

Appellant states he is eligible for a permit based on the unavoidable circumstance regulation because he specifically intended to operate a charter halibut fishing business in 2004 but was thwarted from doing that by mechanical breakdowns of his vessel.⁴ A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.⁵ Therefore, in the IAD, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

The prior administrative judge held a hearing on February 4, 2011.⁶ Due to a mistake or equipment malfunction, the hearing was not recorded. I therefore held another hearing with Appellant on October 10 - 11, 2011. Appellant and his wife, [REDACTED] testified by telephone. I conclude that the record contains sufficient information upon which to decide this appeal.⁷ I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant meets the requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2), with respect to his lack of participation in 2004, and should be awarded a non-transferable charter halibut permit for use in IPHC Area 3C with an angler endorsement of six.

ISSUES

1. Does Appellant satisfy the requirements in section (i) through (iv) of 50 C.F.R. § 300.67(g)(2), the unavoidable circumstance regulation for persons that did meet the participation requirement in either year of the qualifying period (2004 or 2005)?
2. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), should his permit be designated as transferable or non-transferable?
3. If Appellant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(2), what is the proper angler endorsement on the permit?

FINDINGS OF FACT

1. Appellant has operated a charter halibut fishing business out of Homer, a small town in Alaska, whose current population is 5000, since 1998. Appellant has held

⁴ Letter from Appellant to OAA (Aug. 29, 2010).

⁵ 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 from Proposed Rule).

⁶ Order Scheduling Hearing (Jan. 31, 2011).

⁷ 50 C.F.R. § 679.43(g)(2).

the United States Coast Guard (USCG) marine credential required to operate a charter vessel from 1998 to the present.⁸

2. Appellant has operated his charter business with [REDACTED] (VESSEL) since 2000. [REDACTED] (Vessel Owner) bought the vessel in 2000. Vessel Owner lives in California and allows Appellant to run a charter business with VESSEL. Vessel Owner comes to Alaska regularly and Appellant takes him on charter trips. VESSEL is 38 feet length overall.⁹
3. In July 2003, VESSEL broke down during a charter fishing trip with clients on board in July 2003. Appellant had VESSEL examined by a local repair business, In [REDACTED] (Vessel Repair Business). This was one of two repair businesses in this small town and it is very busy in the summer with work for the sport, charter and commercial fleet. The problem was diagnosed as a transmission problem. Vessel Repair Business stated that it could rebuild the transmission. Vessel Repair Business ordered parts in July and Appellant provided the requested downpayment of [REDACTED] for the repairs, which was the approximate cost of the parts, on a total bill of [REDACTED]. Vessel Repair Business delayed in making the repairs but eventually put the new parts in and apparently repaired the transmission. To take a transmission out of VESSEL requires the deck be cut and requires a crane. To put a transmission back in requires a crane and then the vessel to be put back together and resealed. The repair work on VESSEL in 2003 was not completed until November or December of that year.¹⁰
4. In May 2004, Appellant obtained a saltwater charter logbook from the Alaska Department of Fish and Game (ADF&G) and was appropriately licensed to operate a charter halibut business.¹¹ The insurance on the VESSEL was current.¹² Appellant had received a number of bookings for charter halibut trips to occur in 2004.¹³
5. When Appellant tried to take VESSEL out for a test drive before his first charter trip of the 2004 season, VESSEL still had transmission problems and would not go into reverse. Vessel Repair Business had installed parts improperly. Appellant had to crane out the transmission again and bring it back to Vessel Repair Business. Appellant and Vessel Repair Business disagreed over whether Appellant should pay for the additional work because of the defects in the work by Vessel Repair

⁸ Testimony of Appellant (Oct. 10, 2011); Email from USCG Staff to Mary Alice McKeen (Oct. 10, 2011); Alaska Community Database Community Information Summaries, State of Alaska, Division of Community and Regional Affairs, <http://www.dced.state.ak.us/dca/commdb/CIS.cfm>, visited Oct. 11, 2011.

⁹ Testimony of Appellant (Oct. 10, 2011); Marine Survey Report for VESSEL (Apr. 28, 2002).

¹⁰ Invoice [REDACTED] (July 29, 2003)(notation added "paid [REDACTED] 8-29-03") attached to Application; Statement of [REDACTED] (Mar. 19, 2010); Testimony of Appellant (Oct. 10, 2011)

¹¹ ADF&G Sign-out sheet for Logbook 40118 (May 6, 2004) attached to email from Dora Sigurdsson, Research & Technical Services, ADF&G to Mary Alice McKeen (Oct. 11, 2011).

¹² Receipt for Insurance Payment (Sep. 1, 2004) (shows payment no. 3 of 6 total payments); Testimony of Appellant (Oct. 10, 2011).

¹³ Testimony of Appellant (Oct. 10, 2011); Statement by [REDACTED] (Exhibit 4); Statement by [REDACTED] (received Mar. 19, 2010); Statement by [REDACTED] (Mar. 9, 2010); Statement by [REDACTED] (Mar. 14, 2010).

Business. Appellant also did not have the money to pay for additional charges because he had lost the 2003 season. VESSEL was not repaired until near the end of the 2004 season.¹⁴

6. Appellant cancelled a number of trips in 2004 and let the clients know he could not take them out because of transmission problems with VESSEL.¹⁵
7. Appellant took three bottomfish logbook fishing trips in 2004: July 23, July 24 and August 6.¹⁶ Appellant took these trips because he had accepted deposits from clients and could not refund their deposits because he did not have the money to make the refunds. Appellant took clients on these trips with a vessel owned by another resident of this small town, a vessel that was not being used.¹⁷
8. Appellant did not use this vessel for any additional trips because the vessel had mechanical problems on each of these trips. Appellant also was not certain the vessel was insured for him to use.¹⁸
9. In March 2005, Appellant and his wife began bankruptcy proceedings due, in part, to the financial effects of Appellant's extremely limited participation in the 2003 and 2004 season.¹⁹ They withdrew the bankruptcy petition when Appellant got a job operating a vessel doing cleanup of the oil spill from the [REDACTED] that had occurred in December 2004 near Dutch Harbor, Alaska.
10. In 2006, Appellant resumed his charter business and reported eleven bottomfish trips with VESSEL.²¹
11. In 2007, Appellant took twenty halibut logbook fishing trips with VESSEL.²²
12. In 2008, Appellant took eleven halibut logbook fishing trips with VESSEL.²³

¹⁴ Testimony of Appellant (Oct. 10, 2011); Letter from [REDACTED] on behalf of Appellant to Vessel Repair Business (May 25, 2005); Statement by [REDACTED] (received Mar. 19, 2010); Statement of [REDACTED] (received Mar. 19, 2010).

¹⁵ Statement by [REDACTED] (Exhibit 4); Statement by [REDACTED] (received Mar. 19, 2010); Statement by [REDACTED] (Mar. 9, 2010); Statement by [REDACTED] (Mar. 14, 2010).

¹⁶ Official Charter Halibut Record attached to email from NMFS Information Technology Specialist to Mary Alice McKeen (Oct. 5, 2011).

¹⁷ Testimony of Appellant (Oct. 11, 2011).

¹⁸ Testimony of Appellant (Oct. 11, 2011).

¹⁹ Testimony of Appellant and Appellant's Wife (Oct. 10, 2011); United States Bankruptcy Court website, District of Alaska: <http://www.akb.uscourts.gov/new-cases/05cases.pdf>.

²⁰ Testimony of Appellant and Appellant's Wife (Oct. 10, 2011); The Selendang Ayu Oil Spill: Lessons Learned (ed. Reid Brewer) (2006) (confirms date and location of oil spill).

²¹ Email from Dora Sigurdsson, Research and Technical Services, ADF&G, to Mary Alice McKeen (Oct. 11, 2011).

²² Official Charter Halibut Record for Appellant, attached to email from NMFS IT Specialist to Mary Alice McKeen (Oct. 5, 2011).

²³ Official Charter Halibut Record for Appellant.

13. The highest number of anglers that Appellant took on a bottomfish logbook fishing trip in 2004 or a halibut logbook fishing trip in 2007 or 2008 is six.²⁴

14. Appellant timely applied for a charter halibut permit on March 19, 2010.²⁵

PRINCIPLES OF LAW

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 Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.²⁶

To receive a charter halibut permit, an applicant must be a person to whom ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.²⁷

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, and a recent participation period, which is the sport fishing season for halibut in 2008.²⁸

An applicant must prove 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), and a minimum of five halibut logbook fishing trips in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License for that year.²⁹

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 or 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008). The trips must have been reported under the applicant's ADF&G Business Owner License.³⁰

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.³¹ If an applicant meets a minimum participation trip level in the qualifying period (2004 or 2005), but not the recent

²⁴ Official Charter Halibut Record for Appellant.

²⁵ Application (dated Mar. 3, 2010, received March 19, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

²⁶ Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

²⁷ 50 C.F.R. § 300.67(b)(1)(ii).

²⁸ 50 C.F.R. § 300.67(f)(6)-(7).

²⁹ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B); 50 C.F.R. § 300.67(f)(2)(definition of bottomfish logbook fishing trip); 50 C.F.R. § 300.67(f)(3)(definition of halibut logbook fishing trip).

³⁰ 50 C.F.R. § 300.67(d)(1).

³¹ 50 C.F.R. § 300.67(g).

participation period (2008), the applicant may claim to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the recent period (2008).³²

Similarly, if an applicant meets a minimum participation trip level in the recent participation period (2008), but neither year in the qualifying period (2004 or 2005), the applicant may seek to meet the requirements in the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period.³³

For an applicant that participated in the recent period, but did not meet the participation requirement in the qualifying period, section (i) through (iv) of 50 C.F.R. § 300.67(g)(2), the unavoidable circumstance regulation, requires that the applicant prove the following:

Section (i): the applicant had a specific intent to operate a charter halibut fishing business in one year of the qualifying period (2004 or 2005);

Section (ii): the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, unforeseen and reasonably unforeseeable;

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

Section (iv): the applicant took all reasonable steps to overcome the circumstance.

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 meet the participation requirement for the qualifying period (2004 or 2005)? 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 (2004)? Yes.

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 typically have all the essential elements of a charter business in place, or a realistic plan to have all the essential elements of a

³² 50 C.F.R. § 300.67(g)(1).

³³ 50 C.F.R. § 300.67(g)(2).

charter business in place, by the charter halibut season. An applicant with a specific intent will usually have taken concrete steps to operate a charter halibut business for the year in question.

As of May 2004, Appellant had all the essential elements in place to operate a charter halibut fishing business and had taken all the necessary concrete steps to operate a business in 2004. Appellant had the licenses necessary to operate a charter halibut business and therefore, upon his request, was provided a saltwater charter vessel logbook from ADF&G. Appellant had a USCG captain's license that authorized him to carry charter clients. Appellant had the use of VESSEL, a vessel he had used since 1998 to operate a charter business. To his knowledge, VESSEL was in working condition due to repairs that had been completed at the end of 2003. VESSEL was insured. Appellant had clients from past years and had some bookings for return clients. From these facts, I conclude that Appellant had a specific intent to operate a charter halibut fishing 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 evidence in the record convinces me that Appellant's intent to operate a charter halibut business in 2004 was thwarted by the continuation of VESSEL's mechanical problems in 2004 that he thought had been repaired at the end of 2003. I can easily conclude that Appellant would have operated a charter halibut fishing business but for the mechanical problems that he experienced when he took VESSEL for a shakedown drive at the beginning of the 2004 season.

The mechanical problems with VESSEL were unavoidable: he had tried to have the vessel repaired in 2003 and thought that he had done that. The problems with VESSEL are unique: it is not a circumstance, such as bad weather or a poor economy, that affects the entire fleet or a large segment of it. It was unforeseen: he thought the vessel was fixed. It was reasonably unforeseeable: he reasonably believed that he had fixed the vessel through the work performed by Vessel Repair Business.

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

VESSEL had continuing mechanical problems in 2004.

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

The evidence in the record also convinces me that Appellant took all reasonable steps to overcome the circumstance. Appellant promptly sought repair of the vessel in 2003, when the problem began. He reasonably believed it had been fixed. When the problems with VESSEL continued in 2004, he continued his efforts to fix it but was not

successful until the end of the season. He did arrange to use a vessel for three trips but that vessel had mechanical problems on each of those trips. It would not have been a reasonable step for him to continue taking charter trips on that vessel.

I evaluate what steps were reasonable given the situation of the applicant. Appellant's financial circumstances limited what steps were reasonable for him to take. He did not have the funds to simply pay Vessel Repair Business for additional repairs in 2004 and dispute later whether Vessel Repair Business should have repaired their work without charge or at a reduced charge. Appellant's financial circumstances were so difficult that he and his wife initiated bankruptcy proceedings in March 2005 but were able to withdraw their petition only when Appellant unexpectedly got a job operating a vessel doing oil spill cleanup out of Dutch Harbor, Alaska. I also note that Appellant's lack of money in 2004 resulted from his limited participation in the 2003 season, which itself was caused by the VESSEL's mechanical problems in 2003. Appellant recovered financially by 2006 and resumed his charter halibut business in that year. From these facts, I conclude that Appellant took all reasonable steps to overcome the circumstance that thwarted his intent to operate a charter halibut business in 2004.

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

Appellant took eleven halibut logbook fishing trips in 2008. Appellant's permit should be designated as non-transferable because he meets the participation requirement in the recent period for a non-transferable permit, which is a minimum of five halibut logbook fishing trips,³⁴ but not the participation requirement for a transferable permit, which is fifteen halibut logbook fishing trips with the same vessel.³⁵

If Appellant met the participation requirement in the recent period for a transferable permit, I would have determined whether he would have likely taken fifteen or more bottomfish logbook fishing trips in 2004 but for the unavoidable circumstance.³⁶ But I do not address that question because even if he would have, Appellant cannot receive a transferable permit because he did not meet the participation requirement in the recent period for a transferable permit.

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

The standard applicant – the applicant with actual participation in both the qualifying period and the recent period – receives the angler endorsement on the permit that is the highest number of anglers that the applicant took on a bottomfish logbook fishing trip in 2004 or 2005.³⁷ But an applicant that proves an unavoidable circumstance in the qualifying period in lieu of actual participation receives an angler endorsement of four,

³⁴ 50 C.F.R. § 300.67(b)(1)(ii)(A).

³⁵ 50 C.F.R. § 300.67(d)(1)(ii).

³⁶ 50 C.F.R. § 300.67(g)(2)(v)(B).

³⁷ 50 C.F.R. § 300.67(e)(1) (angler endorsement on applicant's first transferable permit). No permit, however, will have an angler endorsement less than four. 50 C.F.R. § 300.67(e)(5).

unless the applicant shows that it would have taken a higher number of anglers on a trip but for the unavoidable circumstance.³⁸

I conclude that, but for the unavoidable circumstance, the highest number of anglers that Appellant would have taken on a trip in the qualifying period would have been six. I base this primarily on the angler trip data in the appeal record. This data is for the years 2004, 2007 and 2008. According to this data, Appellant took six anglers on the three bottomfish logbook fishing trips that he did take in 2004. Appellant took many halibut logbook fishing trips with six anglers in 2007 and 2008. Appellant did not take any trips with more than six anglers in 2004, 2007 or 2008. I also note Appellant's testimony that his vessel comfortably fits six.³⁹

CONCLUSIONS OF LAW

1. Appellant meets the minimum participation requirement for a non-transferable charter halibut permit in the recent period in 50 C.F.R. § 300.67(d)(1)(ii), namely he reported five or more halibut logbook fishing trips in 2008.
2. Appellant satisfies sections (i) through (iv) of the unavoidable circumstance regulation with respect to his insufficient participation in one year of the qualifying period, 50 C.F.R. § 300.67(g)(2): Appellant held a specific intent to operate a charter halibut fishing business in 2004; Appellant's intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable; the circumstance that thwarted Appellant's intent actually occurred; Appellant took all reasonable steps to overcome the circumstance.
3. The highest number of anglers that Appellant would have taken on a bottomfish logbook fishing trip in the qualifying period but for the unavoidable circumstance is six.
4. Appellant should receive a non-transferable charter halibut permit, endorsed for six anglers, for use in IPHC Area 3A.

ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue a transferable charter halibut permit, endorsed for six anglers, for use in IPHC Regulatory Area 3A to Appellant. This decision takes effect on November 28, 2011, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(k), (o).

³⁸ 50 C.F.R. § 300.67(g)(2)(v)(B).

³⁹ Testimony of Appellant (Oct. 10, 2011).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Standard Time on November 7, 2011, the tenth day after the date of this Decision. 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]
Mary Alice McKeen
Administrative Judge

Date issued: October 28, 2011