

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

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Appeal No. 11-0004
DECISION

STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, Maryland, and maintains an office in NMFS's Alaska Region. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with deciding appeals that were filed with the Office of Administrative Appeals, Alaska Region. NAO decides these appeals pursuant to the procedure established in federal regulation 50 C.F.R. § 679.43.

On January 10, 2011, [REDACTED] doing business as [REDACTED] (Appellant) filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) Program.¹ RAM is the administrative unit within the NMFS Alaska Region that implements limited access programs. In the IAD, RAM evaluated Appellant's application for three transferable charter halibut permits under the Charter Halibut Limited Access Program.²

In the IAD, RAM determined that Appellant met the participation requirements for one transferable charter halibut permit for use in International Pacific Halibut Commission (IPHC) Regulatory Area 2C,³ with an angler endorsement of eight. This means that RAM determined that Appellant reported at least fifteen bottomfish logbook fishing trips with one vessel in one year of the qualifying period (2004, 2005) and at least fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008), and that the highest number of anglers that Appellant reported on any trip in the qualifying period (2004, 2005) was eight.⁴ All activity relevant to this application occurred in IPHC Area 2C.

1 Letter from Appellant (received Jan. 20, 2011).
2 The Charter Halibut Limited Access Program is codified at 50 C.F.R. §§ 300.61, 300.66, 300.67. These regulations, and the appeal regulation at 50 C.F.R. § 679.43, are available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/regs/summary.htm>.
3 IPHC Regulatory Area 2C is roughly Southeast Alaska. For the coordinates of Area 2C, see 50 C.F.R. § 300.61.
4 See 50 C.F.R. § 300.67(e) (participation requirement for angler endorsement).

Appellant asserted in a letter attached to his application that he intended to expand his business in 2003 by partnering with ██████████ (Company) and offering halibut fishing trips to his patrons. The Company Director of Administration and Special Projects states that the Company was obligated to lease five vessels and hire its own captains to operate its leased vessels for the 2004 and 2005 season.⁵ Appellant states that the partnership was ready to begin offering halibut trips in 2005 but an agreement with the cruise line was necessary a year in advance of operating and, for that reason, the partnership did not begin to offer halibut trips until 2006. Appellant states that these circumstances were beyond his control. Appellant contends that if he is not awarded two additional permits, his business and the community will suffer greatly.⁶

Appellant can file this appeal because the IAD directly and adversely affected its interests, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that it meets the requirements for two additional transferable charter halibut permits with angler endorsements of six.

I did not order a hearing because Appellant has not alleged facts that, if true, would authorize NMFS to issue two transferable charter halibut permits with angler endorsements of six.⁷ I conclude that the record contains sufficient information upon which to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue a decision.

ISSUES

1. Did RAM correctly determine that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of eight?
2. May Appellant receive two additional permits because he was prevented from expanding his charter halibut business in 2005 due to factors beyond his control?
3. May an applicant receive two additional transferable permits because the applicant started using two vessels in 2006 and has participated heavily with two vessels in the charter halibut fishery since 2006?

5 Letter from ██████████ Director, Administration and Special Projects to To Whom It May Concern (Mar. 17, 2010).

6 Letter from Appellant with application (received Mar. 26, 2010).

7 50 C.F.R. § 679.43(g)(3)(iv).

FINDINGS OF FACT

1. Appellant has operated a charter fishing business that includes halibut charters since 1993.⁸
2. In 2003, Appellant approached Company about starting a joint venture offering charter fishing trips.
3. In 2004, Appellant took seventeen bottomfish logbook fishing trips with one vessel.⁹
4. In 2005, Appellant took thirty-four bottomfish logbook fishing trips with one vessel.¹⁰
5. In 2006, Appellant and Company began offering charter fishing trips using two vessels.¹¹
6. In 2008, Appellant reported 204 halibut logbook fishing trips with two vessels.¹²
7. Appellant filed a timely application for a charter halibut permit on March 26, 2010.¹³

PRINCIPLES OF LAW

NMFS must issue charter halibut permits in accord with the regulations implementing the Charter Halibut Limited Access Program. The Secretary of Commerce adopted these regulations pursuant to section 773c of The Halibut Act.¹⁴ These regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67.

To receive a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued the Business Owner Licenses that authorized logbook fishing trips that met the minimum participation requirements for a permit.¹⁵ A person can be an individual, a corporation, firm or association.¹⁶

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 limit for reporting the trip in effect at the time of the trip except that for multi-day trips, the

8 Letter from Appellant with application (received Mar. 26, 2010).

9 Summary of Official Record (Jan. 26, 2010). When I say that Appellant took a bottomfish or halibut logbook fishing trip, I also mean that the Appellant timely reported the trip to ADF&G in its Saltwater Charter Logbook, because the definition of logbook fishing trip includes that the trip was reported to ADF&G in accord with the time limit for reporting the trip. 50 C.F.R. § 300.67(f)(4).

10 Summary of Official Record for Appellant (Jan. 26, 2010).

11 Letter from Appellant with application (received Mar. 26, 2010).

12 Summary of Official Record for Appellant (Jan. 26, 2010).

13 Application for Charter Halibut Permit(s) (dated Mar. 26, 2010, received Mar. 26, 2010).

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

15 50 C.F.R. § 300.67(b)(1)(ii).

16 50 C.F.R. § 300.61 (definitions).

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.¹⁷

A bottomfish logbook fishing trip is a logbook fishing trip that was reported in the qualifying period 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.¹⁸

A halibut logbook fishing trip is a logbook fishing trip that was reported in the recent participation period with one of the following pieces of information: the number of halibut kept, the number of halibut released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.¹⁹

An applicant must prove participation in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,²⁰ and a recent participation period, which is the sport fishing season for halibut in 2008.²¹

An applicant must prove different levels of participation to receive a non-transferable and a transferable permit. To receive a non-transferable permit, an applicant must have taken at least 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).²²

To receive a transferable charter halibut permit, an applicant must have taken at least fifteen bottomfish logbook fishing trips with one vessel in one year in the qualifying period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).²³ The number of transferable charter halibut permits issued to an applicant will be equal to the number of vessels that met these qualifications.²⁴

If an applicant would not receive any permit – transferable or non-transferable permit – because the applicant did not meet a participation requirement in the qualifying period (2004, 2005) or the recent participation period (2008), an applicant can seek to meet the requirements of the unavoidable circumstance provision with respect to the period where the applicant had no, or insufficient, participation.²⁵

If an applicant does not meet the requirements for a permit, or an endorsement on a permit, in the applicable regulations, NMFS does not have authority to award the applicant the permit or the endorsement on the permit.

17 50 C.F.R. § 300.67(f)(4).

18 50 C.F.R. § 300.67(f)(2).

19 50 C.F.R. § 300.67(f)(3).

20 50 C.F.R. § 300.67(f)(6).

21 50 C.F.R. § 300.67(f)(7).

22 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

23 50 C.F.R. § 300.67(d)(1)(i)-(ii).

24 50 C.F.R. § 300.67(d)(2).

25 50 C.F.R. § 300.67(g).

The function of an administrative judge, or appellate officer, is to evaluate whether the federal agency correctly applied the regulations in evaluating an application for a permit or endorsement on a permit.

ANALYSIS

1. Did RAM correctly determine that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of eight?

Under the charter halibut regulation, RAM first determines if an applicant submitted a timely application.²⁶ Appellant submitted a timely application.

Once RAM makes that determination, RAM takes the following steps to evaluate the application:

Step 1: applying 50 C.F.R. § 300.67(b), does the applicant meet the participation requirements for a non-transferable permit?

Step 2: applying 50 C.F.R. § 300.67(c), does the applicant meet the participation requirements for any additional permits?

Step 3: applying 50 C.F.R. § 300.67(d), does the applicant meet the participation requirements for any of its permits to be a transferable permit?

Step 4: applying 50 C.F.R. § 300.67(e), does the applicant meet the participation requirement for an angler endorsement greater than four?

NMFS correctly applied these steps in evaluating Appellant's application.

Step 1: RAM determined that Appellant met the participation requirements for a non-transferable permit in 50 C.F.R. § 300.67(b), namely Appellant took at least five bottomfish logbook fishing trips in one year of the qualifying period (2004, 2005) and at least five halibut logbook fishing trips in the recent participation period (2008).²⁷

Step 2: RAM determined that Appellant did not meet the participation requirement for a second or third permit in 50 C.F.R. § 300.67(c), which states:

(c) *Number of permits.* An applicant that meets the participation requirements in paragraph (b) of this section [to receive at least one non-transferable charter halibut permit] will be issued the number of charter halibut permits *equal to the lesser of the number of permits* determined by paragraphs (c)(1) or (c)(2) of this section as follows:

²⁶ 50 C.F.R. § 300.67(b)(1)(i).

²⁷ These requirements are specifically at 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B).

(1) The *total number of bottomfish logbook fishing trips* made pursuant to the applicant's ADF&G Business License in *the applicant-selected year* divided by five, and rounded down to a whole number; or

(2) The *number of vessels* that made the bottomfish logbook fishing trips in the applicant-selected year. [italics added]

The applicant-selected year means the year in the qualifying period, either 2004 or 2005, that the applicant selects for NMFS to use in determining the number of applicant's permits.²⁸

Applying federal regulation 50 C.F.R. § 300.67(c) to this applicant, the result is as follows:

*The applicant-selected year: 2004.*²⁹

The total number of bottomfish logbook fishing trips in 2004: 17.

The total number of bottomfish logbook fishing trips in 2004 divided by five, rounded to nearest whole number. $17 \div 5 = 3.4$, rounded to 3.

The number of vessels that made those trips: 1.

Applicant receives **the lesser of 3 or 1**: Appellant receives **1 permit**.

Although this regulation may seem confusing, the underlying rationale is fairly straightforward. If an applicant only used one vessel in the applicant-selected year (2004 or 2005), the applicant receives one permit. Appellant used one vessel in 2004. Therefore, Appellant can only receive one permit, no matter how many trips it took with that vessel in 2004.

Put another way, the regulation prevents an applicant from receiving a greater number of permits than the number of boats that the applicant used in the qualifying period, with the proviso that the applicant must choose one year in the qualifying period, either 2004 or 2005, to determine the number and type of permits it receives. Appellant choose 2004. To receive three non-transferable permits, an applicant would have had to have used three boats in the applicant-selected year and taken fifteen (or more) trips in 2004.³⁰ To receive three transferable permits, an applicant would have had to have used three boats in the applicant-selected year and taken fifteen (or more) trips with each boat in 2004.³¹

Step 3: RAM determined that Appellant met the requirement in 50 C.F.R. § 300.67(d) for its permit to be transferable, namely Appellant took fifteen or more logbook fishing trips with one vessel in the applicant-selected year, which is 2004, and Appellant took

28 50 C.F.R. § 300.67(f)(1).

29 Application for Charter Halibut Permit(s) at 2 (dated Mar. 22, 2010, received Mar. 23, 2010)

30 The same result would occur if Appellant chose 2005 because Appellant also used only one vessel in 2005.

31 50 C.F.R. § 300.67(d)(2).

fifteen or more halibut logbook fishing trips with one vessel in the recent period, which is 2008.

Step 4: RAM determined that Appellant's permit will have an angler endorsement of eight, in accord with 50 C.F.R. § 300.67(e). If an applicant receives one transferable permit, the permit will have an angler endorsement of four, unless the applicant took at least one bottomfish logbook fishing trip in 2004 or 2005 with more than four anglers.³² Appellant took at least one trip in 2004 or 2005 with eight anglers. Therefore, Appellant's permit will have an angler endorsement of eight.

I conclude that RAM correctly determined that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of eight.

2. May Appellant receive two additional permits because he was prevented from expanding his charter halibut business in 2005 due to factors beyond his control?

Appellant states that he would have used two, or possibly three, vessels in 2005 if his partnership with Company had started in 2005. I assume that Appellant could prove that the partnership did not begin in 2005 due to factors beyond his control and that he could show these were unavoidable circumstances within the meaning of the unavoidable circumstance regulation.³³

Appellant cannot receive two additional permits under the unavoidable circumstance regulation because the unavoidable circumstance regulation is only available to applicants that will not receive any permit. The regulation, 50 C.F.R. § 300.67(g), explicitly states:

Unavoidable circumstance claims . . . will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. This unavoidable circumstance provision cannot be used to upgrade the number of permits issued or to change a non-transferable permit to a transferable permit³⁴

Appellant will not be excluded from the charter halibut fishery entirely if his unavoidable circumstance claim is not recognized. He will receive a transferable permit. Appellant is seeking to use the unavoidable circumstance provision to change a non-transferable permit to a transferable permit. The unavoidable circumstance regulation expressly states that NMFS cannot do that.

32 50 C.F.R. § 300.67(e)(1),(5).

33 50 C.F.R. § 300.67(g).

34 50 C.F.R. § 300.67(g)(emphasis added).

3. May Appellant receive two additional transferable permits because the applicant started using two vessels in 2006 and has participated heavily with two vessels since 2006?

An applicant may not receive additional transferable permits on the grounds that the applicant started using two vessels in 2006 and has participated heavily with two vessels in the charter halibut fishery since 2006. An applicant may not receive a permit on that basis because the charter halibut regulation does not authorize NMFS to issue a permit on that basis.

Under the charter halibut regulation, an applicant can receive three transferable charter halibut permits only if the applicant used three vessels in the applicant-selected year (2004 or 2005) and made at least fifteen trips with each vessel in that year and made at least fifteen trips with three vessels each in 2008.³⁵

Appellant objects to the regulation itself, namely that a business owner who expanded his business in 2006 cannot receive a second and third permit based on that expansion. I do not have the authority to change the regulation and order NMFS to issue a permit if an applicant does not meet the requirements in the regulation for a permit. This applicant does not meet the requirement in the regulation to receive a second or third transferable permit because he did not operate with two additional vessels at the fifteen-trip level in 2004 or 2005. I therefore cannot order that NMFS award this applicant a second or third transferable permit.

Under the charter halibut regulation, the only way this applicant can obtain a second or third charter halibut permit is by transfer from a person who has a transferable permit.³⁶ I also note that this applicant operates in a community which has a community quota entity (CQE) that is eligible to receive a community charter halibut permit.³⁷ The CQE holds the permit, which is non-transferable, and arranges with vessel operators to use the permit.

CONCLUSIONS OF LAW

1. RAM correctly determined that Appellant met the requirements in the charter halibut regulation for one transferable permit with an angler endorsement of eight.
2. Appellant does not meet the participation requirement in the qualifying period in 50 C.F.R. § 300.67(c) for a second or third charter halibut permit, namely, Appellant did not take fifteen or more bottomfish logbook fishing trips with a second or third vessel in the applicant-selected year (2004).
3. An applicant may not receive a second or third permit under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).

³⁵ 50 C.F.R. § 300.67(d)(1)(i) & (ii); 50 C.F.R. § 300.67(d)(2).

³⁶ 50 C.F.R. § 300.67(i) (transfer provisions).

³⁷ See 50 C.F.R. § 300.67(k). RAM's permit website lists the holders of all charter halibut permits, including the community charter halibut permits. http://www.fakr.noaa.gov/ram/charter/apps_permits.htm

4. An applicant may not receive any additional transferable permits because the applicant started using two vessels in 2006 and has participated heavily in the charter halibut fishery with two vessels since 2006.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on October 11, 2011, unless by that date the Regional Administrator reverses, modifies or remands the Decision pursuant to 50 C.F.R. § 678.43(k), (o).

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 the tenth day after the date of this Decision, September 19, 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.

████████████████████

Mary Alice McKeen
Administrative Judge

Date Issued: September 9, 2011