

witness, [REDACTED], (Manager of Tour Broker Company), who testified by telephone on November 30, 2010.

I have reviewed the record in its entirety and determined that the record is sufficient to render a decision in accord with 50 C.F.R. § 679.43(n)(8). I therefore close the record and issue this decision. The record in this appeal is consecutively paginated. Therefore, when I refer to a document as [R. 1], that means the document is at page 1 of the record.

ISSUES

1. Does Appellant satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), which is the unavoidable circumstance regulation for persons that did not participate in the charter halibut fishery in the recent participation period (2008)?
2. Did Appellant have a specific intent to operate a charter halibut fishing business in the recent participation period?
3. Was Appellant's specific intent to operate a charter halibut fishing business in the qualifying period thwarted by a circumstance that was unavoidable, unique to Appellant, unforeseen and reasonable unforeseeable?
4. Did the circumstance actually occur?
5. Did Appellant take all reasonable steps to overcome the circumstance?
6. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), should his permit be designated as transferable or non-transferable?
7. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), what is the proper angler endorsement number on the permit?

SUMMARY OF DECISION

Appellant showed that he satisfies sections (i) through (iv) of the unavoidable circumstance regulation for applicants that did not participate in the recent participation period (2008), which is federal regulation 50 C.F.R. § 300.67(g)(1). Appellant had a specific intent to operate a charter halibut business in the recent participation period. His intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable, namely engine problems with the [REDACTED] (VESSEL) that began in July 2008 and made the vessel unreliable for taking clients out on halibut charter trips. This circumstance occurred and Appellant immediately, and repeatedly, tried to fix the engine problem but was unsuccessful.

Since Appellant meets the requirements of sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), NMFS will treat him as though he participated in the recent participation period at the level he participated in the qualifying period. Appellant reported five bottomfish logbook fishing trips in 2005 and NMFS will therefore attribute to him five halibut logbook fishing trips

in the recent period. He therefore will receive a non-transferable permit. The highest number of anglers Appellant took on a bottomfish logbook fishing trip in 2004 or 2005 is six and his trips were all in International Pacific Halibut Commission (IPHC) regulatory area 2C. Appellant's permit therefore should be endorsed for six anglers and for use in IPHC area 2C.

FINDINGS OF FACT

To prove a fact, Appellant must show that a preponderance of evidence in the record supports that factual finding, meaning that it is more likely than not that it occurred. I make the following findings of fact.

1. Appellant runs a business which offers a variety of services, primarily to visitors to Southeast Alaska: whale and wildlife watching tours, salmon charters, halibut charters. Appellant is the captain or vessel operator on these trips and the vessel he operates is the [REDACTED] (VESSEL). He has operated this business since 2002.³
2. VESSEL is a 32-foot documented vessel, licensed to carry twelve passengers.⁴
3. In 2005, Appellant reported five bottomfish logbook fishing trips to the Alaska Department of Fish and Game [ADF&G] from the VESSEL.⁵
4. The highest number of anglers that Appellant took on a trip in 2004 or 2005 was six.⁶
5. Appellant reported two halibut logbook fishing trips to ADF&G in 2006.⁷
6. In 2007, Appellant reported six logbook fishing trips to ADF&G, which occurred between July 19, 2007 and September 17, 2007.⁸
7. Appellant's standard advertising for his business states that he can take clients on a private charter for halibut and/or salmon fishing for a minimum of five hours beginning July 10.⁹
8. In 2008, Appellant obtained a combined ADF&G Business Owner License/ADF&G Sport Fishing Guide License authorizing him to have a charter halibut fishing business and operate the VESSEL as a guide.¹⁰

³ Statement by Appellant at 1 (Apr. 29, 2010) [R. 1]; Testimony of Appellant at 6 min. (July 19, 2010)

⁴ United States Coast Guard Vessel documentation website, http://www.st.nmfs.noaa.gov/pls/webpls/cgv_pkg.vessel_name_list; Testimony of Appellant at 6 min. (July 19, 2010).

⁵ Official Record Summary [R. 33]

⁶ *Id.*

⁷ Email from Appellant to Mary Alice McKeen (Oct. 5, 2010) with logbook trip reports for August 3 and August 15, 2006 [R. 137 – 141].

⁸ Email from Mukha Khalsa, IT Specialist, NMFS AKR, to Mary Alice McKeen (Dec. 23, 2010) [R. 134].

⁹ Reference (c) to Appellant's Statement (Apr. 29, 2010)[R. 8 – 10]

¹⁰ ADF&G Logbook Trip Report submitted for trip dated July 29, 2008 (same license number for Business Owner License and Guide License) [R. 83].

9. In 2008, Appellant obtained a 2008 Saltwater Charter Logbook and Vessel Registration Logbook for the VESSEL.¹¹

10. On July 5, 2008, the VESSEL exhibited erratic operation, specifically the engine's rpm (revolutions per minute) suddenly and unexpectedly decreased from 3600 rpm to 2800 rpm. This translated into a sudden decrease in speed from about twenty-four or twenty-five knots to twelve to fourteen knots with wide-open throttles and a cruising speed of eight or nine knots. This problem was recorded in Appellant's Pilot Log, which is a handwritten log, which is kept contemporaneously and which must be available to the United States Coast guard during vessel inspection.¹²

11. After the engine problems began, Appellant stopped booking clients for charter halibut trips or combination ("combo") trips, which meant halibut chartering and another activity. Appellant did this because he could not be sure that he could get the clients to halibut fishing areas and then back at the scheduled time. This was essential for visitors from cruise ships, Appellant's primary client base, who had to make it to their downtown dock in time for the departure of their ship.¹³ Appellant testified: "But, you don't, I couldn't go out there in good conscience and play a bit of roll of the dice that I'd be able to get the boat back up on speed."¹⁴

12. At the beginning of the 2008 season, Appellant was in a rotation of seven or eight boat captains to receive referrals of clients from a local tour broker, generally clients from cruise ships, who wanted either a trip that was, solely or partly, a charter halibut trip.¹⁵

13. After the VESSEL's engine problems began, Appellant asked the local tour broker to take him out of the rotation for charter halibut trips because the operation of his vessel was too undependable. The tour broker corroborated Appellant's testimony on this point. The local broker testified unequivocally and without hesitation on this point.¹⁶

14. After the VESSEL's engine problems began, Appellant asked the tour broker to reassign a party of anglers who had booked a charter halibut trip with Appellant.¹⁷

15. If Appellant had not told the broker to take his business out of the rotation, the broker would have referred five or more charter halibut trips to Appellant. The broker testified that, "had your boat been functioning at the level before the breakdown, it is likely we would have referred trips

¹¹ Reference (b) to Appellant's Statement (Apr. 29, 2010) [R. 7].

¹² Statement of Appellant at 1 (Apr. 29, 2010) [R. 1]; Testimony of Appellant at 21 min. (July 19, 2010); Pilot Log for VESSEL (June – October 2008), July 5 entry at [R. 15].

¹³ Appellant's testimony was consistent on this point and was corroborated by the tour broker. Appellant's Testimony at 21 – 24 min. (July 19, 2010); Appellant's Testimony, tape 2, at 15 – 18 min. (Sep. 29, 2010); Testimony of Tour Broker at 4 min. and 14 min. (Nov. 30, 2010).

¹⁴ Tape 2, Appellant's Testimony at 23 min. (Sep. 29, 2010).

¹⁵ Testimony of Tour Broker at 12 min. (Nov. 30, 2010).

¹⁶ Testimony of Tour Broker at 14 – 16 min. (Nov. 30, 2010).

¹⁷ Testimony of Tour Broker at 14 min. (Nov. 30, 2010) ("I recall he had some trips already scheduled. We helped him ship clients to other boats.")

to you.”¹⁸ The broker testified, “it could have been as few as five or six [trips] or as many as a dozen or more.”¹⁹ I did not credit the testimony that it could have been a dozen trips, given Appellant’s number of trips in 2005 (five), 2006 (two) and 2007 (six), but given this history, I gave credence to the tour broker’s lower estimate of the number of trips she would likely have referred to Appellant.

16. If Appellant had been willing to take charter halibut clients in 2008, Appellant might have received some charter halibut clients from direct requests, i.e., trips not through referrals from a broker.

17. After the VESSEL’s engine problem began, Appellant immediately contacted three local diesel mechanics and the head mechanic at the builders yard in Bellingham and checked all their suggestions. A mechanic came to the ship and checked the engines with a Volvo portable computer analyzer. The mechanic contacted Volvo who thought the problem might be a dirty exhaust elbow.²⁰

18. Appellant scheduled a maintenance day for the VESSEL on August 1 and removed the port exhaust elbow and cleaned it.²¹

19. The engine problem recurred and Appellant ordered a new turbo for the engine, which Appellant had installed on August 14, 2008.²²

20. The engine problem recurred on August 16, 2008.²³

21. For the 2008 season, with the exception of four trips in July that he had already booked, Appellant took clients on whale watching trips only because he could reasonably expect that the clients would see whales and he could get them back at the scheduled time.²⁴

21. Appellant took four fishing trips in July 2008 on July 8, 12, 21 and 28. These trips were not halibut logbook fishing trips, as defined by regulation, because Appellant did not report these trips to ADF&G with any of the following pieces of information: the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred or the boat hours that the vessel engaged in bottomfish fishing.²⁵

¹⁸ Testimony of Tour Broker at 4 min. (Nov. 30, 2010).

¹⁹ Testimony of Tour Broker at 12 min. (Nov. 30, 2010).

²⁰ Appellant’s Statement at 2 (Apr. 29, 2010) [R. 02]

²¹ *Id.*; Pilot Log Entry Aug. 1, 2008 [R. 17].

²² Pilot Log Entry for Aug. 14 [R. 18].

²³ Pilot Log Entry for Aug. 16 [R. 18]

²⁴ Appellant’s Statement at 1 (Apr. 29, 2010) [R. 2]; Testimony of Appellant at Tape 2, 17 min. (Sep. 29, 2010)(“Whale watching, we could always deliver on. I think we closed off fishing entirely. If I got any combos, I would have farmed them out.); Testimony of Tour Broker at 15 min. (Nov. 30, 2010) (“Out of concern about not being able to provide the best possible trip . . . he stuck with whale watching and we added some time to whale watching trips.)

²⁵ [R. 80 – 83]. *See* 50 C.F.R. § 300.67(f)(3)(“*Halibut logbook fishing trip* means a logbook fishing trip in the recent participation period [2008 sport fishing season] that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with

22. The trips that Appellant took on July 8, 12 and 21, 2008 were combination whale watching/salmon charter trips that occurred in State statistical area 110501, which is very close to Juneau.²⁶

23. The trip reported as July 29, 2008, actually occurred on July 28, 2008,²⁷ and the clients tried to catch halibut. The logbook trip report on file with ADF&G has a notation of telephone contact by ADF&G to Appellant, during which Appellant stated no fishing occurred.²⁸ Appellant testified that he told ADF&G that no fishing occurred because he believed that ADF&G was asking whether the clients actually caught halibut.²⁹ I credited Appellant's testimony that the clients tried to catch halibut on this trip because Appellant had contemporaneous business records indicating it was a combination whale watching/fishing trip, because the logbook report submitted to ADF&G had a line drawn under the halibut part of the form, indicating no halibut were caught, and because no marks on the salmon part of the report.³⁰

24. Appellant sent the VESSEL via barge to the builder's yard, [REDACTED], Bellingham, on October 14, 2008, for an extensive overhaul and correction of the engine problem. The yard put in a new starboard turbocharger. The cost of the work done on the VESSEL was \$35,342,³¹ plus the cost of barging the vessel to Bellingham and Appellant's prior repair efforts.³² After installation of the new turbocharger, the engines on the VESSEL have run satisfactorily.³³

25. If Appellant had not experienced the engine malfunction with the VESSEL, Appellant would have operated a charter halibut fishing business in 2008 that would have taken five or more halibut logbook fishing trips.

26. The highest number of anglers that Appellant took on a bottomfish logbook fishing trip in 2004 or 2005 was six anglers in 2005.³⁴

one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.”)

²⁶ [R. 80, R. 82 - 83] ADF&G maps with the State statistical areas in the vicinity of Juneau are at [R. 68].

²⁷ Appellant's Statement at 1 (received Sep. 1, 2010) with portion of Appellant's Business Records [R. 128], listing “COMBO Fish/ww” [whale watching] trip on 7/28/08 with the last name of two anglers that is in the ADF&G trip report, dated 7/29/09 [R. 81].

²⁸ [R. 81]

²⁹ [R. 81]; Appellant's Testimony at 20 - 21 min. (Sep. 29, 2010).

³⁰ But, as noted, the July 28 trip was not a halibut logbook fishing trip because Appellant did not report to ADF&G any halibut kept or released, the statistical area(s) where bottomfishing fishing occurred or the boat hours engaged in bottomfish fishing. 50 C.F.R. § 300.67(f)(3).

³¹ Pilot Log entries, October 2008 ; Work Order for Turbocharger Exchange and other work [R. 19, 22].

³² Appellant estimated the total cost at \$50,000. Appellant's Testimony at Tape 2, 24 min. (Sep. 29, 2010).

³³ Appellant's Statement at 2 (Apr. 29, 2010) [R. 2]

³⁴ Official Record Summary [R. 33].

CHARTER HALIBUT LIMITED ACCESS PROGRAM

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.³⁵

An applicant must prove participation in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,³⁶ and a recent participation period, which is the sport fishing season for halibut in 2008.³⁷ An applicant must meet different levels of participation for a non-transferable permit and for 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),³⁸ and a minimum of five halibut logbook fishing trips in the recent participation period (2008).³⁹ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.

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 the qualifying period (2004, 2005),⁴⁰ and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).⁴¹ The trips must have been reported under the applicant's ADF&G Business Owner Licenses.

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one, but not both, participation periods.⁴² 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 (2008).⁴³ If the applicant meets the unavoidable circumstance regulation for the recent period, the applicant may be treated as though the applicant participated in the recent period.

³⁵ 50 C.F.R. § 300.67(b)(1)(ii).

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

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

³⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A).

³⁹ 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. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009). Therefore, for 2004 and 2005, the regulation evaluates an applicant's participation by bottomfish logbook fishing trips, not halibut logbook fishing trips. The regulation defines these terms. 50 C.F.R. § 300.67(f)(2)(bottomfish logbook fishing trip); 50 C.F.R. § 300.67(f)(3) (halibut logbook fishing trip); 50 C.F.R. § 300.67(f)(4) (logbook fishing trip).

⁴⁰ 50 C.F.R. § 300.67(d)(1)(i).

⁴¹ 50 C.F.R. § 300.67(d)(1)(ii).

⁴² 50 C.F.R. § 300.67(g).

⁴³ 50 C.F.R. § 300.67(g)(1).

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). If the applicant meets the unavoidable circumstance regulation for the qualifying period, the applicant may be treated as though the applicant participated in the qualifying period.

Appellant meets the participation requirement in the qualifying period for a non-transferable permit. Under his ADF&G Business Owners License, he reported five bottomfish logbook fishing trips in 2005. Appellant did not report any halibut logbook fishing trips in 2008. Therefore, the only way that Appellant can receive a non-transferable charter halibut permit is if he meets the requirements of the unavoidable circumstance regulation for the applicant that did not participate in the recent participation period.

Unavoidable circumstance regulation. The unavoidable circumstance regulation for the applicant who participated in the qualifying period, but not the recent participation period, 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;

(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)(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 the qualifying period.

ANALYSIS

1. Does Appellant satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(2), which is the unavoidable circumstance regulation for persons that did not participate in the charter halibut fishery in the recent participation period (2008)? Yes.

I analyze the requirements in sections (i) through (iv).

Section (i). Did Appellant have a specific intent to operate a charter halibut fishing business in the recent participation period (2008)?

A specific intent is more than a general desire or interest to operate a charter halibut fishing business. An applicant who had a specific intent to operate a charter halibut fishing business will have a definite commitment to operate a charter halibut fishing business in a particular year and will have taken concrete steps to operate a business. Typically, the applicant will have a vessel equipped to participate in the charter halibut fishery, an operator licensed to participate in the fishery and a method for getting clients, before the unavoidable circumstance intervened to prevent the applicant from operating a charter halibut fishing business.

Appellant was prepared to operate a charter halibut fishing business at the beginning of the 2008 season in the same way he had operated the business before 2008. He had a vessel that was equipped to operate as a charter halibut vessel and that had, in fact, operated as a charter halibut vessel. Appellant had obtained a combined ADF&G Business Owner License and Guide License for 2008, which authorized him to operate a charter halibut business and act as guide.

At the beginning of the 2008 season, Appellant was one of seven or eight charter captains to whom a local trip broker referred clients, primarily from cruise ships, on a rotational basis. Appellant had prepared a standard informational packet, which specifically featured charters for halibut and/or salmon. Appellant sent this, on request, to prospective clients. I conclude that Appellant had a specific intent to operate a charter halibut business in 2008.

Section (ii). Was Appellant's intent to operate a charter halibut fishing business thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable? Yes.

The VESSEL had functioned satisfactorily in 2005, 2006 and 2007. I conclude that the malfunctioning engine is a circumstance that was unavoidable, unique to Appellant's vessel, unforeseen before the 2008 season, and reasonably unforeseeable before the 2008 season.

I further conclude that the malfunctioning engine thwarted Appellant's intent to operate a charter halibut fishing business in 2008. After the onset of the engine problems, with the exception of the trip on July 28, Appellant did not take clients on charter halibut trips because the VESSEL could not dependably get clients back to shore at the scheduled time. Appellant was reasonably unwilling to risk either getting clients back to shore on the VESSEL too late to make their cruise

ship departure time or getting clients back on time only because, on a near-emergency basis, he found another boat to which he could transfer the clients to get them to shore.⁴⁴

Appellant informed the tour broker that he could not take referrals, until he resolved the problem of having a dependable vessel. After the engine problem began on July 5, 2008, with one exception, Appellant did not take any clients on a charter halibut trip. Appellant did *not* do this because he made a decision to get out of the charter halibut business. He did this as a response to a particular mechanical problem that his VESSEL was experiencing.

Appellant did take a trip on July 28, 2008, where the clients tried to catch halibut, although Appellant misunderstood the reporting requirements and did not report to ADF&G that the clients tried to catch halibut. Appellant had prebooked this trip before the engine problem began. It was a combination whale watching/halibut trip that lasted a little less than four hours, where two anglers tried, unsuccessfully, for part of the time to catch halibut.⁴⁵ Appellant did not book any other charter halibut trips in the 2008 season – either from the tour broker or from direct inquiries – because of the malfunctioning engine.

I have found that if Appellant had not experienced the engine problem, he likely would have taken a minimum of five halibut logbook fishing trips in 2008.⁴⁶ The evidence tending to show that Appellant would not have taken five halibut trips in 2008 is that he only took two halibut trips in 2006. But the preponderance of evidence supports the finding that Appellant would have taken at least five halibut logbook fishing trips in 2008. The evidence in support of that finding is as follows: Appellant was completely set up to take clients on charter halibut trips at the start of the 2008 season; his history of participation in 2005 (five bottomfish logbook trips) and 2007 (six halibut logbook trips); the reassignment of at least one charter halibut reservation from Appellant's vessel to another vessel;⁴⁷ and the testimony from the tour broker that she would likely have referred five or more halibut trips to Appellant in 2008, if his vessel had been functioning dependably.

Section (iii). Did the circumstances that thwarted Appellant's intent to operate a charter halibut fishing business actually happen? Yes.

The VESSEL experienced engine malfunction.

Section (iv). Did Appellant take all reasonable steps to overcome the circumstances? Yes.

Appellant immediately attempted to repair the vessel several times in Juneau but was unsuccessful. The engine problems were not fixed until, after the 2008 season, he had the vessel barged to Seattle and paid approximately \$36,000 for the installation of a new turbocharger and other boat repairs.

⁴⁴ Appellant's Testimony at 21 min. (July 19, 2010); Appellant's Testimony at Tape 2, 23 min. (Sep. 29, 2010).

⁴⁵ Pilot Log entry for July 29 [R. 16].

⁴⁶ Finding of Fact #25.

⁴⁷ Finding of Fact #14.

2. Should Appellant's permit be designated as transferable or non-transferable? Non-transferable.

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), section (v) directs NMFS to award the applicant a transferable or non-transferable permit, by assuming that the applicant's level of participation in the qualifying period would have been the same as the applicant's participation in the recent period.

The participation requirement for a non-transferable permit in the qualifying period is five bottomfish logbook fishing trips in 2004 or 2005.⁴⁸ Appellant took five bottomfish logbook fishing trips in 2005.⁴⁹ Therefore, Appellant's permit should be designated as non-transferable.

3. What is the proper angler endorsement on Appellant's permit? Six.

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1), section (v) directs NMFS to award the applicant the angler endorsement by assuming that the applicant's highest number of anglers in the qualifying period would have been the applicant's highest number of anglers in the recent period. The highest number of anglers that Appellant took on a bottomfish logbook trip in the qualifying period was six.⁵⁰ Therefore, the angler endorsement on Appellant's permit should be six.⁵¹ All of Appellant's trips occurred in International Halibut Pacific Commission regulatory area 2C, roughly Southeast Alaska.⁵² Therefore, the permit will be endorsed for use in area 2C.

CONCLUSIONS OF LAW

1. Appellant meets the minimum participation requirement for a non-transferable charter halibut permit in the qualifying period, namely he reported five bottomfish logbook fishing trips in 2004 or 2005, but less than fifteen.
2. Appellant satisfies the requirements in sections (i) through (iv) of the unavoidable circumstances regulation, with respect to his lack of participation in the qualifying period.
3. Appellant had a specific intent to operate a charter halibut fishing business in 2008.
4. Appellant's intent was thwarted by a circumstance that was unavoidable, unique to him, unforeseen and reasonably unforeseeable, namely engine problems with the VESSEL.
5. The unavoidable circumstance actually occurred.

⁴⁸ 50 C.F.R. § 300.67(b)(1)(ii)(A).

⁴⁹ Official Record Summary [R. 33].

⁵⁰ *Id.*

⁵¹ 50 C.F.R. § 300.67(e)(3). Appellant is seeking one non-transferable permit. The rules for angler endorsements for an applicant seeking a transferable permit, or more than one permit, are not relevant to this appeal. *See* 50 C.F.R. § 300.67(e)(1), (2) & (4).

⁵² 50 C.F.R. § 300.61 (coordinates of area 2C).

6. Appellant took all reasonable steps to overcome the circumstance.
7. If an applicant satisfies sections (i) through (iv) of the unavoidable circumstances regulation, 50 C.F.R. 300.67(g)(1), with respect to the applicant's lack of participation in the recent period, section (v) directs NMFS to award the applicant a non-transferable permit or a transferable permit based on the applicant's level of participation in the qualifying period.
8. If an applicant satisfies sections (i) through (iv) of the unavoidable circumstances regulation, 50 C.F.R. 300.67(g)(1), with respect to his lack of participation in the qualifying recent period, section (v) directs NMFS to award the applicant the angler endorsement on the permit that is the highest number of anglers on an applicant's trip in the qualifying period.
9. Appellant qualifies for a non-transferable charter halibut permit, endorsed for six anglers, for use in IPHC regulatory area 2C.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue a non-transferable charter halibut permit, endorsed for six anglers, for use in IPHC regulatory area 2C to [REDACTED]. This Decision is effective on April 14, 2011, unless by that date the Regional Administrator orders review of the Decision.

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 25, 2011, the tenth day after 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 judge, and must be accompanied by a written statement in support of the motion.

[REDACTED]
Mary Alice McKeen
Administrative Judge