients provided written statements regarding when they were notified of the cancellation of their reservations; one indicated he was notified in April, one said he received notice in May, and another indicated that he received notice in late May. When questioned, Appellant stated that it was in "late June, early July" when he decided he needed to cancel his contracts.

Under the circumstances, I conclude that Appellant did not hold a specific intent to operate a charter halibut fishing business in 2005. Because I conclude that the Appellant did not hold a specific intent to operate his charter halibut fishing business in 2005, I need not reach additional issues under the unavoidable circumstance rule (e.g., did an unavoidable circumstance thwart the specific intent, did Appellant do all things possible to overcome the circumstance).

CONCLUSIONS OF LAW

1. Appellant reported forty-two halibut logbook fishing trips during the recent participation period (2008); however, Appellant did not report any bottomfish logbook fishing trips in either qualifying year (2004 or 2005).
2. Appellant did not hold a specific intent to operate a charter halibut fishing business in 2005. 50 C.F.R. § 300.67(g)(2).
3. Appellant has not satisfied the requirements of the unavoidable circumstance regulation, as it pertains to his lack of participation during the CHLAP qualifying period. 50 C.F.R. § 300.67(g)(2).
4. Appellant is not qualified to have a charter halibut permit issued to him upon initial issuance.

DISPOSITION AND ORDER

The denial of Appellant's application for a charter halibut permit, as set out in the IAD that is the subject of this appeal, is AFFIRMED. This decision takes effect on May 31, 2011, unless by that date the Regional Administrator orders review of the decision.

Appellants or RAM may submit a Motion for Reconsideration, but it must be received by this office not later than 4:30 p.m., A.S.T., on May 9, 2011, the tenth day after this Decision. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the administrative judges, and must be accompanied by a written statement in support of the motion.²⁴



Philip J. Smith
Administrative Judge

Reviewed and approved:



Eileen G. Jones
Chief Administrative Judge

²⁴ The NAO "Procedures for filing Motions for Reconsideration" are published on the NMFS Alaska Region web site: <http://alaskafisheries.noaa.gov/appeals/reconsiderationpolicy.htm>