

On November 18, 2010, I conducted a hearing by telephone. [REDACTED] and his witnesses participated by telephone from [REDACTED] home in [REDACTED]. At the end of the hearing, having concluded that the record held sufficient information on which to reach final judgment as required by 50 C.F.R. § 679.43(n)(8), I closed the record. This decision follows.

ISSUES

1. Does [REDACTED] 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 during the qualifying period (2004/2005)?
2. Does [REDACTED] meet the minimum qualifications for a charter halibut permit?
3. If [REDACTED] qualifies for a charter halibut permit, should his permit be designated as transferable or non-transferable?
4. If [REDACTED] [REDACTED] qualifies for a charter halibut permit, for how many anglers should his permit be endorsed?

SUMMARY OF DECISION

[REDACTED] has proven, by a preponderance of evidence in the record, that an unavoidable circumstance (namely, the effects of an injury he sustained in September 2003) thwarted his specific intent to participate in the halibut charter fishing business in the charter halibut qualifying period (2004, 2005). Further, [REDACTED] has demonstrated that he has met all of the elements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2).

Additionally, he has proven that it is more likely than not that, if he had actually participated in the charter halibut fishery as he intended, he would have reported a minimum of fifteen bottomfish logbook trips with one vessel in 2004, and that he would have carried a maximum of six anglers on one trip during the qualifying period.

Accordingly, [REDACTED] [REDACTED] qualifies for a transferable charter halibut permit and he should be issued a permit endorsed for use in International Pacific Halibut Commission regulatory area 2C, endorsed for six anglers.

qualifying period, which is the sport fishing period for halibut in 2004 and 2005,⁴ and [2] the *recent participation* period, which is the sport fishing period for halibut in 2008.⁵

NMFS will issue two types of charter halibut permits: transferable and non-transferable. A transferable permit may be transferred to another person, upon approval of the transfer by NMFS. 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.⁶ The trips must have been reported under the applicant's Alaska Department of Fish & Game [ADF&G] Business Owner License.

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.⁷ The trips must have been reported under the applicant's ADF&G Business Owner License.

THE UNAVOIDABLE CIRCUMSTANCE REGULATION

The regulations have a special provision for those who encountered an unavoidable circumstance that caused them to fail to meet the minimum participation requirements in either the qualifying period or the recent participation period.⁸ If an applicant (in this case, ██████████) satisfies the requirements of the unavoidable circumstance regulation, NMFS will treat him as though he had actually participated in the period that he missed. To prevail, ██████████ must prove: [1] that he specifically intended to operate a charter halibut fishing business during the relevant period; [2] that his intent 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.

The text of the unavoidable circumstance regulation that applies to applicants who participated in the recent participation period but not in the qualifying period, 50 C.F.R. § 300.67(g)(2), provides:

(2) *Qualifying period.* An applicant for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the

⁴ 50 C.F.R. § 300.67(c)(6).

⁵ 50 C.F.R. § 300.67(c)(7).

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

⁷ 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).

⁸ 50 C.F.R. § 300.67(g)

qualifying period, may receive one or more permits if the applicant proves paragraphs (g)(2)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period;

(ii) The applicant's specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

(iii) The circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(iv) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:

(A) One non-transferable permit with an angler endorsement of four (4); or

(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 been 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.

To meet the requirements of the unavoidable circumstance regulation, an applicant must satisfy each element of the regulation with respect to the applicant's lack of participation in the qualifying period. Put another way, an applicant must satisfy every requirement set out in the unavoidable circumstance regulation for NMFS to treat the applicant as though the applicant participated in 2004 or 2005. An applicant must prove a fact in support of his claim by a preponderance of evidence in the record.

1. Does [REDACTED] 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 during the qualifying period (2004, 2005)?

I examine the requirements below.

50 C.F.R. § 300.67(g)(2). Is [REDACTED] an applicant who meets the participation requirement in the recent participation period, but does not meet the participation requirement for the qualifying period? Yes

The first requirement for [REDACTED] to meet is to prove that he had five or more halibut fishing trips in 2008, and thereby met the participation requirement in the recent participation period for a non-transferable permit, and fewer than five bottomfish logbook fishing trips in 2004 or 2005, and thereby did not meet the participation requirement for a non-transferable permit in the qualifying period.

The official halibut charter record⁹ shows that [REDACTED] reported twenty-one halibut logbook trips in 2008. Since twenty-one exceeds the minimum requisite amount of trips (five), [REDACTED] has proven this element of his case. The record also shows that [REDACTED] reported no bottomfish logbook trips in 2004, and only two bottomfish logbook fishing trips in 2005. I therefore conclude that [REDACTED] is qualified to have his claim adjudicated under the unavoidable circumstance provisions of 50 C.F.R. § 300.67(g)(2).

50 C.F.R. § 300.67(g)(2)(i). Did [REDACTED] have a specific intent to operate his charter halibut fishing business in 2004? Yes.

[REDACTED] demonstrated his specific intent to operate a charter halibut fishing business in 2004 with the following evidence:

- his ownership of a boat in 2004 that was equipped to participate in the charter halibut fishery;¹⁰
- his obtaining the necessary licenses to participate in 2004;
- his actual attempts in 2004 to overcome the injury and operate a charter halibut business;
- his seeking of further medical treatment during the 2004 charter halibut season to overcome the effects of the injury;
- his successful, albeit limited, efforts to charter clients for the salmon fishery
- his contined efforts to participate in the charter halibut fishery after 2004, which led to limited participation in 2005 and 2006 and full participation in 2007. I examine each of these points.

⁹ 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 Are 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.”

¹⁰ The [REDACTED] used in the fishery since 1996 through 2010.

In 2004, [REDACTED] owned the [REDACTED]. It was fully equipped to participate in the charter halibut fishery and was the boat [REDACTED] had used in the charter halibut fishery since 1996.¹¹ [REDACTED]
[REDACTED]¹²

In spite of his injury, [REDACTED] decided to attempt to operate his charter business in 2004. Accordingly, he obtained the necessary licenses, including ADF&G logbooks, to operate his business in 2004. In fact, he did some salmon chartering, but only with a deckhand aboard, and for short trips to protected waters less than ten miles from downtown Ketchikan. When salmon fishing, [REDACTED] would only troll on straight courses; the vessel's direction (steering) would be controlled [REDACTED]. A typical trip lasted fewer than five hours. These trips were recorded on [REDACTED] ADF&G logbook.¹³

[REDACTED] attempts to operate the halibut charter business in 2004 were not successful. Before his accident, he typically took halibut fishing anglers to an area approximately fifty miles from downtown Ketchikan, in the open waters of Dixon Entrance near the maritime border with Canada.¹⁴ Most such halibut trips were "all day" events, sometimes exceeded thirteen or fourteen hours. They involved anchoring in open seas (where, depending on wind direction and tides, the ocean swell could come athwartships, thus rocking the boat in a rolling motion), and [REDACTED] services on the vessel would include driving the boat, locating the optimal fishing spot, handling the anglers' rods, baiting hooks, helping to haul large fish over the gunwales, providing food and beverages, and, upon his return to harbor, taking his clients and their fish to a local fishing lodge to arrange for cleaning, packing and shipping the product.¹⁵

[REDACTED] carried some halibut fishing passengers aboard the [REDACTED] in 2004, as a "favor" to prior clients or to [REDACTED] friends and family. But he would only leave the harbor if the weather and seas were favorable, and then would travel only a relatively short distance (approximately twenty miles) to protected waters on the north side of Mary Island or to the lower (southern) end of Behm Canal, and only if he had friends or family aboard to operate the vessel and to engage in the physically strenuous duties of the operation (e.g., setting and retrieving the anchor, baiting hooks, assisting others to pull halibut over the gunwales and into the boat, etc.). The trips were of very short duration (normally less than four hours), and the anglers were expected to clean and package their own fish upon their return to port. For payment, he sought only reimbursement for his expenses.¹⁶ None of these trips were recorded in [REDACTED] ADF&G logbook.

¹¹ International Pacific Halibut Commission registration records for [REDACTED]

¹² [REDACTED] physician's notes (Dictated May 26, 2004; Transcribed May 27, 2004).

¹³ ADF&G Southern Southeast Alaska 6-digit Logbook Area [REDACTED] (carbon copies of "2004 Saltwater Charter Vessel logbook," for the [REDACTED])

¹⁴ Carbon copy of ADF&G "2003 Saltwater Charter Vessel Logbook," for the [REDACTED] submitted by [REDACTED]

¹⁵ Applicant's testimony at Oral Hearing (November 18, 2004).

¹⁶ *Id.*

The record contains no evidence that [REDACTED] ever viewed his injury in 2003 as ending his charter halibut fishing business. [REDACTED] efforts to operate in 2004 provide sure evidence of his intent to continue to participate in the charter halibut fishery. In August 2004, during the 2004 charter halibut season, [REDACTED] saw a physician in Juneau who made notes of [REDACTED]. [REDACTED] intention to continue in the charter halibut fishery and, on that basis, ordered further diagnostic tests:

I do think, given the ongoing nature of his pain and severity to the point where it is limiting his ability to continue working at a job that he very much would like to return to suggests that we should proceed with further imaging to assess for any underlying treatable [REDACTED].

[REDACTED]¹⁷

In 2005 and 2006, [REDACTED] continued his efforts to operate his charter halibut business. In 2005, he took two bottomfish logbook fishing trips.¹⁸ In 2006, he took four. In 2007, he was able to take twenty-three halibut logbook fishing trips. And in 2008, he took twenty-one halibut logbook fishing trips. I find by a preponderance of the evidence that [REDACTED] intended to operate his halibut charter fishing business in 2004.

50 C.F.R. § 300.67(g)(2)(ii). Was [REDACTED] intent thwarted by a circumstance that was (a) unavoidable; (b) unique to him; and, (c) unforeseen and reasonably unforeseeable? Yes.

[REDACTED] intent to operate his charter halibut fishing business was indeed thwarted by his injury. As noted above, even though [REDACTED] was on board his vessel when his friends and family caught halibut, his level of participation in the operation can only be termed minimal, at best. Absent the injury, there is every reason to believe that he could have, and would have, fully realized his intent.

Medical records show that in May 2004, he visited the [REDACTED] The physician who examined him stated:

[REDACTED]¹⁹

¹⁷ [REDACTED] physician's report (August 20, 2004)

¹⁸ This number, and the number of trips for 2006 and 2007, is derived from the original ADF&G "Saltwater Logbook and Vessel Registration" books for those years submitted by [REDACTED]

¹⁹ [REDACTED] physician's notes (Dictated May 26, 2004; Transcribed May 27, 2004).

As noted, during the 2004 season, [REDACTED] physician in [REDACTED] noted that the nature and severity [REDACTED] pain from the injury was “limiting his ability” to continue in charter halibut fishing [REDACTED]²⁰

In addition to the medical records, the effects of his injury on his ability to operate a charter halibut fishing business were reported by the statements of his friends. One wrote:

During the years 2004 thru 2005, . . . I fished with [REDACTED] who owns and operates [REDACTED]. During those times we made a few fishing trips using [REDACTED]

[REDACTED] He had trouble moving and was in pain. We always fished the north side of Mary’s Island, 43 fathom bank, and went down to Ka Shakes on a hunch to fish in protected waters. . . . [REDACTED] was not fit for duty nor capable of doing any Halibut charter for any duration

[REDACTED] basically went along for the ride and would lay down and try to be comfortable. Other people that would go along would usually drive and we would only go out in calm seas. [REDACTED] . . . did not fish or help people fish. Several local people and their families were privileged to accompany [REDACTED] to fish. Some would help out with the fuel or chip in to help out . . .²¹

Another wrote:

This is what I do know. [REDACTED] was in no condition to be out fishing and especially halibut fishing in exposed waters and we appreciate what he did for us. Basically, [REDACTED] would feel OK for a while, [REDACTED] . . .²²

A friend [REDACTED] testified at the hearing. She commented on [REDACTED] condition as follows:

All I can say is that I know [REDACTED] got really banged up really bad [REDACTED] [REDACTED] We didn’t go out as much as we wanted to, but we did go out with him and when we did, he didn’t do jack, honestly, he just sat . . . He was pretty much worthless for a couple of years – no offense . . .²³

These comments corroborate [REDACTED] own written statement:

²⁰ [REDACTED] physician’s report (August 20, 2004)

²¹ Email from a friend and associate [REDACTED] to Judge Smith (November 16, 2010).

²² Email from another friend and associate [REDACTED] to Judge Smith (November 17, 2010).

²³ Testimony of [REDACTED] friend at Administrative Hearing (November 18, 2010).

The season of 2004, 2005, and even 2006 was very limited with fishing charters. Any charter not only requires the captain to drive to the location, but snacks, pop, bait coffee, getting underway, setting up gear, baiting, dropping the hook, etc. takes a lot of work and movement. A halibut charter for twelve hours keeps you on your feet for at least 10 hours. It is a charter that you spend 14 to 16 hours working.

I was not able to do a halibut charter, [REDACTED]
[REDACTED]

In consideration of the above, I find by a preponderance of evidence in the record that [REDACTED] intent to operate a charter halibut business in 2004 was thwarted by [REDACTED] a circumstance that was unique to him, unavoidable, unforeseen, and reasonably unforeseeable.

50 C.F.R. § 300.67(g)(2)(iii): Did the circumstance that prevented the applicant from operating a charter halibut fishing business actually occur? Yes.

The record contains voluminous evidence that [REDACTED] suffered an injury [REDACTED] and I so find.

50 C.F.R. § 300.67(g)(2)(iv): Did [REDACTED] take all reasonable steps to overcome the circumstance that thwarted his attempt to operate his charter halibut fishing business? Yes.

[REDACTED] immediately after he was injured, [REDACTED] was thoroughly examined at the [REDACTED]. Subsequently, and for several years thereafter, he regularly visited physicians in [REDACTED] to find relief from his pain.

In addition to seeking medical treatment, [REDACTED] kept on fishing. Even though he could not operate the business at the level at which it was run before the accident, [REDACTED] maintained his licensing with the State of Alaska and the ADF&G.

He considered hiring a licensed captain to operate the halibut charters, but he had bad experiences with another running his somewhat unique vessel. The only people that he could trust with the operation were otherwise employed. In 2007, he obtained another vessel, [REDACTED] for use in the business, thus demonstrating his commitment to the business and its success.

Consequently, I find that [REDACTED] took all reasonable steps to overcome the circumstances.

[REDACTED] has proven that he meets all of the elements of the unavoidable circumstance regulation, with respect to his lack of participation during the qualifying year of 2004. The next inquiry is whether he satisfies the requirement for a transferable charter halibut permit.

²⁴ Email, [REDACTED] to Judge Smith (November 17, 2010).

2. Should [REDACTED] charter halibut permit be designated as transferable or non-transferable?

The regulation provides as follows:

(v) If the applicant proves the foregoing (*see* paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:

(A) One non-transferable permit with an angler endorsement of four (4); or

(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 been 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.²⁵

According to the official charter halibut record, [REDACTED] reported twenty-one halibut logbook fishing trips in 2008. Fifteen of those trips were made using [REDACTED] and the other six were made using the [REDACTED].²⁶ Therefore, [REDACTED] met the reporting requirement for a transferable permit in the recent participation period (2008): fifteen trips with one vessel.²⁷

The question remains: how many bottomfish logbook trip reports would [REDACTED] have submitted in 2004, but for the unavoidable circumstance? A review of the evidence shows the following:

- In the 2003 season [REDACTED] reported sixteen bottomfish logbook fishing trips to ADF&G.²⁸
- In the 2004 season, [REDACTED] reported no bottomfish logbook fishing trips to ADF&G.
- In the 2005 season, [REDACTED] reported two bottomfish logbook fishing trips to ADF&G.
- In the 2006 season, [REDACTED] reported four halibut logbook fishing trips to ADF&G.

²⁵ 50 C.F.R. § 300.67(g)(2)(v).

²⁶ Email, NMFS/Alaska Region/Information Services Division, to Judge Smith (November 23, 2010).

²⁷ 50 C.F.R. § 300.67(d)(1)(ii).

²⁸ This number, and the number of trips for 2004, 2005 and 2006, is derived from the original ADF&G "Saltwater Logbook and Vessel Registration" books for those years submitted by [REDACTED]

- In the 2007 season, according to the official charter halibut record, ██████████ reported twenty-three halibut logbook fishing trips to the ADF&G.

This pattern is entirely consistent with ██████████ testimony and the facts in the record. ██████████ was a moderately active halibut charter business operator before his injury (sixteen reports in 2003), and then was not active at all until a few years after his injury, when he had recovered from the injury to the point where he could renew his level of prior participation.

I therefore conclude, from the evidence on the record, that it is more likely than not that, were it not for the unavoidable circumstance he experienced, ██████████ would have reported at least fifteen bottomfish logbook fishing trips with one vessel in 2004.

██████████ therefore qualifies for a transferable charter halibut permit.

3. For how many anglers should ██████████ permit be endorsed?

According to 50.C.F.R. § 300.67.(g)(2)(v), quoted above, ██████████ 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 ██████████ took on his two reported trips in 2005 was six. Additionally, ██████████ 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 ██████████ would have reported on a trip in 2004 or 2005 would have been six. Therefore, his permit is to be endorsed for six anglers.

CONCLUSION

██████████ is to be issued a transferable charter halibut permit for use in International Pacific Halibut Commission regulatory area 2C,²⁹ and endorsed for six anglers.

FINDINGS OF FACT

1. ██████████ held a specific intent to participate in the charter halibut fishing business in 2004.
2. ██████████ intent to participate was thwarted by a circumstance that was unique to him, unavoidable, and unforeseen and reasonably unforeseeable;

²⁹ 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.

3. The circumstance actually occurred;
4. ██████████ took all reasonable steps to overcome the circumstance.
5. But for the unavoidable circumstance, it is more likely than not that ██████████ would have reported a minimum of fifteen bottomfish logbook fishing trips from one vessel in 2004.
6. But for the unavoidable circumstance, it is more likely than not that the highest number of anglers that ██████████ would have reported on any trip in the qualifying period (2004/2005) would have been six.

CONCLUSIONS OF LAW

1. ██████████ satisfies 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 during the qualifying period (2004).
2. ██████████ meets the minimum qualifications for a charter halibut permit.
3. ██████████ charter halibut permit should be designated as transferable.
4. ██████████ charter halibut permit should be endorsed for six anglers.

DISPOSITION

The IAD that is the subject of this appeal is VACATED. ██████████ is to be issued a transferable charter halibut permit for use in International Pacific Halibut Commission regulatory area 2C, and endorsed for six anglers.

This decision takes effect on February 2, 2011, unless by that date the Regional Administrator orders review of the Decision.

The 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 Time, on the tenth day after the date of this Decision, January 13, 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.



Philip J. Smith
Administrative Judge

Reviewed and approved:

Eileen Jones
Chief Administrative Judge