

Appellant states that he should receive a permit. First, he states that, in 2004 and 2005, he operated a charter halibut business and hired his cousin, [REDACTED] as captain (Captain) of a vessel owned by Appellant, [REDACTED] (VESSEL). Appellant asserts that Captain took sixty-eight charter halibut trips in 2004 and sixty trips in 2005 with Appellant's vessel. Second, Appellant states that, as a member of the [REDACTED], he was ordered to active service in [REDACTED] in 2004 and 2005, he was ordered to serve out of the country in 2006 and he was not released from active duty until early 2008. Appellant argues that, because he was uncertain as to when he would be released, he did not advertise or prepare the VESSEL for the 2008 season and did not participate in the 2008 season.

With respect to the first claim, RAM determined that neither Appellant, nor anyone on behalf of Appellant, reported at least five bottomfish logbook fishing trips in 2004 or 2005 to ADF&G under an ADF&G Business Owner License issued to Business.⁶ With respect to the second claim, to the extent that Appellant is claiming that an unavoidable circumstance prevented him from participating in the 2008 season, RAM denied Appellant's application because RAM does not have the authority to adjudicate an unavoidable circumstance claim, which is made under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).⁷ A claim of unavoidable circumstances must be adjudicated by an appellate officer, not by RAM.⁸

Appellant can file this appeal because he is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that he meets the requirements for a charter halibut permit. Appellant did not request a hearing and I did not order a hearing because Appellant has not alleged that he could provide evidence, at a hearing, that would authorize NMFS to issue a charter halibut permit.⁹ I conclude that the record contains sufficient information upon which to decide the merits of this appeal.¹⁰ I therefore close the record and issue a decision.

ISSUES

1. Can an applicant meet the participation requirement for a charter halibut permit in the qualifying period (2004, 2005) through charter halibut trips that occurred but were not reported to ADF&G within the time limits for reporting the trips to ADF&G?
2. Can an applicant meet the military service provision in the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(3), if the applicant did not meet the participation requirement for a charter halibut permit in the recent period (2008)?

⁶ IAD at 3.

⁷ IAD at 3 – 5.

⁸ 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).

⁹ 50 C.F.R. § 679.43(g)(3)(iii) (“A hearing will not be ordered on the basis of mere allegations”).

¹⁰ 50 C.F.R. § 679.43(g)(2).

3. Can an applicant meet the unavoidable circumstance regulation with respect to his lack of participation in 2008, 50 C.F.R. § 300.67(g)(2), if the applicant did not meet the participation requirement in the qualifying period (2004, 2005)?

SUMMARY

The IAD is affirmed. First, an applicant cannot meet the participation requirements for a charter halibut permit in the qualifying period (2004, 2005) simply by showing that charter halibut trips occurred with the applicant's vessel. An applicant must show that the minimum number of charter halibut trips were reported to Alaska Department of Fish and Game (ADF&G) under an ADG&G Business Owner license issued to the applicant or the applicant's business, within the time limits for reporting the trips to ADF&G. Neither Appellant, nor the captain that Appellant hired in 2004 and 2005, reported any trips to ADF&G that occurred under an ADF&G Business Owner License issued to Appellant or Appellant's Business. Therefore, Appellant does not meet the participation requirement in the qualifying period. Second, an applicant cannot meet the military service provision in the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2), because this provision is only available to applicants that participated in the charter halibut fishery in the recent period (2008). Third, Appellant cannot meet the unavoidable circumstance regulation for applicants that did not participate in the recent period, 50 C.F.R. § 300.67(g)(3), because he did not meet the participation requirement in the qualifying period (2004, 2005). To receive a charter halibut permit, an applicant must meet the actual participation requirement for a permit in either the qualifying period or the recent participation period.

FINDINGS OF FACT

I find the following facts by a preponderance of evidence in the record:

1. Appellant is owner of Business and has been since 1996.¹¹
2. In 2003, Appellant purchased VESSEL and, as captain, took anglers on charter halibut trips with VESSEL.¹²
3. In 2004, Appellant was called to active duty in the [REDACTED] and, in 2004 and 2005, performed his military service in [REDACTED].¹³
4. In 2004 and 2005, Appellant continued to arrange bookings for charter halibut trips from VESSEL but hired his cousin, Captain, to work as captain of VESSEL.¹⁴
5. On June 23, 2004, Appellant, on behalf of Business, obtained a 2004 ADF&G Saltwater Sport Fishing Charter Vessel Logbook from ADF&G for VESSEL, to conduct charter fishing activity. Appellant received Logbook Number [REDACTED].¹⁵

¹¹ Letter from Appellant to NMFS; IAD at 3 note 1.

¹² Letter from Appellant to NMFS (Mar. 21, 2010).

¹³ Letter from Appellant to NMFS (Mar. 21, 2010).

¹⁴ Letter from Appellant to NMFS (Mar. 21, 2010); Letter from Appellant to NMFS Dec. 1, 2010).

6. On January 4, 2005, Appellant, on behalf of Business, obtained a second 2004 ADF&G Saltwater Sport Fishing Charter Vessel Logbook from ADF&G for the VESSEL. Appellant received Logbook Number [REDACTED].¹⁶ The Sign-Out sheet for Logbook [REDACTED] has a staff comment: "Re-issue log, original in vessel in [REDACTED] [REDACTED] rec'd notice that ADFG did not rec his vessel's logs."
7. Neither Appellant, nor anyone on Appellant's behalf, reported any bottomfish logbook fishing trips to ADF&G under Appellant's ADF&G Business Owner Registration in 2004.¹⁷
8. The deadline for reporting a bottomfish logbook fishing trip to ADF&G in 2004 was weekly and each page of the logbook specifies the deadline for reporting.¹⁸ For example, the logbook page for trips taken the week of June 14 – June 20, 2004, states as follows, "WEEK of June 14-June 20, 2004 This sheet must be postmarked by June 28, 2004."
9. In 2005, Appellant's cousin, Captain, on behalf of Business, obtained an ADF&G Business Owner License.¹⁹
10. Neither Appellant, nor anyone on behalf of Appellant, reported any bottomfish logbook fishing trips to ADF&G for trips occurring in 2005 under the authority of an ADF&G Business Owner License issued to Business.²⁰
11. The deadline for reporting logbook fishing trips to ADF&G for any charter halibut fishing activity between January 1, 2005, and September 30, 2005, was October 15, 2005. The deadline for reporting logbooks fishing trips to ADF&G for any charter halibut fishing activity between October 1, 2005, and December 31, 2005, was January 15, 2006.²¹
12. Through bookings arranged by Appellant, Captain took sixty charter halibut trips with VESSEL in 2004.²²

¹⁵ Email from Bob Powers, Research Analyst, ADF&G, to Tracy Buck, RAM (July 23, 2010) with copy of Sign-Out Sheet for Logbook [REDACTED].

¹⁶ Email from Bob Powers, Research Analyst, ADF&G, to Tracy Buck, RAM (July 23, 2010) with copy of Sign-Out Sheet for Logbook [REDACTED].

¹⁷ IAD at 3; Email from Bob Powers, Research Analyst, ADF&G, to Tracy Buck (RAM) (July 23, 2010). The regulation defines ADF&G Business Owner License to include an ADF&G Business Registration. 50 C.F.R. § 300.67(b)(3). For background on this provision, see Final Rule, 75 Fed. Reg. 554, 580 (Comment 83) and 596 (Change #14) (Jan. 5, 2010).

¹⁸ 2004 Logbook Pages submitted with Appellant's Application (Apr. 2, 2010)

¹⁹ IAD at 3 note 1.

²⁰ IAD at 3. I do not make a finding whether any of the trips that occurred in 2004 or 2005 were reported under an ADF&G Business Owner License issued to a different person.

²¹ The 2005 Saltwater Charter Logbook is on the NMFS Alaska Region website, Office of Administrative Appeals: http://www.fakr.noaa.gov/appeals/adfg_logbooks/2005.pdf.

²² Excel spreadsheets of bookings and trips from 2004, Logbook pages from 2004, submitted to NMFS with Application (Apr. 2, 2010).

13. Through bookings arranged by Appellant, Captain took sixty-eight charter halibut trips with VESSEL in 2005.²³
14. In 2006, Appellant's Army National Guard unit was activated and he was ordered to report to Kuwait and then to Iraq.²⁴
15. Appellant served with distinction and was honorably discharged from active duty in the military on January 18, 2008.²⁵ During his period of service, Appellant received the following awards: Army Commendation Medal, Army Achievement Medal, Army Reserve Components Achievement Medal, National Defense Service Medal with Bronze Star, and the Global War on Terrorism Service Medal.
16. In 2008, Appellant, or someone on behalf of Appellant, reported one halibut logbook fishing trip to ADF&G under the authority of an ADF&G Business Owner License issued to Business.²⁶
17. Appellant submitted a timely application for a charter halibut permit on April 2, 2010.²⁷
18. On April 2, 2010, with Appellant's application, Appellant submitted to NMFS logbook trip reports for sixty-eight charter halibut trips that occurred in 2004 with VESSEL.

APPLICABLE REGULATIONS

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 official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.²⁸

To receive 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 that authorized logbook fishing trips that met the minimum participation requirements for a permit.²⁹ A person can be an individual, a corporation, firm or association.³⁰

²³ Excel spreadsheets of bookings and trips from 2005, submitted to NMFS with Application (Apr. 2, 2010).

²⁴ Certificate of Release or Discharge from Active Duty, submitted with Letter to NMFS (Dec. 1, 2010); Letter from Appellant to NMFS (Dec. 1, 2010).

²⁵ Certificate of Release or Discharge from Active Duty, submitted with Letter to NMFS (Dec. 1, 2010).

²⁶ Notice of Opportunity to Submit Evidence (May 17, 2010). In his Application, Appellant stated that he took two halibut logbook fishing trips in 2008. Application (Apr. 2, 2010). Appellant did not submit further evidence of two trips, rather than the one trip contained in the official record. But since two trips is still less than the minimum participation requirement of five trips, it would not affect this decision if Appellant reported two halibut logbook trips in 2008.

²⁷ Application (received Apr. 2, 2010).

²⁸ 50 C.F.R. § 300.67(f)(5).

²⁹ 50 C.F.R. § 300.67(b)(1)(ii).

³⁰ 50 C.F.R. § 300.61 (definitions).

The relevant unit of participation is a logbook fishing trip. A logbook fishing trip is either a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip except that for multi-day trips, the number of trips will be equal to the number of days of the multi-day trip, e.g., a two-day trip will be counted as two trips.³¹

The charter halibut regulation specifically defines a bottomfish logbook fishing trip and a halibut logbook fishing trip to mean that the trip was reported to the State of Alaska within the time limit for reporting the trip in effect at the time of the trip.³²

An applicant must prove participation through logbook fishing trips in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,³³ and a recent participation period, which is the sport fishing season for halibut in 2008.³⁴

An applicant must prove different levels of participation to receive a non-transferable and 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).³⁵ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.³⁶

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, 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).³⁷ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.³⁸

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one, but not both, participation periods.³⁹ If an applicant meets a minimum participation trip level in the qualifying period (2004, 2005), but not the recent participation period (2008), the applicant may meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period

³¹ 50 C.F.R. § 300.67(f)(4).

³² 50 C.F.R. § 300.67(f)(2); 50 C.F.R. § 300.67(f)(3).

³³ 50 C.F.R. § 300.67(f)(6).

³⁴ 50 C.F.R. § 300.67(f)(7).

³⁵ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B). In 2004 and 2005, ADF&G did not require participants in the charter halibut fishery to report halibut specifically but did require participants to report halibut effort as bottomfish effort. Therefore, for 2004 and 2005, the regulation evaluates an applicant's participation by bottomfish logbook fishing trips, not halibut logbook fishing trips. Beginning in 2006, ADF&G required participants to report halibut specifically. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

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

³⁷ 50 C.F.R. § 300.67(d)(1)(i)&(ii).

³⁸ 50 C.F.R. § 300.67(d)(1), *incorporating* 50 C.F.R. § 300.67(c).

³⁹ 50 C.F.R. § 300.67(g).

(2008).⁴⁰ If the applicant meets the unavoidable circumstance regulation for the recent period, the applicant will be treated as though the applicant participated in the recent period.

Similarly, if the applicant meets a minimum participation trip level in the recent participation period (2008), but not the qualifying period (2004, 2005), the applicant may meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period (2004, 2005).⁴¹ If the applicant meets the unavoidable circumstance regulation for the qualifying period, the applicant will be treated as though the applicant participated in the qualifying period.

ANALYSIS

1. Can an applicant meet the participation requirement for a charter halibut permit in the qualifying period (2004, 2005) through charter halibut trips that occurred but were not reported to ADF&G under the applicant's ADF&G Business Owner License within the time limits for reporting the trips to ADF&G?

A. Trips occurred.

Appellant submitted extensive evidence that charter halibut trips occurred with VESSEL in 2004 and 2005. I have found that, through bookings arranged by Appellant, Captain operated VESSEL in those years and took clients on sixty-eight trips in 2004 and sixty trips in 2005. But that is not sufficient for NMFS to credit trips in either year toward Appellant's application for a charter halibut permit.

B. Trips were not reported.

I have determined that neither Appellant, nor anyone on his behalf, submitted any logbook trip reports to ADF&G for trips that occurred in 2004 and 2005 under the authority of an ADF&G Business Owner License issued to Business.⁴² Since this is the essential finding of fact in this appeal, I will state the basis of that finding.

With his application, Appellant submitted logbook trip reports to NMFS listing sixty-eight trips in 2004 but these were logbook pages signed by Appellant. Appellant did not assert that these were copies of logbook pages that had actually been submitted to ADF&G at or near the time the trips occurred. Appellant filled out these logbook pages and submitted those with his application for a charter halibut permit. Appellant stated:

In 2004 and 2005 the [VESSEL] was captained by [Captain] in [REDACTED]. Since I was called to active duty in the [REDACTED]. I, as owner, kept track of the bookings and finance. [Captain] had the ADF&G log books and was supposed to have submitted them.⁴³

In May 2010, NMFS sent Appellant a notice that, according to the official charter halibut record, [1] Appellant was the owner of Business in 2004, [2] Captain, Appellant's cousin,

⁴⁰ 50 C.F.R. § 300.67(g)(1).

⁴¹ 50 C.F.R. § 300.67(g)(2).

⁴² Finding of Facts # 7 and # 10.

⁴³ Letter from Appellant to NMFS (Mar. 21, 2010), submitted with Application.

obtained an ADF&G Business Owner License in 2005 and was the owner of Business in 2005, [3] Business had not reported five logbook fishing trips to ADF&G in 2004 or 2005; [4] Appellant was the owner of the Business in 2008; [5] Business had reported one logbook fishing trip to ADF&G in 2008. Through the notice, Appellant was given an opportunity to submit evidence that the official charter halibut record was wrong and that Appellant met the minimum participation requirements for a permit in 2004, 2005 or 2008.⁴⁴

In response, Appellant submitted evidence that he was the owner of Business in 2005.⁴⁵ RAM examined his evidence and agreed that he was the owner of Business in 2005.⁴⁶ RAM therefore would credit Appellant with any trips reported to ADF&G under the ADF&G Business Owner License that Captain was issued in 2005. As for whether the official record was incorrect with respect to the trips reported by Business in 2004 and 2005, Appellant was unable to find the logbooks but said that Captain said that he submitted the logbook reports weekly to ADF&G.⁴⁷ Each logbook page has an original, that is submitted to ADF&G, and a pink carbon copy, that the business owner may retain. Appellant submitted no carbon copies of logbook pages that were submitted to ADF&G.

Upon receiving Appellant's statement, RAM contacted ADF&G and asked ADF&G to search their records for the trips in 2004 that were listed on the logbook pages submitted with Appellant's application.⁴⁸ ADF&G staff stated that they found no logbook pages submitted for trips in 2004.⁴⁹ ADF&G provided copies of the two actual sign-out sheets for 2004 logbooks signed by Appellant: one for Logbook [REDACTED] on June 23, 2004, and for Logbook [REDACTED] on January 4, 2005. The second sign-out sheet had the staff comment, "Re-issue log, original in vessel in [REDACTED] [REDACTED] rec'd notice ADFG did not rec. his vessel's logs."⁵⁰

On August 27, 2010, RAM issued the IAD and stated Appellant had not submitted evidence that showed that the official charter halibut record was incorrect and that, according to the official charter halibut record, Business reported no bottomfish logbook trips to ADF&G in 2004 or 2005 and reported one halibut logbook fishing trip in 2008.⁵¹

In September 22, 2010, RAM provided Appellant with contact information for the ADF&G staff so Appellant could inquire about logbook reports submitted to ADF&G.⁵² On October 25, 2010, when Appellant filed his appeal, he asked for "more time to work with ADF&G on this

⁴⁴ Notice of Opportunity to Submit Evidence (May 17, 2010).

⁴⁵ Letter from Appellant to NMFS (June 16, 2010) with attachments: City of Seward Business License, No. 3352, Issued Mar. 1, 2005; Schedule C from 2004 Income Tax Return; Alaska Business License (for period beginning Dec. 8, 2004).

⁴⁶ IAD at 3 note 1.

⁴⁷ Letter from Appellant to NMFS (June 16, 2010).

⁴⁸ Email from Tracy Buck, RAM, to Dora Sigurdsson, ADF&G (July 19, 2010).

⁴⁹ Email from Bob Powers, Research Analyst, ADF&G, to Tracy Buck, RAM (July 23, 2010) ("We don't have scans for either logbook. I also looked at our late scans and was unable to find any records for these logbooks.").

⁵⁰ Email from Bob Powers, Research Analyst, ADF&G, to Tracy Buck, RAM (July 23, 2010) ("We don't have scans for either logbook. I also looked at our late scans and was unable to find any records for these logbooks.").

⁵¹ IAD at 3.

⁵² Email from Jessica Gharrett, RAM Program Administrator, to the Record (Sep, 22, 2010).

matter.”⁵³ On November 18, 2010, this Office sent Appellant a letter giving him until December 8, 2010, to submit any additional evidence in support of his appeal.⁵⁴ In response, Appellant submitted a letter with his Discharge Form (DD Form 214) but no evidence that any trips were reported to ADF&G by Captain for trips that occurred in 2004 or 2005 with VESSEL.⁵⁵

In sum, after having ample notice and opportunity to submit evidence, the only evidence that Appellant submitted five logbook trip reports to ADF&G under an ADF&G Business Owner License issued to Business in 2004 or 2005 was Appellant’s bare statement that Captain said he submitted these reports.⁵⁶ The evidence that Appellant did not submit logbook trip reports was that Appellant submitted no copies of logbook trip reports that were submitted to ADF&G, ADF&G specifically searched its records and located sign-out sheets for two logbooks in 2004 but found no trip reports, NMFS’s official charter halibut record shows that Business obtained ADF&G Business Owner Licenses in 2004 and 2005 and NMFS’s official charter halibut record does not contain any trip reports for either 2004 or 2005. Based on the preponderance of evidence in the record, I therefore found that neither Appellant, nor anyone on Appellant’s behalf, reported any trips to ADF&G that occurred in 2004 or 2005 under an ADF&G Business Owner License issued to Business for 2004 or 2005.

C. Appellant may not report these trips now.

Appellant’s submissions on appeal, fairly construed, raise the argument that, even if the trips were not reported in 2004 and 2005, the trips occurred, Appellant relied on Captain to submit the logbook reports, Captain did not do that and Appellant should be able to submit the logbook trips reports now -- during the application process for a charter halibut permit.⁵⁷ The regulations do not allow Appellant, or any other applicant, to report logbook trips during the application process for a charter halibut permit.

To receive a permit, an applicant must show that, in 2004 or 2005, five or more “bottomfish logbook fishing trips” were reported to ADF&G under the applicant’s ADF&G Business Owner License.⁵⁸ A “bottomfish logbook fishing trip” is a regulatory term that means

a logbook fishing trip in the qualifying period *that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information:* The statistical area(s) 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.⁵⁹

In the proposed rule, NMFS addressed whether an applicant could add trips to the official charter halibut record if the applicant did not them to ADF&G when the trips occurred:

⁵³ Letter from Appellant to OAA (Oct. 18, 2010, received Oct. 25, 2010).

⁵⁴ Letter from Eileen Jones, Chief Administrative Judge, to Appellant (Nov. 18, 2010).

⁵⁵ Letter from Appellant to NMFS (Dec. 1, 2010).

⁵⁶ Letter from Appellant to NMFS (June 16, 2010).

⁵⁷ Letter from Appellant to NMFS (Dec. 1, 2010).

⁵⁸ 50 C.F.R. § 300.67(b)(1)(i).

⁵⁹ 50 C.F.R. § 300.67(f)(2)(emphasis added).

A logbook fishing trip would be an event that was reported to ADF&G in a logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. The required time limit differed in minor ways in 2004, 2005, 2007 and 2008; and depended on when the trip occurred; however, the latest date for reporting a trip was January 15 of the year after it occurred. If a trip was not reported within those time limits, NMFS would not consider it a logbook fishing trip for purposes of this proposed rule, and it would not serve as the basis for NMFS to issue a charter halibut permit. *Hence, a permit applicant could not add a trip to the official record years after the trip should have been reported to the State.*⁶⁰

In the commentary to the final rule, NMFS restated that proposition:

As stated above, the basic unit of participation for receiving a charter halibut permit will be a logbook fishing trip, which is a trip that was reported to ADF&G in a saltwater charter logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. *If a trip was not reported within those time limits, NMFS will not consider it a logbook fishing trip for purposes of a charter halibut permit application.*⁶¹

Thus, the participation requirement for a non-transferable charter halibut permit is not simply that an applicant took five or more charter halibut fishing trips in 2004 or 2005 but that the applicant took five or more bottomfish *logbook* fishing trips, which means that the trip was reported in a logbook to ADF&G in accord with ADF&G time limits.⁶²

Similarly, for a transferable permit, the participation requirement in 2004 or 2005 is not simply that the applicant took fifteen charter halibut fishing trips but that the applicant took fifteen or more bottomfish logbook fishing trips, which means that the trips were reported in a logbook to ADF&G in accord with ADF&G time limits.⁶³ Appellant is seeking to report these trips approximately five years after the trips occurred and approximately five years after the deadline for reporting these trips to ADF&G. The regulations do not allow an applicant to do that.

I conclude that if an applicant did not report a trip to ADF&G, under an ADF&G Business Owner License issued to the applicant or the applicant's business, within ADF&G time limits for reporting the trip, the trip is not a bottomfish logbook fishing trip as defined by federal regulation and the trip cannot count towards the participation requirement for a transferable or non-transferable charter halibut permit. I therefore conclude that Appellant does not meet the participation requirement in the qualifying period for a transferable or non-transferable charter halibut permit.

⁶⁰ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009)(emphasis added).

⁶¹ Final Rule, 75 Fed. Reg. 554, 556 (Jan. 5, 2010)(emphasis added).

⁶² 50 C.F.R. § 300.67(b)(1)(i).

⁶³ 50 C.F.R. § 300.67(d)(1)(i). For a transferable permit, the trips must have been with the same vessel.

2. Can an applicant meet the military service provision in the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(3), if the applicant did not meet the participation requirement for a charter halibut permit in the recent period (2008)?

Appellant was called to serve in the [REDACTED] in 2004 and 2005, ordered to Kuwait and Iraq in 2006 and 2007, and released in January 2008. Although Appellant was able to make bookings for VESSEL in 2004 and 2005, [REDACTED], Appellant was not able to continue serving as captain of the VESSEL.

The charter halibut regulation has a provision for applicants that were ordered to report for active military service in the [REDACTED], but it only applies to applicants that met the participation requirement in 2008 and did not meet the participation requirement for the qualifying period due to their military service (2004, 2005).⁶⁴ Since Applicant did not meet the participation requirement in the recent period – five reported halibut logbook trips in 2008 – I conclude he cannot meet the military service provision in the unavoidable circumstance regulation.

3. Can an applicant meet the unavoidable circumstance regulation with respect to his lack of participation in 2008, 50 C.F.R. § 300.67(g)(2), if the applicant did not meet the participation requirement in the qualifying period (2004, 2005)?

Appellant argues that he did not participate in 2008 because he was uncertain as to when he would be released from the military and because of that, he did not advertise or prepare his vessel for 2008.⁶⁵ For purposes of this decision, I accept these facts as true.

The charter halibut regulation contains a provision, 50 C.F.R. § 300.67(g)(2), for applicants that specifically intended to participate in 2008 but were thwarted from participating by a circumstance that was unavoidable, unique to them, unforeseen and reasonably unforeseeable. But the regulation expressly provides that an applicant can only claim unavoidable circumstances for the recent participation period (2008), if the applicant met the actual participation requirements for the qualifying period (2004, 2005).⁶⁶

Similarly, an applicant can only claim unavoidable circumstance for the qualifying period (2004, 2005), if the applicant met the actual participation requirement for the recent period (2008).⁶⁷ The regulation is structured that way so that NMFS can only issue a permit to an applicant that meets the actual participation requirement in either the qualifying period or the recent period.⁶⁸

Since Appellant does not meet the participation requirement for the qualifying period, Appellant cannot meet the unavoidable circumstance regulation with respect to his lack of participation in the recent period, no matter what the reason for his lack of participation.

⁶⁴ 50 C.F.R. § 300.67(g)(3).

⁶⁵ Letter from Appellant to NMFS (Dec. 1, 2010).

⁶⁶ 50 C.F.R. § 300.67(g)(2).

⁶⁷ 50 C.F.R. § 300.67(g)(2).

⁶⁸ See Proposed Rule, 74 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009)

I am aware that Appellant's life was no doubt upended by his orders to report for active duty in the military, [REDACTED]. But I must follow the regulations adopted by the Secretary of Commerce that implemented the Charter Halibut Limited Access Program. Under those regulations, Appellant does not meet the requirements for a charter halibut permit and NMFS does not have authority to issue him a permit through initial issuance.

CONCLUSIONS OF LAW

1. A charter halibut fishing trip that was not reported to ADF&G within the time limits for reporting the trip is not a bottomfish logbook fishing trip, within the meaning of 50 C.F.R. § 300.67(f)(3), and cannot count toward the participation requirements for a non-transferable charter halibut permit, 50 C.F.R. § 300.67(b)(1)(ii)(A), or a transferable permit, 50 C.F.R. § 300.67(b)(1)(A).
2. Appellant does not meet the minimum participation requirement for a permit in the qualifying period for a non-transferable charter halibut permit, 50 C.F.R. § 300.67(b)(1)(A), or a transferable permit, 50 C.F.R. § 300.67(d)(1)(i).
3. Appellant cannot meet the military service provision of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(3), because he does not meet the participation requirement in 2008.
4. Appellant cannot meet the unavoidable circumstance regulation with respect to his lack of participation in 2008, 50 C.F.R. § 300.67(g)(3), no matter what the reason for his lack of participation, because he did not meet the participation requirement in the qualifying period (2004, 2005).
5. Appellant does not qualify for a charter halibut permit through initial issuance.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on July 5, 2011, unless by that date the Regional Administrator orders review of the Decision.

Appellants 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 the tenth day after the date of this Decision, June 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.

[REDACTED]
[REDACTED]
Mary Alice McKeen
Administrative Judge