

I conclude that [REDACTED] has not shown that the Decision overlooked or misunderstood a material fact or issue of law. I affirm the conclusion in the Decision that the angler endorsement on [REDACTED] charter halibut permit should be six. I therefore deny reconsideration of the Decision and establish March XX, 2011, as the new effective date of the Decision.

ANALYSIS

Under the CHLAP regulations, the number of anglers endorsed on a charter halibut permit resulting from a successful showing of unavoidable circumstances during one year in the qualifying period (2004, 2005) is determined by applying the criteria set out in 50 C.F.R. § 300.67(g)(2)(v)(B), as follows:

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

This regulation is ambiguous as to how the angler endorsement should be determined but, under either interpretation, the Decision was correct in concluding that the angler endorsement on [REDACTED] permit should be six. I will analyze two interpretations: the Decision's interpretation and an alternate interpretation.

The Decision stated:

According to 50.C.F.R. § 300.67(g)(2)(v), quoted above, [REDACTED] permit will be endorsed for four anglers unless he shows it is likely that he would have taken a higher number of anglers on a trip in the qualifying period.

The official halibut charter record shows that the highest number of clients (anglers) that [REDACTED] took on his two reported trips in 2005 was six. Additionally, [REDACTED] submitted carbon copies of his ADF&G logbooks that he submitted in 2003, 2006 and 2007, and in each year, the highest number of anglers that he took on a trip was six. Therefore, I find that it is more likely than not that, but for his unavoidable circumstance, the highest number of anglers that [REDACTED] would have reported on a trip in 2004 or 2005 would have been six. Therefore, his permit is to be endorsed for six anglers.³

In the Decision, I interpreted section (v)(B) to mean that an applicant's permit will be endorsed for four anglers unless the applicant shows that it is likely that, but for his unavoidable circumstance, he would have likely taken more than four anglers on a trip in the qualifying

³ Decision at 12.

period. Applying that standard, I concluded that [REDACTED] permit should be endorsed for six.

In the Decision, I stated that six anglers was the highest number of anglers that [REDACTED] [REDACTED] reported on a trip in 2003, 2006 and 2007 was six. The 2006 number was correct. The 2003 and 2007 numbers were not. Based on the carbon copies of logbook trip reports submitted by [REDACTED]. [REDACTED], the highest number of reported anglers on [REDACTED] logbook fishing trips during the relevant years was as follows:

<u>2003</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>
5 [not 6]	6	6	8 [not 6]	8 ⁴

Those mistakes are not material because I still find it likely that, but for [REDACTED] unavoidable circumstance, the highest number of anglers he would have taken on a trip in the qualifying period would have been six.

In 2003, the year before [REDACTED] injury, the highest number of anglers he reported on a trip was five. In the two years after his injury (2005, 2006), the highest number of anglers that he reported on a logbook fishing trip was six. In 2007, he bought another boat, took eight anglers on three trips and generally expanded his business, and continued to do so in 2008 (the highest number of anglers on any trip in 2008 was eight). But [REDACTED] offered no testimony, or evidence, that he would have done in 2004 what he did in 2007.

In his request for reconsideration, [REDACTED] asserted that “State logbooks show as many as 16 people that day on my vessel.”⁵ He did not specify what day and none of the logbook fishing trip reports submitted by [REDACTED] show sixteen people on a bottomfish logbook fishing trip or a halibut logbook fishing trip.⁶

I find it likely that, but for his injury in 2004, [REDACTED] would have operated his charter halibut business in 2004 roughly how he operated it in 2003, when his highest number of anglers was five; in 2005, when his highest number of anglers was six; and in 2006, when his highest number of anglers was six. I affirm the finding in the Decision that, in the absence of his injury in 2004, it is more likely than not that the highest number of anglers that [REDACTED] would have reported on a logbook fishing trip in the qualifying period would have been six.

An alternate interpretation of 50 C.F.R. § 300.67(v)(b) is based on the last phrase of subsection (B), namely “and the applicant did not participate during the other year in the qualifying period.” Under this interpretation, if the applicant did participate during the other year in the qualifying period, the applicant receives as an angler endorsement the highest number of anglers from that year. [REDACTED] faced an unavoidable circumstance in 2004 and did not participate in that year

⁴ The 2008 figure is from the official charter halibut record.

⁵ Request for Reconsideration, Letter from [REDACTED] to NMFS (Jan. 13, 2011).

⁶ Logbook fishing trips are defined in 50 C.F.R. § 300.67(f)(4).

at all. He participated in the “other year in the qualifying period,” namely 2005. The angler endorsement on a charter halibut permit is, pursuant to 50 C.F.R. § 300.67(e), the “highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period,” subject to two exceptions which are not relevant to this appeal.⁷ The highest number of anglers reported by ██████████ in the “other year of the qualifying period” was six. Therefore, under this interpretation, the angler endorsement on his permit is also six.

From ██████████ request for reconsideration, it appears that he simply wants to operate his charter as he did before the CHLAP was implemented; i.e., he wants to carry more than six anglers on his (inspected) vessel and rotate the fishing so that no more than six are fishing at any one time.

NMFS recently published a “Small Entity Compliance Guide” on the agency web site: <http://alaskafisheries.noaa.gov/sustainablefisheries/halibut/charter/faq.pdf>. The Guide has “Frequently Asked Questions (FAQs), two of which (numbers twenty and twenty-one) address ██████████ concern. These are as follows:

20. May I have more passengers onboard than the angler endorsement allows if the extras are not fishing?

Yes. The charter halibut limited access program limits the number of anglers catching and retaining halibut and not the number of passengers (however passengers may be limited by other applicable law and regulation).

21. If I have a CHP endorsed for four (4) anglers, but have six (6) anglers onboard, may I rotate my anglers so that all six (6) anglers get to fish for halibut so long as I'm never fishing more than four (4) anglers simultaneously?

No. Effective February 1, 2011, it is prohibited to be an operator of a vessel with more charter vessel anglers onboard catching and retaining halibut than the angler endorsement number specified on the CHP(s) onboard the vessel during one trip. In this example, six (6) anglers are considered to be onboard and fishing even if all six (6) are not fishing at the same time. [50 CFR 300.66(s)]

If ██████████ has any questions about these responses, or if he is seeking clarification about the allowable use of his permit, he should contact the Restricted Access Management Program (RAM) or the NOAA Office of Law Enforcement.

⁷ The two exceptions are (1) no permit will have an angler endorsement of less than four and (2) a permit awarded based on the military service regulation, 50 C.F.R. §300.67(g)(3), will have an angler endorsement of six. 50 C.F.R. § 300.67(e)(1) & (2).

DISPOSITION

For the reasons stated herein, [REDACTED] Request for Reconsideration is DENIED.

The Decision entered in this appeal, dated January 3, 2011, will take effect on March 9, 2011, unless by that date the Regional Administrator orders review of the decision.

[REDACTED]
Philip J. Smith
Administrative Judge