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

In re Application of [redacted] Appellant	))))))))	Appeal No. 10-0058 DECISION

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 September 16, 2010, [redacted] (Appellant) filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program on July 23, 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] All activity relevant to this application occurred in IPHC Area 3A.

In the IAD, RAM denied Appellant's application for a charter halibut permit. RAM determined that Appellant met the participation requirement in the qualifying period for a non-transferable charter halibut permit, namely a minimum of five bottomfish logbook fishing trips in either 2004 or 2005.[4] According to the official charter halibut record, Appellant reported ten bottomfish logbook fishing trips with two vessels in 2004 and

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[1] Letter from Appellant to OAA (dated Aug. 29, 2010, received Sep. 2, 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.
[4] 50 C.F.R. § 300.67(b)(1)(ii)(A).

seven bottomfish logbook fishing trips with one vessel in 2005.[5] Appellant took at least one trip with six anglers in the qualifying period (2004, 2005).

RAM denied Appellant's application because she did not meet the participation requirement for a permit in the recent period, namely a minimum of five halibut logbook fishing trips in 2008.[6] Appellant acknowledges that she did not take any halibut logbook fishing trips in 2008 and states she is eligible for a permit based on the unavoidable circumstance regulation for applicants that participated in the qualifying period but not the recent period.[7]

Appellant states that she specifically intended to operate a charter halibut fishing business in 2008 but was thwarted from doing that by a series of events: [redacted] January 2008, [redacted] May 2008, [redacted] June 2008 and [redacted] beginning in August 2008. A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.[9] Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

I concluded that the record was insufficient to decide the merits of the appeal. I held a hearing on October 20 and 28, 2011.[10] During the hearing process, Appellant submitted records regarding her [redacted][11] [redacted],[12] [redacted],[13] and [redacted].[14] Appellant testified telephonically. I conclude that the record now contains sufficient information upon which to decide this appeal.[15] I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant meets the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1), with respect to her lack of participation in 2008, and should be awarded a non-transferable charter halibut permit for use in IPHC Area 3A with an angler endorsement of six.

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[5] Official Record Print Summary (dated created Jan. 27, 2010).
[6] 50 C.F.R. § 300.67(b)(1)(ii)(B).
[7] 50 C.F.R. § 300.67(g)(1).
[8] Letter from Appellant to NMFS (Apr. 13, 2010); Testimony of Appellant (Oct. 20 & Oct. 28, 2011).
[9] 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)(Change 19 from Proposed Rule).
[10] Order Scheduling Hearing (Sep. 19, 2011).
[11] Submission by Appellant (Oct. 21, 2011): Medical Records from [redacted] California – Consultation (May 21, 2008), History and Physical Examination Report (May 21, 2008), Operative Report (May 22, 2008).
[12] Submission by Appellant (Oct. 28, 2011): Medical Records from [redacted] Letter to Insurance Provider (Jan. 26, 2010) and Record of Visits (January to March 2010).
[13] Submission by Appellant (Oct. 31, 2011): Settlement and Release of All Claims with [redacted] (Aug. 17, 2011).
[14] Submission by Appellant (Oct. 21, 2011): Medical record from [redacted] (Apr. 14, 2009).
[15] 50 C.F.R. § 679.43(g)(2).

ISSUES

1. Does Appellant satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), the unavoidable circumstance regulation for persons that did meet the participation requirement in the recent participation period (2008)?

2. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), should her permit be designated as transferable or non-transferable?

3. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), what is the proper angler endorsement on the permit?

FINDINGS OF FACT

1. Appellant has had a marine credential from the United States Coast Guard (USCG) since 1999: a license that authorized her to operate a 50-ton vessel in 1999; an upgrade on that license to a 100-ton vessel license in 2004; a second upgrade in 2006 to a 200-ton vessel license ; and a 200-ton vessel license in 2009, which is valid until July 14, 2014.[16]

2. Appellant worked as a charter captain for her father-in-law, [redacted] from 2000 to 2003.[17]

3. Appellant began her own business, [redacted] (Appellant's Business), in 2003.[18]

4. Appellant operates her charter halibut fishing business as part of a business that provides trips for small groups of people to go hunting, nature-viewing, fishing for salmon, halibut and other fish. The trips are multi-day trips to remote locations in Alaska.[19]

5. Appellant uses or has used four vessels in her business: [redacted], (VESSEL 1); [redacted] (VESSEL 2); [redacted] (VESSEL 2); [redacted] (VESSEL 3); and [redacted] (VESSEL 4).

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[16] USCG Credential Search result (Oct. 20, 2011)(current credential) (July 20, 2009 to July 20, 2014); Email from USCG Staff [redacted] (Oct. 27, 2011).
[17] Testimony of Appellant (Oct. 28, 2011); State of Alaska Commercial Fisheries Entry Commission (CFEC) public lookup website, Charter Vessels: http://www.cfec.state.ak.us/plook (shows [redacted] registered a charter vessel 1999 - 2004)(site only has charter vessel information through 2004).
[18] State of Alaska website: http://commerce.alaska.gov/CBP/Main/CBPLSearch.aspx?mode=Corp (Certificate of Incorporation, Feb. 18, 2003).
[19] Testimony of Appellant (Oct. 20, 2011); Appellant's website: [redacted]

6. VESSEL 1 is a large vessel, with a gross weight of 198 tons, with a length overall of 110 feet. Appellant purchased the boat in 2006. Appellant lives on VESSEL 1 with her husband and [redacted] daughter. The vessel is currently anchored in the waters near Kodiak Island.

7. VESSEL 1 functions as a floating base camp or hotel for trips and a place from which clients take fishing trips and shore excursions with VESSEL 2 and VESSEL 3. With VESSEL 1, Appellant also contracts with film companies and with the government for research trips.[21]

8. VESSEL 2 is a thirty-eight foot landing craft from which Appellant takes clients fishing who are staying on VESSEL 1. VESSEL 2 is the primary vessel that Appellant uses for salmon and halibut charter trips from VESSEL 1.[22]

9. VESSEL 3 is a small, sixteen-foot, Boston Whaler that Appellant occasionally uses to take clients halibut fishing.[23]

10. VESSEL 4 is a forty-seven foot vessel that Appellant occasionally used to take clients halibut fishing. Appellant has sold VESSEL 4.[24]

11. Appellant took ten bottomfish logbook fishing trips in 2004: nine with VESSEL 2 and one with VESSEL 4. The highest number of anglers on any trip in 2004 was four. [25]

12. Appellant took seven bottomfish logbook fishing trips in 2005 with VESSEL 2. The highest number of anglers on any trip in 2005 was six.[26]

13. Appellant took two halibut logbook fishing trips in 2007 with VESSEL 3. [27]

14. In 2007, Appellant's father-in-law signed a contract with Appellant to act as her licensed hunting guide.[28]

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[20] Testimony of Appellant (Oct. 20, 2011) (110 feet is length overall; 93.6 feet is keel length); USCG Vessel Documentation website http://www.st.nmfs.noa.gov/ps/webpls/cgv_pkg.vessel_name_list

[21] Testimony of Appellant (Oct. 20, 2011); Submission by Appellant (Oct. 20, 2011): Schedule of Trips by Appellant's Business from 2002 to 2009.

[22] Testimony of Appellant (Oct. 20, 2011); Official Record List of Trips by Appellant (Oct. 18, 2011) attached to email from NMFS Computer Specialist (Oc. 18, 2011). VESSEL 2 is the vessel listed in the Official Record for sixteen of seventeen bottomfish logbook fishing trips by Appellant for 2004 and 2005. NMFS's database contains ADF&G data on reported salmon logbook fishing trips. VESSEL 2 is the vessel listed in NMFS's database for sixteen of the seventeen salmon trips by Appellant in 2004. VESSEL 3 took the other salmon trip in 2004. Appellant reported no salmon trips in 2005.

[23] Testimony of Appellant (Oct. 20, 2011); Official Record list of Trips by Appellant (Oct. 18, 2011) attaché to email from NMFS Computer Specialist (Oct. 18, 2011).

[24] Testimony of Appellant (Oct. 20 and Oct. 28, 2011); CFEC public lookup website, Charter Vessels: http://www.cfec.state.ak.us/plook (length of VESSEL 4 is forty-seven feet).

[25] Official Record List of Trips by Appellant (Oct. 18, 2011).

[26] Official Record List of Trips by Appellant (Oct. 18, 2011).

[27] Official Record List of Trips by Appellant (Oct. 18, 2011).

[28] Testimony of Appellant (Oct. 28, 2011).

15. On May 14, 2007, Appellant's father-in-law [redacted] (VESSEL 3) during bad weather.

16. In late December 2007, Appellant applied to renew her combined ADF&G Business Owner/Guide License for 2008, which ADF&G issued on March 11, 2008.[30]

17. On January 19, 2008, Appellant [redacted]

18. A few days later, Appellant developed [redacted] Appellant immediately went to the emergency room.

19. Between January and May 2008, Appellant received [redacted]

20. In the spring of 2008, Appellant cancelled nine multi-day trips she had scheduled between May and September 2008 and refunded any money she had received.[34]

21. On May 21, 2008, [redacted]

22. Appellant [redacted]

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[29] Testimony of Appellant (Oct. 20, 2011); Submission by Appellant (Oct. 20, 2011): State of Alaska Department of Public Safety Report (July 2, 2007).
[30] ADF&G Business Owner/Guide License application and License 8312, attached to email from Dora Sigurdsson, Research and Technical Services, ADF&G (Oct. 27 & 28, 2011). Usually ADF&G issues the license the same or the next day. Ms. Sigurdsson explained in her email that the delay occurred because it was at the beginning of the season.
[31] Medical Records – History and Physical Examination (May 21, 2008).
[32] Medical Records – Consultation (May 21, 2008); Testimony of Appellant (Oct. 20, 2011).
[33] Medical Records – Consultation (May 21, 2008); Testimony of Appellant (Oct. 20, Oct. 28, 2011).
[34] Submission by Appellant: October 20, 2011: Schedule of Trips by Appellant's Business in 2008; Testimony by Appellant (Oct. 28, 2011).
[35] Submission by Appellant (Oct. 21, 2011): Medical Records – Consultation (May 21, 2008).
[36] Submission by Appellant (Oct. 21, 2011): Medical Records - Operative Report (May 22, 2008).
[37] Testimony by Appellant (Oct. 20, 2011).

23. On May 24, 2008, as Appellant [redacted]

24. Appellant [redacted]

25. On June 19, 2008, Appellant obtained two ADF&G logbooks for VESSEL 2 and VESSEL 3. Appellant was planning to try to offer charter halibut side-trips to clients on two bear-viewing trips she had scheduled for August 2008.[40]

26. Appellant operated VESSEL 1 on a limited basis in the 2008 season, contracting with NOAA for a research trip in June/July and taking clients on two bear viewing trips of one week each in August.[41]

27. On June 24, 2008, at the beginning of the research trip, while in port in Dutch Harbor, Appellant [redacted]

28. In August 2008, Appellant took clients on two bear-viewing trips with VESSEL 1 for a total of two weeks but did not offer them the option of a charter fishing because she did not feel well enough to provide that service. [redacted]

29. In August 2008, Appellant learned [redacted].[44]

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[38] [redacted] Record (Jan. 26, 2010).
[39] [redacted] Record (Jan 26, 2010). Testimony of Appellant (Oct. 20, 2011).
[40] Logbook [redacted] for Vessel 2– Signout sheet (June 19, 2008), Logbook [redacted] for VESSEL 4– Signout sheet , attached to email from Dora Sigurdsson, ADF&G (Oct. 27, 2011).
[41] Testimony of Appellant (Oct. 20, 2011).
[42] Testimony by Appellant (Oct. 28, 2011); Submission by Appellant (Oct. 29, 2011): Settlement and Release of All Claims (Aug. 17, 2011). Appellant filed suit against the hotel where she ate the offending meal and settled the claim in August 2011.
[43] Testimony of Appellant (Oct. 28, 2011).
[44] Letter from Appellant to NMFS (received Apr. 26, 2010); Testimony of Appellant (Oct. 20, 2011); Medical record: note from doctor [redacted] (April 14, 2009)[redacted]

30. Due to Appellant's [redacted] she was not able to take clients on any charter halibut trips in 2008 because of the physical demands of providing that service. Appellant's principal primary health care provider wrote: "This is to verify that I am the medical provider that has been treating [Appellant] since July 2006. I follow her for her family practice needs and am aware of the medical conditions that occurred in 2008 that unfortunately precluded her from working as a sport fishing guide in 2008." [45]

31. Appellant's [redacted] Appellant had a very limited season in 2009 but was physically able to resume work in the 2010 season.[46]

32. Appellant timely applied for a charter halibut permit on April 5, 2010.[47]

PRINCIPLES OF LAW

The issuance of charter halibut permits is governed by regulations implementing the Charter Halibut Limited Access Program (CHLAP), which is codified at federal regulations 50 C.F.R. §§ 300.61, 300.66, and 300.67. The Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.[48]

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.[49]

An applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sportfishing season for halibut in 2004 and 2005, and a recent participation period, which is the sportfishing season for halibut in 2008.[50]

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).[51]

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[45] Testimony of Appellant (Oct. 20, 2011); Statement by [redacted], Beacon Occupational health and Safety Services (Apr. 18, 2010). I also rely on the evidence that supports Findings of Fact 1 – 29.
[46] Statement by [redacted] Beacon Occupational Health and Safety Services (Apr. 18, 2010).
[47] Application (dated Mar. 26, 2010, received Apr. 5, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).
[48] Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).
[49] 50 C.F.R. § 300.67(b)(1)(ii).
[50] 50 C.F.R. § 300.67(f)(6)-(7).
[51] 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B); 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).

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).[52]

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.[53] 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).[54]

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.[55]

For an applicant that participated in the qualifying period, but not the recent participation period, section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), the unavoidable circumstance regulation, requires the applicant prove the following:

> Section (i): the applicant had a specific intent to operate a charter halibut fishing business in the recent participation period (2008);
>
> 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.

[52] 50 C.F.R. § 300.67(d)(1).
[53] 50 C.F.R. § 300.67(g).
[54] 50 C.F.R. § 300.67(g)(1).
[55] 50 C.F.R. § 300.67(g)(2).

ANALYSIS

1. Does Appellant satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), which is the unavoidable circumstance regulation for persons that did not participate in the charter halibut fishery in the recent participation period (2008)?

I analyze the requirements in sections (i) through (iv).

Section (i). Did Appellant have a specific intent to operate a charter halibut fishing business in the recent participation period (2008)? Yes.

A specific intent is more than a general desire or interest to operate a charter halibut fishing business. An applicant who had a specific intent to operate a charter halibut fishing business will have a definite commitment to operate a charter halibut fishing business in a particular year and will typically have all the essential elements of a charter business in place, or a realistic plan to have all the essential elements of a charter business in place, by the charter halibut season. An applicant who had a specific intent to operate a charter halibut fishing business will have a definite commitment to operate a charter halibut fishing business in a particular year and will have taken concrete steps to operate a business.

Appellant had the essential elements in place to operate a charter halibut business for the 2008 season. Appellant had a functioning business that included halibut charters as part of the business. Appellant applied with ADF&G to renew her combined ADF&G Business Owner/Guide License in December 2007, which ADF&G issued in March 2008. Appellant had a large vessel that functioned as a base camp for clients on multi-day trips and two smaller vessels from which she took clients on charter trips for salmon and halibut. Appellant had the necessary marine credential to operate all of her vessels. Appellant had nine multi-day hunting trips scheduled with VESSEL 1, which would likely have resulted in side charter fishing trips as occurred in 2004 and 2005. Appellant's Business also had a website that advertised a variety of trips, including fishing trips.[56]

From these facts, I conclude that Appellant had a specific intent to operate a charter halibut fishing business in 2008.

Section (ii). Was Appellant's intent to operate a charter halibut fishing business thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable? Yes.

After Appellant's father-in-law [redacted] in July 2007, Appellant experienced a series of events which thwarted her ability to operate a charter halibut fishing business: [redacted] in January 2008, [redacted] in May 2008 on the way [redacted] n June 2008 and

[56] [redacted]

[redacted] in August 2008. I conclude that Appellant's physical condition was a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable.

The next question is whether Appellant's [redacted] thwarted her intent to operate a charter halibut fishing business. I found that, because of her physical condition, she could not take clients on charter trips in 2008.[57] She could not perform the physically demanding tasks required in taking clients: overseeing the launching and land of smaller vessels, getting in and out of smaller vessels, helping the clients gear up and suit up for trips on the smaller vessels, helping the clients with the actual fishing.[58]

In the summer of 2008, Appellant did operate VESSEL 1 for a research trip for NOAA and two bear viewing trips of one week each. On the difference between piloting the large vessel on a research trip or a bear viewing trip and taking clients on charter trips on the smaller vessels, Appellant explained, " [With the large vessel,] I didn't have to do anything except drive the boat. Driving the boat is the easiest part. It's like playing a video game almost. It's so high tech. It's very, very minimally physically. . . .You must make sure you get from Point A to Point B and you keep the boat safe."[59] On the bear viewing trips, a biologist takes the clients on shore to view the animals. These trips contrast with in contrast to the hands-on involvement Appellant has with "clients with high expectations" in charter trips.[60]

Thus, Appellant's limited activity with VESSEL 1 in 2008 does not show that she could have operated a charter halibut fishing business in 2008.

<u>Section (iii)</u>. Did the circumstances that thwarted Appellant's intent to operate a charter halibut fishing business actually happen? Yes.

Appellant [redacted] in January 2008, [redacted] in May 2008, [redacted] in July 2008 and the [redacted] in August 2008.

<u>Section (iv)</u>. Did Appellant take all reasonable steps to overcome the circumstances? Yes.

The evidence in the record shows that Appellant took all reasonable steps to overcome the series of physical challenges she faced. [redacted] in January 2008, Appellant sought medical treatment and sought it, more or less continuously, through May 2008. It was not until May 2008 [redacted]

[57] Finding of Fact 30.
[58] Testimony of Appellant (Oct. 20, 28, 2011).
[59] Testimony of Appellant at 22 min. (Oct. 20, 2011).
[60] Testimony of Appellant at 23 min. (Oct. 20, 2011).

Even after that, Appellant obtained a logbook for VESSEL 2 and a logbook for VESSEL 3 because she hoped she would be able to offer charter trips to the clients on the bear-viewing trips. Appellant was hoping she would feel well enough to offer them this service so that, on their way to Kodiak, while they were in Anchorage, she could tell them to get the necessary fishing licenses. Appellant did not feel well enough to offer these clients the option of a side-charter trip and so did not.[61] I conclude that Appellant took all reasonable steps to overcome the circumstance that thwarted her intent to operate a charter halibut business in 2008.

2. Should Appellant's permit be designated as transferable or non-transferable? Non-transferable.

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1) with respect to why she did not participate in the recent period, section (v) governs whether the applicant will receive a transferable or non-transferable permit. Section (v) states:

> (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.

The criteria in paragraphs [50 C.F.R. § 300.67] (b), (c), (d), (e) and (f) are the criteria that applies to an applicant's actual participation. Since this type of applicant, by definition, did not participate in the recent period or participated at an insufficient level, NMFS can only apply this criteria to an applicant's participation in the qualifying period. Section (v) thus directs NMFS to award the applicant a transferable or non-transferable permit by substituting the applicant's actual participation in the qualifying period for the applicant's lack of participation in the recent period.[62]

The participation requirement for a non-transferable permit in the qualifying period is five bottomfish logbook fishing trips in 2004 or 2005.[63] The participation requirement for a transferable permit in the qualifying period is fifteen bottomfish logbook fishing trips with the same vessel in 2004 or 2005.[64] Appellant took seven bottomfish logbook fishing trips in 2004 and ten bottomfish logbook fishing trips in 2005. NMFS substitutes

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[61] Testimony of Appellant (Oct. 28, 2011).

[62] Proposed Rule, 75 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009) ("Assuming that the applicant is able to successfully demonstrate that it meets the criteria for an unavoidable circumstance, NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that *substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program*.") (emphasis added).

[63] 50 C.F.R. § 300.67(b)(1)(ii)(A).

[64] 50 C.F.R. § 300.67(d)(1)(i).

Appellant's participation in the qualifying period for her participation in the recent period. Appellant does not have fifteen trips in either 2004 or 2005. I therefore conclude Appellant's permit should be designated as non-transferable.

3. What is the proper angler endorsement on Appellant's permit? Six.

If an applicant proves an unavoidable circumstance in the qualifying period, section (v) of 50 C.F.R. § 300.67(g)(1), quoted above, directs NMFS to determine the angler endorsement on the applicant's permit based on the applicant's participation in the qualifying period. Further, the standard rule for an angler endorsement is that the angler endorsement on a permit is the highest number of anglers that the applicant took on a bottomfish logbook fishing trip in the qualifying period (2004, 2005).[65] The highest number of anglers that Appellant took on bottomfish logbook fishing trip in 2004 or 2005 was six.

Thus, whether by virtue of section (v) or by virtue of the standard rule for angler endorsements, the proper angler endorsement on Appellant's permit is six.

CONCLUSIONS OF LAW

1. Appellant satisfies sections (i) through (iv) of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1), with respect to Appellant's lack of participation in the recent period.

2. If an applicant satisfies sections (i) through (iv) of the unavoidable circumstance regulation, 50 C.F.R. 300.67(g)(1), section (v) directs NMFS to award the applicant a non-transferable permit or a transferable permit based on the applicant's level of participation in the qualifying period.

3. The angler endorsement on Appellant's permit should be the highest number of anglers that Appellant took on a bottomfish logbook fishing trip in 2004 or 2005.

4. Appellant qualifies for a non-transferable charter halibut permit, endorsed for six anglers, for use in IPHC Area 3A.

ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue a transferable charter halibut permit, endorsed for six anglers, for use in IPHC Regulatory Area 3A to Appellant. This decision takes effect on January 30, 2012, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(k), (o).

[65] 50 C.F.R. § 300.67(e)(1) (angler endorsement on applicant's first transferable permit). No permit, however, will have an angler endorsement less than four. 50 C.F.R. § 300.67(e)(5).

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 January 9, 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: December 30, 2011