

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

In re Application of) Appeal 11-0049
)
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) DECISION
)
)
 Appellant) August 19, 2011
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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's 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 February 28, 2011, [REDACTED] (Appellant) filed a timely appeal of a revised Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on December 30, 2010.¹ In the IAD, RAM evaluated Appellant's application for a permit under the Charter Halibut Limited Access Program.²

In the IAD, RAM determined that Appellant met the participation requirements for one non-transferable charter halibut permit for International Pacific Halibut Commission (IPHC) Regulatory Area 2C,³ with a maximum angler endorsement of five. RAM determined that [1] Appellant filed a timely application for a charter halibut permit, [2] Appellant reported at least five bottomfish logbook fishing trips in one year of the qualifying period (2004 or 2005) and at least five halibut logbook fishing trips in the recent participation period (2008), and [3] the highest number of anglers that Appellant reported on any trip in the qualifying period (2004, 2005) was five.

In the IAD, RAM determined that Appellant did not meet the participation requirements for a transferable charter halibut permit. The minimum participation requirement in the qualifying period (2004, 2005) for a transferable permit is fifteen bottomfish logbook fishing trips reported under the applicant's Alaska Department of Fish and Game (ADF&G) Business Owner License

¹ Appeal Brief submitted by Appellant's attorney (Feb. 28, 2011).

² The Charter Halibut Limited Access 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 IPHC Regulatory Area 2C is roughly Southeast Alaska. For the coordinates of Area 2C, see 50 C.F.R. § 300.61.

in 2004 or 2005 with one vessel.⁴ The minimum participation requirement in the recent participation period is fifteen halibut logbook fishing trips reported under the applicant's ADF&G Business Owner License with one vessel in 2008.⁵

RAM determined that Appellant met the participation requirement in the qualifying period for a transferable permit. According to the official charter halibut record, Appellant made twenty-eight bottomfish logbook fishing trips in 2004 and 2005. RAM determined that Appellant did not meet the participation requirement in the recent period. In the recent period (2008), according to the official charter halibut record, Appellant made eleven halibut logbook fishing trips with the same vessel, which is less than the fifteen required for a transferable permit.

Appellant argues that he should receive a transferable permit because he would have taken fifteen halibut trips in 2008, but for the regulation that NMFS adopted on May 28, 2008, which changed the daily bag limit for halibut for anglers on charter halibut trips to one halibut per day.⁶ Appellant also stated that in 2008 he experienced several unanticipated vessel breakdowns which caused him to lose approximately twenty-five percent of his season.⁷ Appellant argues the charter halibut regulation constitutes a taking of his business because it makes his business uneconomical.⁸ Appellant argues that he should receive a permit with an angler endorsement of six to enable him to recoup the losses he has incurred from the one-halibut rule.⁹

Appellant can file this appeal because the IAD directly and adversely affected his interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that he meets the requirements for a transferable charter halibut permit.

Although Appellant requested a hearing, I did not hold a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue him a transferable charter halibut permit.¹⁰ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision.

⁴ 50 C.F.R. § 300.67(d)(1)(i).

⁵ 50 C.F.R. § 300.67(d)(1)(ii).

⁶ Appeal Brief (Feb. 28, 2011).

⁷ Supplement to Appellant's Opening Brief (Apr. 4, 2011).

⁸ Appeal Brief (Feb. 28, 2011).

⁹ Appeal Brief at 6 (Feb. 28, 2011).

¹⁰ 50 C.F.R. § 679.43(g)(3)(iv) (appellate officer may order a hearing only if "[r]esolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.")

ISSUES

1. Has Appellant alleged grounds that would authorize NMFS to award him a transferable charter halibut permit instead of a non-transferable charter halibut permit?
2. Did RAM correctly determine that Appellant should receive an angler endorsement of five?

SUMMARY

The IAD is affirmed. Appellant has not stated grounds that would authorize NMFS to award him a transferable charter halibut permit. Appellant does not meet the participation requirement in the recent period to receive a transferable charter halibut permit, namely fifteen trips with the same vessel under his ADF&G Business Owner License in 2008. Appellant meets the participation requirements to receive a non-transferable charter halibut permit, namely five trips in one year of the qualifying period (2004 or 2005) and five trips in the recent period (2008).

Appellant argues that he should receive a transferable permit because he did not make fifteen trips due to mechanical breakdowns in 2008 and due to NMFS's adoption of the one-halibut rule in May 2008. Appellant cannot receive a transferable charter halibut permit under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g). The regulation prevents NMFS from awarding a transferable charter halibut permit under the unavoidable circumstance regulation if the applicant will receive a non-transferable charter halibut permit without an unavoidable circumstance claim. Further, the one-halibut rule was not a circumstance that was unique to Appellant, which is a requirement of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1)(ii)(B). Finally, NMFS cannot award Appellant a transferable charter halibut permit based on his claim that he will go out of business without that permit. NMFS cannot award any permit unless the applicant meets the requirements in regulation to receive a permit.

RAM correctly determined that Appellant's non-transferable charter halibut permit should have an angler endorsement of five because that is the highest number of anglers that Appellant took on any trip in 2004 or 2005.

FINDINGS OF FACT

I find the following facts by a preponderance of evidence in the record:

1. Appellant has operated a charter halibut fishing business since at least 2001.¹¹
2. In 2004 and 2005, Appellant took fifteen or more bottomfish logbook fishing trips with [REDACTED] (VESSEL).¹² Appellant stated that he took 32 trips in 2004 and 34 trips in 2005. According to the official charter halibut record, he took 28 trips in both years.¹³

¹¹ Affidavit of Appellant (Feb. 28, 2011).

¹² IAD at 2 – 3; Official Record Print Summary (Jan. 27, 2010).

3. In 2008, Appellant took eleven halibut logbook fishing trips with VESSEL.¹⁴
4. In 2008, Appellant experienced four breakdowns due to significant mechanical problems with VESSEL, which resulted in a loss of approximately one month's fishing time. If Appellant had not experienced these mechanical breakdowns, he would have taken at least four more halibut fishing trips with VESSEL in 2008, for a total of fifteen trips.¹⁵
5. On May 28, 2008, NMFS adopted a one-halibut rule, which restricted anglers on a charter halibut fishing trip in Area 2C from catching and retaining more than one halibut per day.¹⁶
6. On June 10, 2008, by a court order, NMFS was prevented from enforcing the one-halibut rule for the 2008 season.¹⁷ NMFS withdrew the rule.¹⁸
7. NMFS proposed and adopted a rule on the same subject in 2009, which restricted anglers from catching and retaining more than one halibut per day.¹⁹
8. In each year from 2001 to 2007, Appellant took more than fifteen halibut trips. In the years 2008 to 2010, Appellant took less than fifteen halibut trips. Appellant submitted an affidavit that he took the following number of charter halibut fishing trips: 20 trips – 2001; 18 trips – 2002; 46 trips – 2003; 32 trips – 2004; 34 trips – 2005; 20 trips – 2006; 21 trips – 2007; 11 trips – 2008; 7 trips – 2009; 11 trips – 2010.²⁰ In light of the discrepancy between Appellant's number of trips in 2004 (32) and 2005 (34) and the official record number of trips in 2004 (28) and 2005 (28), I do not make a finding as to whether Appellant took the number of trips as stated in his affidavit because the precise number is not material to resolving any point in the appeal. Appellant has shown that he took at least fifteen trips from 2001 to 2007 and less than fifteen in 2008 to 2010.
9. The highest number of anglers that Appellant took on any trip in 2004 or 2005 was five.²¹
10. Appellant filed a timely application for a charter halibut permit on March 3, 2010.²²

¹³ The difference between Appellant's number of trips for 2004 and 2005 and the numbers in the official Record is not material to resolving any issue in this appeal.

¹⁴ Official Record Print Summary (Jan. 27, 2010).

¹⁵ Supplement to Appellant's Brief (Apr. 4, 2011); Exhibits 1 – 4 to Supplement to Appellant's Brief (four receipts for significant vessel repairs).

¹⁶ Final Rule, 73 Fed. Reg. 30,504 (May 28, 2008).

¹⁷ Proposed Rule, 73 Fed. Reg. 78,276, 78,276 (Dec. 22, 2008).

¹⁸ Final Rule, 73 Fed. Reg. 52,795 (Sep. 11, 2008)

¹⁹ Proposed Rule, 73 Fed. Reg. 78,276 (Dec. 22, 2008); Final Rule, 74 Fed. Reg. 21,194 (May 6, 2009), *adopting* 50 C.F.R. § 300.65(d)(2).

²⁰ Affidavit of Appellant (Feb. 28, 2011).

²¹ Official Record Print Summary (Jan. 27, 2010); IAD at 3.

²² Application (received Mar. 3, 2010),

CHARTER HALIBUT LIMITED ACCESS PROGRAM REGULATIONS

NMFS must issue charter halibut permits in accord with the regulations implementing the Charter Halibut Limited Access Program (CHLAP). After giving the public notice and opportunity to comment, the Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.²³ The regulations for the CHLAP are found at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67.

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.²⁴ NMFS based the official charter halibut record on data from ADF&G that linked each logbook fishing trip reported to ADF&G with the ADF&G Business Owner License that authorized the trip.²⁵

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.²⁶ A person can be an individual, a corporation, firm or association.²⁷

The relevant unit of participation is a logbook fishing trip. A logbook fishing trip is either a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip except that for multi-day trips, the number of trips will be equal to the number of days of the multi-day trip, e.g., a two-day trip will be counted as two trips.²⁸

A bottomfish logbook fishing is a logbook fishing trip that was reported with one of the following pieces of information: the statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.²⁹

A halibut logbook fishing trip is a logbook fishing trip that was reported with one of the following pieces of information: the number of halibut kept, the number of halibut released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.³⁰

²³ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010); Proposed Rule, 75 Fed. Reg. 18,178 (Apr. 21, 2009).

²⁴ 50 C.F.R. § 300.67(f)(5).

²⁵ Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010).

²⁶ 50 C.F.R. § 300.67(b)(1)(ii).

²⁷ 50 C.F.R. § 300.61 (definitions).

²⁸ 50 C.F.R. § 300.67(f)(4).

²⁹ 50 C.F.R. § 300.67(f)(2).

³⁰ 50 C.F.R. § 300.67(f)(3).

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 2005,³¹ and a recent participation period, which is the sport fishing season for halibut in 2008.³²

An applicant must prove different levels of participation to receive a non-transferable and 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).³³

To receive a transferable charter halibut permit, an applicant must have reported a minimum of fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004, 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).³⁴

The angler endorsement number on a charter halibut permit is the highest number of anglers reported on any trip in the qualifying period (2004, 2005), unless the highest number is less than four. If that is the case, the angler endorsement number will be four.³⁵

If an applicant would not receive any permit – transferable or non-transferable permit – because the applicant did not meet a participation requirement in the qualifying period (2004, 2005) or the recent participation period (2008), an applicant can seek to meet the requirements of the unavoidable circumstance provision with respect to the period where the applicant had no, or insufficient, participation.³⁶

³¹ 50 C.F.R. § 300.67(f)(6).

³² 50 C.F.R. § 300.67(f)(7).

³³ 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. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

³⁴ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

³⁵ 50 C.F.R. § 300.67(e) (1), (3), (5). This is the rule for an applicant's first permit.

³⁶ 50 C.F.R. § 300.67(g).

ANALYSIS

1. Has Appellant stated grounds that would authorize NMFS to award him a transferable charter halibut permit instead of a non-transferable charter halibut permit?

Appellant meets the participation requirements for a non-transferable permit, namely five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and five halibut logbook fishing trips in the recent participation period (2008).³⁷ Appellant does not meet the participation requirement in the recent period for a transferable permit: fifteen halibut logbook fishing trips with one vessel.³⁸

Appellant states he should receive a transferable permit for three reasons. First, Appellant states that he was unable to meet the fifteen-trip requirement due to mechanical breakdowns during the 2008 fishing season which caused him to lose a month worth of trips. Second, Appellant states that he was unable to meet the fifteen-trip requirement because of NMFS's adoption of the one-halibut rule in May 2008. Third, Appellant states that NMFS's adoption of the charter halibut regulation constitutes a taking without compensation because the regulation renders his business uneconomical. I conclude that NMFS is not authorized to issue Appellant a transferable charter halibut permit, instead of a non-transferable charter halibut permit, for any of these reasons.

A. Appellant cannot receive a transferable permit under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), because of the trips he lost due to mechanical breakdowns.

Appellant took eleven halibut logbook fishing trips in 2008. Appellant states that he was plagued by breakdowns during the 2008 season which resulted in approximately a month of lost time and which therefore prevented him from making the fifteen trips required for a transferable permit.³⁹ I found that Appellant did show, by a preponderance of evidence in the record, that he did suffer four mechanical breakdowns in 2008 and that, but for these breakdowns, he would have made fifteen halibut logbook fishing trips in 2008.⁴⁰

Appellant considers his situation to fall under the unavoidable circumstance regulation and that he should receive a transferable permit under that regulation. While Appellant suffered these setbacks during his 2008 fishing season, he still took enough trips to receive a non-transferable permit. The unavoidable circumstance regulation is only available to applicants that do not qualify for a transferable or non-transferable charter halibut permit. The unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), explicitly states:

Unavoidable circumstance claims . . . will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. This unavoidable circumstance provision cannot be

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

³⁸ 50 C.F.R. § 300.67(d)(1)(ii).

³⁹ Supplement to Appellant's Opening Brief (Apr. 4, 2011).

⁴⁰ Finding of Fact 4.

used to upgrade the number of permits issued or to change a non-transferable permit to a transferable permit⁴¹

Appellant is seeking to use the unavoidable circumstance provision to change a non-transferable permit to a transferable permit. Appellant will not be excluded from the charter halibut fishery entirely if his unavoidable circumstance claim is not recognized. I conclude that the unavoidable circumstance regulation denies me the authority to order, based on an unavoidable circumstance claim, that any applicant receive a transferable permit rather than a non-transferable permit.

B. Appellant cannot receive a transferable permit under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), because of the trips that he stated he lost due to the one-halibut rule.

Appellant argues that NMFS's adoption of the one-halibut rule in 2008 caused him not to take the fifteen halibut logbook fishing trips, which are required for a transferable permit.⁴²

NMFS adopted the one-halibut per day rule on May 28, 2008, with an effective date of June 1, 2008.⁴³ On June 10, 2008, a federal district court prevented NMFS from enforcing the rule for the 2008 season.⁴⁴ NMFS withdrew the rule.⁴⁵ NMFS adopted a new rule in 2009 which limited anglers to one-halibut per day. That rule has been in effect since 2009.⁴⁶

Appellant argues that clients from past years cancelled trips for 2008, or did not book a trip at all in 2008, because of the one-halibut rule.⁴⁷ The evidence currently in the record is insufficient to show that the one-halibut rule caused Appellant to lose four trips. That evidence consists of a news release from the State of Alaska, statements from clients and a crew member and the overall number of halibut trips that Appellant took before and after 2008.

With respect to the new release and statements, the news release states that, in 2008, the State of Alaska restricted non-residents to catching one king salmon forty-eight inches or greater from July 16 through September 30.⁴⁸ Of the four letters, one client mentioned only the salmon restriction as why he and his wife were not coming to Alaska to fish.⁴⁹ One client and the crew member mentioned both the halibut and salmon restriction.⁵⁰ One client mentioned "size and number limits" but it was not clear which limits – salmon or halibut or both – that he meant.⁵¹

⁴¹ 50 C.F.R. § 300.67(g).

⁴² Appeal Brief at 2 – 5 (Feb. 28, 2011).

⁴³ Final Rule, 73 Fed. Reg. 30,504 (May 28, 2008).

⁴⁴ Proposed Rule, 73 Fed. Reg. 78, 276, 78, 276 (Dec. 22, 2008).

⁴⁵ Final Rule, 73 Fed. Reg. 52,795 (Sep. 11, 2008).

⁴⁶ Final Rule, 74 Fed. Reg. 21,194 (May 6, 2009) *adopting* 50 C.F.R. 300.65(d)(2).

⁴⁷ Appeal Brief at 2 – 5 (Feb. 28, 2011); Letter from Appellant to RAM with Appellant's Application, Enclosures 5 – 8 (Mar. 2, 2010).

⁴⁸ Letter from Appellant to RAM with Appellant's Application, Enclosure 3 (Mar. 2, 2010).

⁴⁹ Letter from Appellant to RAM with Appellant's Application, Enclosure 5 (Mar. 2, 2010).

⁵⁰ Letter from Appellant to RAM with Appellant's Application, Enclosures 7 & 8 (Mar. 2, 2010).

⁵¹ Letter from Appellant to RAM with Appellant's Application, Enclosure 6 (Mar. 2, 2010).

With respect to his overall number of trips, Appellant took fifteen or more halibut trips in the years prior to 2008, when the one-halibut rule was not in effect, and fifteen or less in the years since 2008.⁵² But the years since 2008 have also been marked by an economic downturn and restrictions on salmon, which might have caused the post-2008 decline.

If Appellant could prevail on an unavoidable circumstance claim, I would hold a hearing to give Appellant an opportunity to prove a cause-in-fact link between the one-halibut rule and the loss of four trips in 2008. But I did not hold a hearing because Appellant cannot prevail on an unavoidable circumstance claim, as a matter of law, for two reasons.

First, to meet the unavoidable circumstance regulation, the circumstance that thwarted the applicant's participation must have been unique to the applicant.⁵³ The classic case of a circumstance that is not unique, in a commercial fishing context, is the price of the fish being caught. If an applicant did not fish for halibut because the price of halibut was too low, that circumstance affected everyone and therefore should not be a valid reason to explain non-participation because everyone who did not participate in the fishery could use that reason. Here, the one-halibut rule applied to all vessel operators in Area 2C and therefore is not a circumstance that was unique to Appellant.

Second, as noted, I do not have authority to recognize *any* circumstance under the unavoidable circumstance regulation, if the applicant qualifies for non-transferable permit.⁵⁴ Thus, assuming that Appellant could prove a cause-in-fact connection between the one-halibut rule and a loss of four trips, and assuming that the one-halibut rule was unique to him, I still do not have authority, for any reason, to order that NMFS issue an applicant a transferable charter halibut permit under the unavoidable circumstance regulation if the applicant meets the requirements for a non-transferable charter permit.

C. Appellant cannot receive a transferable permit on the grounds that the adoption of the charter halibut regulation made his charter halibut fishing business uneconomical.

Appellant argues that he should receive a transferable permit because NMFS's actions in adopting the one-halibut rule made it impossible for him to meet the fifteen-trip requirement. Appellant then argues that the denial to him of a transferable permit amounts to a de facto exclusion from the fishery and a taking of his business interests without just compensation.⁵⁵ These are not grounds for NMFS to issue Appellant a transferable permit.

First, it was not impossible for a vessel operator to meet the fifteen-trip requirement. Many vessels did take fifteen trips or more in 2008 in Area 2C. In the Analysis of the preferred alternative adopted by the North Pacific Fishery Management Council, the Council and NMFS analyzed ADF&G logbook participation data from 2008 to estimate the number of permits that would result from the Council's preferred alternative. The result was an estimate that 231

⁵² Finding of Fact 8.

⁵³ 50 C.F.R. § 300.67(g)(1)(ii)(B).

⁵⁴ 50 C.F.R. § 300.67(g), quoted at page 7 *supra*.

⁵⁵ Appeal Brief at 5 – 6.

businesses in Area 2C met the participation requirements to receive an estimated 502 permits, of which 347 would be transferable permits.⁵⁶

Second, it was not impossible for Appellant to have taken fifteen trips. He took eleven trips. And, but for the mechanical breakdowns, he would have taken fifteen trips.

Third, Appellant is not being excluded from the fishery. He is receiving a non-transferable permit, which will enable him to participate in the fishery for life. In the proposed rule, NMFS explained its rationale for the two types of permits and the different participation levels required for each:

This two-tiered qualification criterion would create two types of permits: a non-transferable permit that would cease to exist when the entity that holds the permit no longer exists and a transferable permit that would have value as an asset that could be transferred to another business when the permit holder decided to leave the fishery. The Council recommended transferable permits to establish a market-based system of allocating access to the fishery after the initial allocation of permits. Persons wanting to enter the charter halibut fishery could obtain permits from persons leaving the fishery. The Council concluded this would be more reasonable and efficient than a continual permit-application-and-permit-award process by the government. But the council did not recommend that all permits be transferable. The Council recommended two types of permits – transferable and non-transferable—as proposed by this action.

This part of the council's recommendation reflects a balance of the Council's objective to reduce fishing effort and its objective to minimize disruption to the charter fishing industry. Requiring a high minimum number of logbook fishing trips would result in a sudden reduction of charter halibut operations because many existing charter vessel operators would not be able to qualify. On the other hand, requiring a low minimum number of logbook fishing trips would result in little or no reduction in potential harvesting capacity. The two-tiered qualification criterion is designed to allow a business with relatively less participation in the charter halibut fishery to continue its operation while reducing potential harvesting capacity over time by not allowing that permit to be transferred to another entity.⁵⁷

Fourth, Appellant states that the denial to him of a transferable permit has the effect of preventing him from continuing in the fishery because it renders his business uneconomical.

⁵⁶ Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Limit Entry in the Halibut Charter Fisheries in IPHC Regulatory Areas 2C and 3A, National Marine Fisheries Service, (Nov. 6, 2009), (hereinafter Analysis) at available on NMFS Alaska Region website, at ix (Executive Summary) & § 2.8 at 158 - 59, http://alaskafisheries.noaa.gov/analyses/halibut/earirfrfa_charter_vessel_moratorium110609.pdf. This estimate does not include any permits that might be issued because an applicant met the unavoidable circumstance regulation.

⁵⁷ Proposed Rule, 74 Fed. Reg. 18,178, 18,183 – 18,184 (Apr. 21, 2009).

Since Appellant is receiving a non-transferable permit, it is not clear how denial to him of a transferable permit would render his business uneconomical. He did not have a transferable asset before the Charter Halibut Limited Access Program and he does not have one after it.

But assuming that Appellant could show that, without a transferable permit, he would go out of business, I do not have authority to order that NMFS issue a transferable permit on that basis because the regulation does not authorize NMFS to issue a permit on that basis.

Further, it would be arbitrary if, on appeal, I ordered an applicant to receive a permit on the grounds that the applicant would go out of business without the permit. If this applicant had the opportunity to receive a permit on this basis, all other applicants should have the same opportunity.

And to evaluate whether an applicant would go out of business because of the denial of a permit, I would have to examine whether an applicant had made unwise decisions on money that was spent on the business before the adoption of the limited access system. I do not have criteria or a framework to examine that question. I would then have to try to predict whether, in fact, the applicant would go out of business without a transferable permit. I would have to analyze whether the applicant could do other things with the vessel, whether the applicant could, for example, begin or increase salmon charters, and whether the applicant could buy a permit, if a transferable permit was essential to the operation of the business.⁵⁸ I do not have criteria or a framework to examine that question.

It would be arbitrary if I, without giving the public notice and an opportunity to comment, devised my own standard of what type of adverse economic effect an applicant would have to show to receive a permit, even through the applicant did not meet the requirements in the regulation for a permit. Clearly, an administrative judge does not have, and should not have, the authority to do that.

I have authority to examine whether NMFS correctly applied the regulations in evaluating Appellant's application for a permit. Appellant meets the requirements in the charter halibut regulation for a non-transferable permit. Appellant does not meet the requirements in the charter halibut regulation for a transferable permit. I therefore conclude Appellant has not stated grounds under which NMFS could award him a transferable permit.

⁵⁸ See Final Rule, 75 Fed. Reg. 554, 591 (Jan. 5, 2010) (“Another reason compensation is not provided [to business that do not qualify for a permit] is that businesses have value even without charter permits. Charter vessel assets may be used in fishing for species other than halibut or for other endeavors. Also, a market for transferable charter halibut permits is expected to emerge under this rule that will allow acquisition of permit(s).”) (Comment 143)

2. Did RAM correctly determine that Appellant should receive an angler endorsement of five on his charter halibut permit?

Appellant states that he wishes to augment his business, and compensate for the effect of the one-halibut rule, by carrying six anglers on his trips.⁵⁹ I cannot order that NMFS determine an angler endorsement on a charter halibut permit by any criterion except what is specified in the regulation. The charter halibut regulation states that NMFS shall determine an angler endorsement on a permit based on the highest number of anglers that the applicant took on a trip in 2004 or 2005.⁶⁰ The highest number of anglers that applicant took on any trip in 2004 or 2005 was five.⁶¹ Therefore, RAM correctly determined that Appellant's charter halibut permit should have an angler endorsement of five.

CONCLUSIONS OF LAW

1. Appellant does not meet the participation requirement in the recent period for a transferable permit in 50 C.F.R. § 300.67(d)(1)(ii), namely fifteen halibut logbook fishing trips with the same vessel in 2008.
2. An applicant who qualifies for a non-transferable charter halibut permit may not receive a transferable charter halibut permit based on the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).
3. The one-halibut rule is not a circumstance that was unique to Appellant, within the meaning of 50 C.F.R. § 300.67(g)(1)(ii)(B), because it applied to the entire charter halibut fleet in Area 2C.
4. Appellant has not stated grounds under which NMFS could award him a transferable permit rather than a non-transferable permit.
5. An appellate officer must apply the regulations, as adopted, to determine whether an applicant should receive a permit.
6. Appellant does not qualify for a transferable permit through initial issuance.

⁵⁹ Appellant's Appeal Brief at 6

⁶⁰ 50 C.F.R. § 300.67(e)(1), (3), (5). This is the rule for an applicant's first permit.

⁶¹ Official Record Print Summary (Jan. 27, 2010); IAD at 3.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on September 19, 2011, unless by that date the Regional Administrator orders review of the Decision.

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 the tenth day after the date of this Decision, August 29, 2011. 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