



5. If [REDACTED] satisfies the elements of the unavoidable circumstance regulation, for which halibut Administrative Area should his permit be endorsed, and should his permit be designated as transferable or non-transferable, and for how many anglers?

#### FACTUAL BACKGROUND

[REDACTED] submitted statements and documentary evidence to the Office of Administrative Appeals (OAA). In addition to his own statements, he submitted the statement of his commanding officer in Kodiak. Documentary evidence includes photocopies of licensing record, Alaska Department of Fish and Game (ADF&G) logbook pages, and military orders.

[REDACTED] is now, and at all times relevant to this decision, an active duty member of the U.S. [REDACTED]. In 2004, he opened his charter fishing business, [REDACTED] in Kodiak. [REDACTED] ran an active business taking clients on fishing charters in the evenings and on weekends with his 28' charter vessel, [REDACTED]. In 2004, he reported thirty-six bottomfish logbook trips to the Alaska Department of Fish and Game (ADF&G), and in 2005 he reported fifty-one such trips.<sup>3</sup> The largest number of anglers he guided on any of those trips was five. [REDACTED] reported twenty-four halibut logbook fishing trips in 2006.<sup>4</sup>

By order dated May 17, 2007, the [REDACTED] ordered [REDACTED] to travel to the [REDACTED] (located near the western end of the chain of Aleutian Islands), for a one year assignment. [REDACTED] was obligated to obey the order, so he left Kodiak for [REDACTED] 2007. While serving on [REDACTED] was virtually incommunicado. According to the July 21, 2010, statement from his commanding officer, "The unit he was stationed at was the most isolated location of any Coast Guard unit. While stationed [REDACTED] there was no commercial internet or phones available for [REDACTED] to utilize for booking clients for his charter boat business." [REDACTED] returned to Kodiak on [REDACTED], 2008, too late in the season to reactivate his business for the 2008 halibut sport fishing season.

#### ANALYSIS

To qualify for a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License. Once issued, the license would have authorized logbook fishing trips that met the minimum participation requirements for a permit.<sup>5</sup> The charter halibut regulation specifies a minimum participation requirement in two periods: a qualifying period, which is the sport fishing season for halibut in

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<sup>3</sup> Official Charter Halibut Record, Summary of Emerald Isle Outfitters' participation in 2004 and 2005, created by NMFS (Jan. 27, 2010)(Appeal Record). The official charter halibut record "means the information prepared by NMFS on participation charter halibut fishing in Area 2C and area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits." 50 C.F.R. § 300.67(f)(5).

<sup>4</sup> Photocopies of Log Book data submitted by [REDACTED] to ADF&G. "

<sup>5</sup> 50 C.F.R. § 300.67(b)(1)(ii).

either 2004 or 2005,<sup>6</sup> and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>7</sup> There are both non-transferable permits and transferable permits available, both of which have distinct regulatory requirements for eligibility.

To receive a non-transferable charter halibut permit, the ADF&G license holder must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005),<sup>8</sup> and a minimum of five halibut logbook fishing trips in the recent participation period (2008).<sup>9</sup>

To receive a transferable charter halibut permit, the license holder must have reported a minimum of fifteen logbook fishing trips with the same vessel in the qualifying period (2004, 2005)<sup>10</sup> and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).<sup>11</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirements in either (but not both) participation period.<sup>12</sup> If an applicant meets a minimum participation trip level in the qualifying period (2004/2005), but not in the recent participation period, the applicant may seek to meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008),<sup>13</sup> and if the applicant satisfied the requirements of the unavoidable circumstance regulation for the recent period, the applicant may be treated as though the applicant participated in the recent period.

Similarly, if the applicant meets the minimum participation trip level in the recent participation period (2008), but not in the qualifying period (2004/2005), the applicant may still qualify for a permit if the applicant can meet the requirements of the unavoidable circumstance regulation.

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

(1) *Recent participation period.* 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, may receive one or more

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<sup>6</sup> 50 C.F.R. § 300.67(c)(6) (“*Qualifying period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005”).

<sup>7</sup> 50 C.F.R. § 300.67(c)(7) (“*Recent participation period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008.”).

<sup>8</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A).

<sup>9</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

<sup>10</sup> 50 C.F.R. § 300.67(d)(1)(i).

<sup>11</sup> 50 C.F.R. § 300.67(d)(1)(ii).

<sup>12</sup> 50 C.F.R. § 300.67(g).

<sup>13</sup> 50 C.F.R. § 300.67(g)(1).

permits if the applicant proves paragraphs (g)(1)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation 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 recent participation period.

(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.

An applicant must satisfy each requirement of the unavoidable circumstance regulation for NMFS to treat the applicant as though he or she participated in 2008.

As explained below, I conclude that [REDACTED] by a preponderance of evidence in the record, satisfies all of the elements of the unavoidable circumstance regulation.

**50 C.F.R § 300.67(g)(1)(i): Did [REDACTED] have a specific intent to participate in the 2008 charter halibut fishery? Yes.**

[REDACTED] a member of the U.S. [REDACTED] [REDACTED] started his business in 2004, and continued to operate it in 2005 and 2006. [REDACTED] submitted to OAA photocopies of his licensing documents for the years 2004 through 2008. The licensing documents show that he held the required State of Alaska Business License, valid for all of those years, as well as the Alaska Department of Fish and Game (ADF&G) business and guide licenses for the same period, and specifically for the charter halibut qualifying period (2004, 2005) and for the charter halibut recent participation period (2008).

Additionally, [REDACTED] registered the [REDACTED] for charter fishing in every year from 2004 through 2010.<sup>14</sup>

As a result of [REDACTED] assignment to [REDACTED], he could not operate his charter business in 2008. Nevertheless, he maintained the requisite licensing, retained ownership of his vessel, and

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<sup>14</sup> ADF&G Saltwater Charter Logbook and Vessel Registration.

reactivated his business as soon as practicable after his return to Kodiak. Therefore, I find by a preponderance of the evidence that [REDACTED] held a specific intent to participate in the charter halibut fishery in 2008.

**50 C.F.R. 300.67(g)(1)(ii)(A) through (C): Was [REDACTED] intent to participate thwarted by a circumstance that was unique to him, unavoidable, unexpected, unforeseen, and reasonably unforeseeable? Yes.**

According to his Commanding Officer,<sup>15</sup> [REDACTED] received military orders to report to [REDACTED] “the most isolated location of any Coast Guard unit.” The duration of his assignment was one year. Accepting the assignment was the only way that [REDACTED] could have stayed in Alaska and resumed his charter fishing business, and his family life (his family remained in Kodiak while he was gone), upon his return to Kodiak. According to his Commanding Officer, [REDACTED] [REDACTED] “did everything in his grasp to remain in Kodiak, but there was no position available for him in Kodiak. He was under military orders and had no choice but to leave Kodiak.”

I find that [REDACTED] intent to participate in the charter halibut fishing business in 2008 was, indeed, thwarted by a circumstance that was unique to him, unavoidable, unexpected, unforeseen and reasonably unforeseeable.

**50 C.F.R. 300.67(g)(1)(iii): Did the circumstance that thwarted [REDACTED] intent to participate actually happen? Yes.**

In addition to the statement from Commanding Officer, the record contains a photocopy of a “Standard Travel Order” by which [REDACTED] was ordered to report in Attu and given travel time from June 1, 2007 to July 1, 2007. That corroborates his Commanding Officer’s statement that [REDACTED] “departed Kodiak on 13 June 2007 for a one year isolated duty tour on [REDACTED]. Therefore, I find that the circumstances actually happened.

**50 C.F.R. 300.67(g)(1)(iv): Did [REDACTED] take all reasonable steps to overcome the circumstances? Yes.**

Once his attempt to remain in Kodiak failed, [REDACTED] was required to follow his military orders and report to duty in [REDACTED]. During the entire year in which he was stationed in [REDACTED] [REDACTED] had no access to commercial internet or phone service, and was allowed only a month of leave at the end of 2007.<sup>16</sup> [REDACTED] maintained his licenses throughout his absence and kept his boat, indicating his intent to reactivate the business as soon as he could. Accordingly, I find by a preponderance of the evidence that [REDACTED] took all reasonable steps to overcome the circumstance.

Because [REDACTED] satisfies the requirements imposed by the unavoidable circumstance regulation, he is to be issued a charter halibut permit, endorsed for use in Area 3A.<sup>17</sup> The

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<sup>15</sup> Memorandum from [REDACTED] Commanding Officer in Kodiak to Judge Smith, July 21, 2010

<sup>16</sup> Commanding Officer’s memorandum, op.cit.

<sup>17</sup> 50 C.F.R. § 300.61 [Area 3A means all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41’15” N. latitude, 155°35’00” W. longitude) to Cape Ikolik

remaining endorsement questions (transferable or non-transferable and number of anglers authorized by the permit) are discussed below.

**Does [REDACTED] satisfy the requirement in section (v) of 50 C.F.R. § 300.67(g)(1) for a transferable permit? Yes.**

If an applicant satisfies the requirements of sub-sections (i) through (iv) of the unavoidable circumstance regulation, NMFS is instructed, in sub-section (v), as follows:

(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. [50 C.F.R. § 300.67(g)(1)]

The criteria in paragraphs (b), (c), (d), (e), and (f) are the participation requirements for the standard applicant – the applicant that met the actual participation requirements in both the qualifying period (2004, 2005) and the recent period (2008). NMFS cannot determine [REDACTED] permits based on his actual participation in the recent period, because, as outlined previously in this decision, [REDACTED] has shown that he did not participate in the recent period due to an unavoidable circumstance. Under these circumstances, the regulatory history suggests that NMFS will substitute the applicant's participation in the qualifying period for the applicant's participation in the recent period. In the proposed rule, NMFS explained:

*Missed recent participation period.* An applicant who meets the participation requirements for the qualifying period (2004 and 2005) may claim that it did not meet the participation requirement in the recent participation period due to an unavoidable circumstance. Assuming 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.*<sup>18</sup>

Applying this standard to [REDACTED] met the participation requirement for a transferable permit in the qualifying period. [REDACTED] reported more than fifteen bottomfish logbook fishing trips with the same vessel in 2004 and 2005. According to [REDACTED] logbooks, he reported thirty-six bottomfish logbook fishing trips with the same vessel in 2004

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(57°17'17" N. latitude, 154°47'18" W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44'50" N. latitude, 154°08'44" W. longitude), then 140° true.]

<sup>18</sup> Proposed Rule, 75 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009).

and fifty-one bottomfish logbook fishing trips with the same vessel in 2005.<sup>19</sup> The official charter halibut record verifies the logbook data submitted by ██████████<sup>20</sup>

I therefore conclude that ██████████ meets the participation requirement for a transferable permit in the qualifying period and his charter halibut permit should be designated as transferable. ██████████ submitted copies of his logbooks for 2004, 2005, and 2006.

#### **For how many anglers should ██████████ permit be endorsed?**

The highest number of charter vessel anglers ██████████ reported on a bottomfish logbook in 2004 or 2005 was five. Accordingly, pursuant to 50 C.F.R. § 300.67(e),<sup>21</sup> I conclude that ██████████ charter halibut permit should be endorsed for five anglers.

For the reasons set out above, I conclude that ██████████ qualifies for a transferable charter halibut permit for Area 3A, endorsed for five charter anglers.

#### FINDINGS OF FACT

1. ██████████ reported 36 bottomfish logbook fishing trips in 2004 and 51 bottomfish logbook fishing trips in 2005.
1. ██████████ held a specific intent to operate his charter halibut fishing business during the recent participation period (2008).
2. ██████████ intent was thwarted by a circumstance (his obligation to perform in accordance with military orders) that was unique, unavoidable, and reasonably unforeseeable.
3. The unavoidable circumstance actually occurred.
4. ██████████ took all reasonable steps to overcome the circumstance.

#### CONCLUSIONS OF LAW

1. ██████████ has satisfied the requirements of the unavoidable circumstances regulation, 50 C.F.R. 300.67(g)(1), with respect to his lack of participation in the recent period.
2. ██████████ met the minimum participation requirement for a transferable permit in the qualifying period.

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<sup>19</sup> Letter from ██████████ to NMFS (July 9, 2010). ██████████ submitted his logbooks from 2004, 2005 and 2006.

<sup>20</sup> Summary of Official Charter Halibut Record (DATE) or memo from ██████████. The official charter halibut record means “the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.” 50 C.F.R. § 300.67(f)(5).

<sup>21</sup> C.F.R. § 300.67(e) [*Angler endorsement*. A charter halibut permit will be endorsed for the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period . . .].

