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

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| In Re Application of | ) | |
| | ) | Appeal No. 10-0010 |
| [redacted] | ) | |
| | ) | ORDER DENYING MOTION |
| | ) | FOR RECONSIDERATION |
| Appellant | ) | |
| | ) | |

On April 29, 2011, the Decision was issued in this appeal. The decision was made by Philip J. Smith, Administrative Judge, and reviewed and approved by Eileen J. Jones, Chief Administrative Judge. Judge Smith was working on contract with the NMFS Alaska Region and his contract ended. This appeal was reassigned to the undersigned administrative judge.[1]

The National Appeals Office policy on reconsideration provides that the motion for reconsideration must state material matters of law or fact that the appellant believes the Administrative Judge misunderstood or overlooked.[2] I have carefully reviewed the Decision in this appeal and Appellant's Motion for Reconsideration.[3]

In his motion for reconsideration, Appellant states that another appellant made the same claim, namely that they were both told that their method of fishing for halibut was trolling, and not bottom fishing, and they were both told by Alaska Department of Fish and Game staff to record their effort as salmon fishing.[4] Appellant states that he was told that ADF&G staff would make a note on his record but he was not able to produce the note.[5]

The Decision was based on the legal conclusion that misadvice by an ADF&G staff person was not an unavoidable circumstance within the meaning of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2)(ii)(A).[6] The Decision relied on two things. First, the printed instructions for the 2004 and 2005 Saltwater Charter Vessel Logbook told vessel operators who were simultaneously targeting salmon and bottomfish, including halibut, to record that effort, in terms of rods and boat hours, in both the salmon and bottomfish sections of the logbook page.[7]

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[1] Notice (June 15, 2011).
[2] http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm.
[3] Letter from Appellant to Philip Smith (June 14, 2011).
[4] Letter from Appellant to Philip Smith (June 14, 2011).
[5] Letter from Appellant to RAM (May 17, 2010)
[6] Decision at 5 – 7.
[7] Decision at 5 – 6.

Second, in publishing the final rule, NMFS rejected the comment that an applicant who was misadvised by an individual ADF&G staff person not to report a trip as a halibut trip should be able to submit alternative types of proof besides a logbook trip report.[8] This strongly supports the conclusion that misadvice by an individual ADF&G staff person, that was contrary to published instructions, is not an unavoidable circumstance within the meaning of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).

I conclude that Appellant has not shown that the Decision contains a material error of law or fact. Accordingly, I deny Appellant's Motion for Reconsideration. The new effective date of the Decision is October 13, 2011, unless the Regional Administrator reverses, modifies or remands the Decision pursuant to federal regulation 50 C.F.R. § 679.43(o).

Mary Alice McKeen
Administrative Judge

Date Issued: September 13, 2011

[8] Decision at 6 – 7, relying on NMFS's response to Comment 146, Final Rule, 75 Fed. Reg. 554, 592 (Jan. 5, 2010).