

Appellant's appeal.

A prehearing conference was held on July 15, 2010, which resulted in an order scheduling a hearing on August 12, 2010. Subsequently, that order was revised and the hearing was rescheduled to September 23, 2010. Three hearings were conducted, each of them recorded and included as part of this record.

The hearing was conducted on September 23, 2010. At the hearing, Appellant testified in person. On November 18, 2010, a supplemental hearing was held to address the sole question of the steps that Appellant took to overcome the circumstance that thwarted his 2008 intent to operate his charter halibut fishing business. On February 15, 2011, a supplemental hearing was held. At that hearing, Appellant's physician testified. Following the hearing, pursuant to 50 C.F.R. § 679 (m)(8),² the record was closed. This decision follows.

ISSUES

1. Does Appellant satisfy the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 300.67(g)(1) with respect to his lack of participation in the charter halibut fishery in 2008?
 - a) Did Appellant have a specific intent to operate a charter halibut fishing business in the recent participation period?
 - b) Was Appellant's specific intent to operate a charter halibut fishing business in the recent participation period thwarted by a circumstance that was unique to Appellant, unforeseen and reasonably unforeseeable?
 - c) Did the circumstance actually occur?
 - d) Under the circumstances, did Appellant take all reasonable steps to overcome the circumstance?
2. If Appellant satisfies the elements of the unavoidable circumstance regulation, should his permit be transferable or non-transferable? And,
3. For how many anglers should his permit be endorsed?

² 50 C.F.R. § 679.43(n)(8): "The appellate officer will close the record and issue a decision after determining that the information on the record is sufficient to render a decision."

SUMMARY OF DECISION

The initial administrative determination that is the subject of this decision is VACATED.

Appellant has proven, by a preponderance of the evidence on the record, that (a) he held a specific intent to operate his charter halibut fishing business in 2008; (b) that his intent was thwarted by an unavoidable circumstance, namely a debilitating medical condition that was unique to him, unforeseen and reasonably unforeseeable; and, (c) that he did all things reasonably possible to overcome the circumstance.

Appellant is to be issued a transferable charter halibut permit for use in International Pacific Halibut Commission (IPHC) Administrative Area 3A, and endorsed for six anglers.

FACTUAL BACKGROUND

Appellant is a long-time participant in the charter halibut fishery out of a port on the Kenai Peninsula of Alaska. Appellant stated that he and his wife started their charter business in 1983.³

Appellant offers charter fishing trips for both salmon and halibut anglers. Some of his clients are recruited during the fishing year, while others are referred by other businesses. In 2004, according to the official charter halibut record,⁴ Appellant reported fifteen bottomfish logbook fishing trips and, in 2005, he reported eight. During the first oral hearing, Appellant testified that, as a member of the concerned public, and as a member of the local Charter Boat Association, he was aware of the pendency of the Charter Halibut Limited Access Program and participated in meetings of the North Pacific Fishery Management Council where the specifics of the program were being developed.

In the early 2000s, according to his physician, [REDACTED] Appellant, [REDACTED] and undergoes semi-annual physical examinations from a flight surgeon, was told that the condition was not life-threatening and, if it reached a point when

³ Letter from Appellant to NMFS/RAM, February 25, 2010 (received by RAM on March 29, 2010).

⁴ 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 Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.”

it interfered with his daily activities, he could see a specialist to have the condition rectified.

Appellant testified that, in the winter of 2007-2008, the condition worsened significantly and, when he took his charter vessel out for a “test cruise” in May 2008, he realized that he simply could no longer engage in physically strenuous work, such as setting and pulling his vessel’s anchor and pulling large halibut over the gunwale and into the boat. As a result, he declined opportunities to do any halibut charters during 2008, and operated his business for only a limited number of salmon charters.⁵

Because of his discomfort and the physical debilitation he experienced in 2008, Appellant sought treatment. He was reluctant to subject himself to surgery, so he first attempted to find a non-surgical, non-invasive alternative. He spent time on the internet and found, and purchased, an herbal remedy, which he tried. It did not work.

In March 2009 Appellant visited a [REDACTED] and completed some laboratory work. He saw [REDACTED] in April 2009, and underwent an operation on May 11, 2009. He has now recovered and is once again fully engaged in the fishery.

ANALYSIS

To receive a charter halibut permit, a person must have been a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner/Guide License that authorized its holder to participate in the fishery and to report logbook fishing trips that met the minimum participation requirements for a permit.⁶ The charter halibut regulation specifies the minimum participation requirement in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005, and a recent participation period, which is the sport fishing season for halibut in 2008. The regulation specifies two levels of minimum participation: one for a non-transferable permit and one for a transferable permit.

To receive a non-transferable charter halibut permit, the license holder must have reported a minimum of five bottomfish logbook fishing trips from the same vessel in one year of the qualifying period (2004, 2005)⁷ and a minimum of five halibut logbook fishing trips in the recent participation period (2008).⁸

⁵ Salmon charter fishing was less strenuous because it does not involve anchoring the vessel and, as a general rule, salmon weigh considerably less than halibut.

⁶ 50 C.F.R. § 300.67(b)(1)(ii).

⁷ 50 C.F.R. § 300.67(b)(1)(ii)(A). The qualifying period is the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005. 50 C.F.R. § 300.67(b)(1)(ii)(f)(6).

⁸ 50 C.F.R. § 300.67(b)(1)(ii)(B). The recent participation period is the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008. 50 C.F.R. § 300.67(b)(1)(ii)(f)(7).

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

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirements in one, but not both, participation periods. If an applicant meets the minimum participation trip level in the qualifying period (2004, 2005), but not in the recent participation period, the applicant may meet the requirements in the unavoidable circumstance regulation for the recent participation period (2008) and thereby be treated *as if* he had participated in the recent period.⁹

Likewise, if an applicant meets the minimum participation trip level in the recent participation period (2008), but not in the qualifying period (2004, 2005), the applicant may meet the requirements in the unavoidable circumstance regulation for the qualifying period and thereby be treated *as if* he had participated in the qualifying period.¹⁰

The applicant may not claim unavoidable circumstances for both periods. The applicant must meet the minimum participation requirement for a permit through actual trips in either the qualifying period (2004, 2005) or the recent participation period (2008).

According to the official charter halibut record, Appellant, dba [REDACTED], reported fifteen bottomfish logbook fishing trips in 2004, and eight bottomfish logbook fishing trips in 2005. Therefore, he meets the minimum participation requirement for a transferable permit in the qualifying period (2004, 2005).

Appellant reported no halibut logbook fishing trips in the recent participation period (2008). Nevertheless, he may receive a charter halibut permit if he satisfies the requirements of the unavoidable circumstance regulation, as set out below.

For appellants who did not participate in the recent participation period, the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1), 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 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;

⁹ 50 C.F.R. § 300.67(g)(1).

¹⁰ 50 C.F.R. § 300.67(g)(2).

(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 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 endorsement 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.

Does Appellant meet the requirements for a charter halibut permit as set out in the unavoidable circumstance regulation [50 C.F.R. § 300.67(g)(1)(i) to (iv)], as premised on his medical condition in 2008?

The first requirement of the unavoidable circumstance regulation sets out the precondition for claiming unavoidable circumstance in the recent participation period; namely, that the applicant "meets the participation requirement for the qualifying period but does not meet the participation requirement for the recent participation period."

According to the official charter halibut record, Appellant reported fifteen bottomfish logbook fishing trips in 2004 and eight bottomfish logbook fishing trips in 2005. Appellant therefore meets the participation requirements for a transferable permit in the qualifying period. However, he did not participate in the halibut charter business in 2008. His claim that an unavoidable circumstance thwarted his intent to participate in 2008 allows him to pursue his permit application under the unavoidable circumstance provisions of the regulation.

His claim is analyzed below.

50 C.F.R. § 300.67(g)(1)(i): Did Appellant hold a specific intent to participate in the charter halibut fishery in 2008? Yes.

Appellant held all necessary licenses for 2008 and he was prepared to participate as a halibut charter fishing business operator. He owned the charter vessel [REDACTED], and the

vessel was fully equipped to participate in the charter halibut fishing business. In fact, he did participate (albeit minimally) in the salmon charter fishery in 2008.

I find by a preponderance of the evidence that Appellant held a specific intent to participate in the charter halibut fishing business in 2008.

50 C.F.R. § 300.67(g)(1)(ii): Was Appellant's intent to participate thwarted by a circumstance that was unavoidable, unique to Appellant, unexpected, unforeseen, and reasonably unforeseeable? Yes.

The onset of Appellant's medical condition [REDACTED] occurred some seven or eight years before the 2008 charter halibut season. Although the condition gradually worsened [REDACTED] over the years, Appellant met the strenuous physical challenges associated with chartering for halibut for the years before 2008. In May 2008, Appellant discovered that the [REDACTED] had [REDACTED] that he could no longer meet the physical demands of the halibut charter business. In short, the condition had reached a "tipping point" and was interfering with his life activities and his business activities. Before May 2008, Appellant did not think his condition would affect his 2008 season. To that extent, the circumstance he uniquely experienced was unavoidable, unforeseen, and reasonably unforeseeable.

I find that Appellant's intent to participate in the charter halibut fishing business in 2008 was, indeed, thwarted by an unavoidable circumstance.

50 C.F.R. § 300.67(g)(1)(iii): Did the circumstance that thwarted Appellant's intent to participate actually occur? Yes.

Appellant's condition is well documented in the record. Therefore, I find that the circumstances actually happened.

50 C.F.R. § 300.67(g)(1)(iv): Did Appellant take all reasonable steps to overcome the circumstance? Yes.

According to testimony adduced during the supplemental hearing,¹¹ Appellant [REDACTED] [REDACTED] is required to undergo a semi-annual physical examination. Appellant testified that he had discussed his condition with his flight surgeon on prior occasions, and had been informed that the condition was not life-threatening [REDACTED] that he could delay treatment until the condition worsened to the point that it interfered with his occupation as a charter vessel owner/operator, and that he would suffer no harm by delaying treatment. His flight surgeon also gave him the name of a specialist [REDACTED] who could treat the [REDACTED] when Appellant felt that such treatment was necessary.

¹¹ November 18, 2010.

When, in May of 2008, Appellant concluded that he could no longer do the heavy work required of halibut charter fishing operators, he purchased, and used, an herbal remedy that he had learned about on the internet. That treatment failed to improve his situation; so, the following spring, he determined to visit the specialist recommended by his flight surgeon.

Appellant testified that he contacted the specialist's office in March 2009, made an office visit and had laboratory work accomplished in late March 2009,¹² visited with ██████████ in late April and underwent surgery on May 11, 2009. Following the surgery, which Appellant characterized as quite invasive, his recovery time was six to eight weeks before he could resume his normal activities, including operating his vessel.

During the February 15, 2011, oral hearing with Appellant's physician, the fact that Appellant, attempting to avoid surgery, turning to remedies he found on the internet, was discussed.

Administrative Judge: "As a physician, do you think that somebody in [Appellant's] position seeking non-invasive surgical treatment is a reasonable thing to have done?"

Appellant's Physician: "Well, I think it's reasonable for the lay person to at least do that research and try some non-surgical remedies. Unfortunately, they just don't work. . . the really definitive treatment is surgical, but again, I wouldn't think it's unreasonable for someone, before seeking medical treatment, to look for another means of taking care of it. It's certainly not a life-threatening condition; it's a ██████████ condition and the treatment is based on how symptomatic patients are."

The Administrative Judge questioned the physician about the time for recovery from the surgery performed. In his December 10, 2010, letter, the physician had written: "The expected recovery after the left ██████████ was approximately 6 - 8 weeks."¹³

Administrative Judge: "Would it have taken less time [for Appellant to recuperate] if he had had the operation a year earlier, in May of 2008?"

██████████: No, I don't think so. I don't think the recovery is any different for, let's say, a ██████████."

So, according to Appellant's physician, the recovery time would have been the same if Appellant had the operation in 2008. Assuming the same time frame in 2008 as what actually occurred in 2009, Appellant would have spent six weeks to two months (May and June) preparing for the surgery and another two months (July and August) recuperating from it. So, even if Appellant had decided to seek an immediate surgical solution to his problem, he could not have effectively operated his halibut charter business in 2008.

¹² "Explanation of Benefits" from ██████████ (Insurance Co.) to Appellant, showing "office visit" and laboratory work on March 24, 2009 (July 25, 2009).

¹³ Letter "To Whom it May Concern" from ██████████ (December 10, 2010).

Therefore, I find, by a preponderance of the evidence in the file, that that he took all reasonable steps to overcome the circumstance he was facing in May 2008.

If Appellant satisfies the elements of the unavoidable circumstance regulation, should his permit be transferable or non-transferable? It should be transferable.

If an applicant satisfies the requirements of sections (i) through (iv) of the unavoidable circumstance regulation, NMFS is instructed, in 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.

This section requires NMFS to use the applicant's activities during the qualifying period as a predictor of what the appellant would have done during the recent participation period, but for the unavoidable circumstance. Having satisfied the requirements of the unavoidable circumstance regulation, Appellant's 2004 participation level (15 reported bottomfish logbook fishing trips) qualifies him to receive a transferable charter halibut permit.

For how many anglers should his permit be endorsed?

With respect to the angler endorsement on the permit, the Official Record shows that the highest number of anglers Appellant reported during the qualifying period was six. Accordingly, pursuant to 50 C.F.R. § 300.67(e), Appellant's permit should be endorsed for a total of six anglers.

For what International Pacific Halibut Commission (IPHC) Regulatory Area should Appellant's permit be endorsed?

The permit should be endorsed for use in the (IPHC) regulatory area in which the qualifying charter halibut fishing activity occurred; i.e., Area 3A.¹⁴

FINDINGS OF FACT

1. Appellant held a specific intent to operate his charter halibut fishing business during the recent participation period.

¹⁴ 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 (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.]

2. Appellant's intent was thwarted by a circumstance that was unavoidable, unique to him, unforeseen and reasonably unforeseeable; namely a painful and debilitating medical condition, the severity of which increased until it interfered with his ability to operate his charter halibut fishing business in 2008.
3. Appellant took all reasonable steps to alleviate the condition and return to full-time charter halibut fishing.
4. Appellant reported fifteen bottomfish logbook fishing trips in 2004.
5. The highest number of anglers that Appellant reported on a bottomfish logbook fishing trip in the qualifying period was six.

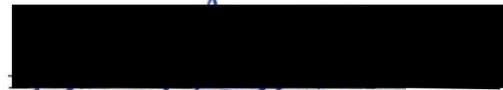
CONCLUSIONS OF LAW

1. Appellant meets the participation requirement in the qualifying period for a transferable charter halibut permit.
2. Appellant meets the requirements in sections (i) through (iv) of the unavoidable circumstance regulation for applicants who did not meet the minimum participation requirement in the recent participation period. 50 C.F.R. § 300.67(g)(1).
3. If an applicant meets the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), with regard to an applicant's lack of participation in the recent participation period, section (v) requires that NMFS substitute the applicant's actual participation in the qualifying period of the applicant's participation in the recent period and determine the endorsements on the applicant's permit based on the applicant's participation in the qualifying period.
4. Appellant qualifies for a transferable charter halibut permit, endorsed for six anglers, for use in IPHC regulatory Area 3A.

DISPOSITION AND ORDER

The denial of Appellant's application for a charter halibut permit, as set out in the IAD that is the subject of this appeal, is VACATED. RAM is ordered to issue to Appellant a transferable charter halibut permit, endorsed for six anglers, for use in IPHC regulatory area 3A. This decision takes effect on March 31, 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 by this office not later than 4:30 p.m., A.S.T., on March 11, the tenth day after the date of this Decision. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the administrative judges, and must be accompanied by a written statement in support of the motion.



Philip J. Smith
Administrative Judge

Reviewed and approved:



Christine D. Coughlin
Chief Administrative Judge (Acting)