



17, 2010, that there were “no bottomfish logbook fishing trips in the official record for [Appellant] in 2004 and 2005. Additionally, there are no halibut logbook fishing trips for [Appellant] in 2008. Therefore, it does not appear that your charter fishing business meets the eligibility criteria.”<sup>3</sup> The letter further provided a deadline for providing evidence to RAM to rebut the program’s initial opinion about Appellant’s permit application.

On June 7, 2010 Appellant submitted and RAM accepted eleven pages of documentation. That documentation included six letters from individuals who state they were on charter halibut trips with the Appellant in 2004.

After receipt of Appellant’s rebuttal evidence, in its IAD dated July 23, 2010, RAM denied Appellants a permit to operate a charter halibut business in regulatory area 3A. That denial was made under regulations published at 50 C.F.R. § 300.67. The basis for the denial was Appellants lack of official logbook information for 2004 or 2005 and 2008, as required under 50 C.F.R. §§ 300.67(b)(1)(i)&(ii) and 300.67(f)(4). RAM explained that charter operators were required to report certain information about charter trips they took to the Alaska Department of Fish and Game (ADF&G), and were required to do so within certain timeframes, as outlined in the regulations governing charter halibut permits.

Also in the IAD, RAM informed Appellants that the applicable regulations provided 60 days to file an appeal, in this case by September 20, 2010. Since Counsel filed Appellants’ appeal on September 20, 2010, I consider it timely filed within the meaning of 50 C.F.R. § 679.43(d).

After receipt of Appellants’ appeal and then the case record from RAM, I sent a letter to Counsel setting a deadline of December 10, 2010 to submit additional materials in support of his clients’ claims. In response, Counsel timely submitted a letter from his clients dated December 7, 2010 as well as copies of records from ADF&G. Those records include “2002 Saltwater Charter Vessel Logbook Data” and “2003 Saltwater Charter Vessel Logbook Data” as well as instructions for completing logbook forms.

On appeal, Appellants concede they do not have the requisite information from ADF&G showing certain logbook fishing trips for 2004 or 2005 and 2008.<sup>4</sup> Rather, Appellants argue they were “operating their lodge and actively involved in the charter halibut business both before and after the 2004 and 2005 qualifying years.”<sup>5</sup> Somewhat contradictorily, Counsel also argues that Appellants “provided more than 15 guided

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<sup>3</sup> Notice of Opportunity to Submit Evidence, May 17, 2010, First Page.

<sup>4</sup> Appellant’s letter dated December 7, 2010; Affidavit dated September 20, 2010, First Page.

<sup>5</sup> Counsel email message dated December 10, 2010.

halibut trips during both 2004 and 2005.” Counsel also states Appellants are “within the class of people that were intended to be qualified since they had a long history of participation and investment in the charter halibut fishery.”<sup>6</sup> In support, Appellants provided names of individuals that claim they took charter halibut fishing and have submitted copies of fishing licenses Appellants say they issued to clients in 2004 and 2005.<sup>7</sup>

Appellant explains that she has operated a remote lodge since 1989.<sup>8</sup> In 2008, Appellant’s husband suffered from several physical problems which prevented Appellants from operating their fishing boat in 2008.<sup>9</sup> Appellant believes the future financial success of the lodge depends on her ability to offer charter halibut fishing trips.<sup>10</sup>

I have determined that the information in the record is sufficient to render a decision within the meaning of 50 C.F.R. § 679.43(g)(2). I therefore close the record and render this decision. See 50 C.F.R. § 679.43(k).

## ISSUES

My function in reviewing this case is to decide whether RAM erred in its determination to deny Appellants a charter halibut permit. To resolve that issue, I must answer the following:

1. Did Appellants show by a preponderance of the evidence that within the deadline established by ADF&G, Appellants provided the state with their Saltwater Charter Logbook for 2004 or 2005 and the logbook had information about the statistical area(a) where bottomfishing occurred, the boat hours that the vessel was used for bottomfishing, or the number of rods used from the vessel in bottomfish fishing.

If the answer to Question 1 is “no,” I must answer the following:

2. Did Appellants show by a preponderance of the evidence that within the deadline established by ADF&G, Appellants provided the state with their Saltwater Charter Logbook for 2008 and the logbook contained the number of halibut that was kept, the number released, the statistical

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<sup>6</sup> Notice of Appeal dated September 20, 2010; Affidavit dated September 16, 2010.

<sup>7</sup> Marked as Exhibit 1 and Exhibit 2 and attached to Affidavit dated September 16, 2010.

<sup>8</sup> Affidavit dated September 16, 2010, first page.

<sup>9</sup> Affidavit dated September 16, 2010, Page 1; Medical Certificate dated September 8, 2010.

<sup>10</sup> Affidavit dated September 16, 2010, Pages 3-4.

area(s) where bottomfishing occurred, or the boat hours the vessel was used for bottomfishing.

If the answer to Question 2 is “no,” I must decide whether Appellants do not meet the threshold criteria for obtaining a charter halibut permit, and therefore, the IAD should be upheld. I will also determine whether Appellants do not meet the threshold criteria for an “unavoidable circumstance” claim because they lack proof of meeting the participation requirements in 2004 or 2005, or 2008.

#### FINDINGS OF FACT

1. Appellants have operated a remote lodge since 1989.<sup>11</sup>
2. Appellants submitted certain logbook fishing information to ADF&G for fishing years 2002 and 2003.<sup>12</sup>
3. Appellants did not timely submit relevant logbooks to ADF&G in 2004, 2005, and 2008.
4. In 2008, Appellants were unable to provide charter halibut trips to clients due to Appellant’s husband’s medical condition.<sup>13</sup>

#### PRINCIPLES OF LAW

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business in regulatory area 3A, is the applicant’s participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. See 50 C.F.R. § 300.67(a),(b)&(f)(1) and Notes to Final Rule, 75 Fed.Reg. 554, 554-555.

An applicant for a permit must designate either 2004 or 2005 as his or her qualifying year. See 50 C.F.R. § 300.67(f)(1).

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<sup>11</sup> Affidavit dated September 16, 2010, first page.

<sup>12</sup> Attachments to Counsel’s email dated December 10, 2010.

<sup>13</sup> Affidavit dated September 16, 2010, Page 1-2.

Proof of participating in the industry during the *qualifying period* consists of a applicant reporting at least five “bottomfish logbook fishing trips.” 50 C.F.R. § 600.67(b)(ii)(A).

A “bottomfish logbook fishing trip” has specific regulatory criteria: It is timely reported to the State of Alaska in a Saltwater Charter Logbook and includes information about the statistical area where bottomfish fishing occurred, the boat hours the vessel was used for bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing. See 50 C.F.R. § 300.67(f)(2) and (4).

Proof of participating in the industry during the *recent participation period* consists of an applicant reporting at least five “halibut logbook fishing trips.” 50 C.F.R. § 300.67(b)(ii)(B).

A “halibut logbook fishing trip” has specific regulatory criteria: It is one timely reported to the State of Alaska by the deadline in a Saltwater Charter Logbook and includes information about the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred, or the boat hours that the vessel was used for bottomfish fishing. See 50 C.F.R. § 300.67(f)(3) and (4).

A charter halibut permit will not be issued by NMFS unless, among other criteria, the participation requirements are met or the applicant meets the regulatory exception for not meeting the participation requirements. The regulatory exception is sometimes referred to as the “unavoidable circumstance” rule. See 50 C.F.R. §§ 300.67(b)(1) and 300.67(g).

Under the regulatory exception, an applicant who meets the participation requirements in one but not both relevant periods (i.e., the qualifying period in 2004 or 2005 *and* recent participation period in 2008), may nevertheless be eligible for a charter halibut permit if he or she can meet the requirements for an “unavoidable circumstance claim.” See 50 C.F.R. § 300.67(g).

If the applicant cannot meet the participation requirements for either the qualifying period (2004 or 2005) or recent participation period (2008), he or she is not eligible for a charter halibut permit under the unavoidable circumstance exception. See 50 C.F.R. § 300.67(g).

## ANALYSIS

In the case before me I must decide whether RAM erred in its determination to deny Appellants a charter halibut permit. A threshold requirement for obtaining a charter

halibut permit is proof of a history of participating in the industry. As defined in the applicable regulations outlined under Principles of Law above, an applicant must prove that she reported both her *qualifying* participation in 2004 or 2005 as well as *recent* participation in 2008. Those reporting requirements are specific: timely reporting, and; in a Saltwater Charter Logbook with particular information. For the qualifying period in 2004 or 2005, an applicant must have submitted information about the area fished in, the hours fished, or the number of rods used. *See generally* 50 C.F.R. § 300.67(f)(2)&(4) and (g). Similarly, for the recent participation period in 2008, an applicant must have submitted information about the number of fish kept, the number released, the area fished, or the hours fished. *See generally* 50 C.F.R. § 300.67(f)(3)&(4). In the case before me, the record does not contain copies of State of Alaska Saltwater Charter Logbook or official charter halibut data based on the logbooks for Appellants for 2004, 2005, or 2008.

Appellants attempt to show they meet participation requirements by arguing that although there are no official records of their charter halibut trips, Appellants really did take them in 2004 and 2005. In support thereof, Appellants submitted letters purportedly signed by clients who went with Appellants on charter halibut fishing trips in 2004 as well as copies of fishing licenses Appellants allege they issued to clients in 2004 and 2005. Similarly, Appellant has submitted her own affidavit stating she knows her business took fifteen or more charter halibut trips in 2004 and 2005. Appellant also suggests that because she was operating a charter halibut business in 2002, 2003 and 2008, it may be inferred that she operated one in 2004 and 2005.

Even if I were to find Appellants' evidence persuasive, it would not be sufficient to meet the regulatory requirements for a charter halibut permit. Indeed, Appellants have produced no evidence that they met the regulatory criteria of providing the State of Alaska with information required by regulation. Appellants have not provided evidence that they *timely* submitted information about their *2004 or 2005 participation* to the State of Alaska, including "the statistical area 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." *See* 50 C.F.R. § 300.67(f)(2)&(4). Perhaps most fundamentally, the applicable regulations require evidence that information was provided to the state in a "Saltwater Charter Logbook." 50 C.F.R. § 300.67(f)(2)&(3). Again, there are no copies of such logbooks or official data based on those logbooks in the record before me.

Further, Appellants have not provided evidence that they *timely* submitted information about their *2008 participation* to the State of Alaska in a Saltwater Charter Logbook, including "the number of halibut...kept, the number...released, the statistical area(s)

where bottomfishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.” See 50 C.F.R. § 300.67(f)(3)&(4). In short, Appellants’ claim lacks evidence of: reporting to the state; in official logbooks; on a timely basis, and; with the relevant information. Given the lack of evidence to prove Appellants’ claims, I conclude the IAD issued by the RAM is consistent with applicable regulations, and is, therefore, sustained.

In reaching my conclusion that the IAD is consistent with applicable regulations, I have carefully considered Appellants’ concern that their business relies on charter halibut fishing and without a permit they believe they may not be able to continue operating their lodge. Similarly Appellants note that in their remote area, they would not be interfering with another charter halibut fleet. These arguments do not show that Appellants met regulatory criteria for a permit. Rather, they are arguments of an equitable nature. Neither the undersigned nor NAO has the authority to grant equitable claims under applicable regulations. Accordingly, while I empathize with Appellants’ claims, I am not authorized to provide equitable relief under the facts of this case.

I also note Appellants’ argument that they are within the group of people NMFS intended to qualify for a permit because of their long-term participation in charter halibut fishing. Regardless if that is an accurate statement, the fact is the charter halibut regulations have specific criteria, as discussed at length above, and that criterion was not met in this case. I am therefore not persuaded that Appellants’ argument on this point provides a basis for me to overturn the IAD.

Finally I note that since Appellants have not proved they met the participation requirements for 2004 or 2005 and 2008, they do not meet the threshold requirements for eligibility for a permit pursuant to the “unavoidable circumstance” exception under 50 C.F.R. § 300.67(g). See 50 C.F.R. § 300.67 (g)(1)&(2)(“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” or “[a]n application for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period,” may nevertheless receive a permit if he or she meets the unavoidable circumstance exception requirements.).

### CONCLUSIONS OF LAW

Appellants have not shown by a preponderance of the evidence that they timely reported the requisite logbook fishing trips to the State of Alaska for 2004 or 2005.

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Appellants have not shown by a preponderance of the evidence that they timely reported the requisite halibut logbook fishing trips to the State of Alaska for 2008.

Accordingly, Appellants do not meet the threshold criteria for obtaining a charter halibut permit.

Appellants have not met the threshold requirements for an "unavoidable circumstances claim," namely that they participated in 2004 or 2005, or in 2008.

### ORDER

The IAD dated July 23, 2010 is upheld. Further, Appellants are not eligible for a permit under the unavoidable circumstances rule. This decision is effective thirty days from the date issued and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made or the Regional Administrator elects to review this decision.<sup>14</sup>

[REDACTED]  
Eileen G. Jones  
Chief Administrative Judge

Date Issued: 02/11/11

<sup>14</sup> <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).