



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 2008 but was thwarted from doing that by the occurrence and subsequent effects of [REDACTED] prior to the fishing season.<sup>4</sup> A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.<sup>5</sup> 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 March 1, 2011.<sup>6</sup> Counsel represented appellant.<sup>7</sup> I have listened to a recording of the hearing and have carefully considered the entire record in this appeal. I conclude that the record contains sufficient information upon which to decide this appeal.<sup>8</sup> 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)(1), with respect to his lack of participation in 2008, and should be awarded a 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)(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. 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?
3. 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 on the permit?

---

<sup>4</sup> Letter from Counsel to NMFS (Feb. 23, 2011)(prehearing brief).

<sup>5</sup> 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).

<sup>6</sup> Order Scheduling Hearing (Jan. 20, 2011).

<sup>7</sup> Entry of Appearance (Feb. 14, 2011).

<sup>8</sup> 50 C.F.R. § 679.43(g)(2).

## FINDINGS OF FACT

1. Appellant operated a charter fishing business for at least nine years between 1994 and 2004.<sup>9</sup>
2. Appellant held the United States Coast Guard (USCG) marine credential required to operate a charter vessel from 1994 to 2004.<sup>10</sup>
3. Appellant took twenty-seven combined salmon/bottomfish logbook fishing trips with [REDACTED] (VESSEL) between June 7 and August 22, 2004.<sup>11</sup>
4. Appellant took twenty-three salmon-only fishing trips with VESSEL in 2004.<sup>12</sup>
5. The highest number of anglers that Appellant reported on a bottomfish logbook fishing trip in 2004 was six.<sup>13</sup>
6. Appellant did not report any bottomfish logbook fishing trips in 2005.<sup>14</sup>
7. Appellant sold VESSEL in 2006 as a result of a judgment entered in the dissolution of his marriage.<sup>15</sup>
8. [REDACTED] Appellant was employed as a mechanic.

9. [REDACTED]

<sup>9</sup> State of Alaska Commercial Fisheries Entry Commission (CFEC) vessel database website, <http://www.cfec.state.ak.us/plook> (Appellant registered charter vessel for nine years: 1994, 1995, 1996, 1997, 1998, 2001, 2002, 2003, 2004). The years 1999 and 2000 are missing from that list. It is possible Appellant ran a charter business in those years as well but with a vessel registered to someone else. If it were material to resolving any issue in the appeal, I would have determined whether Appellant ran a charter business in those years. Since it is not material, I relied on the information on the CFEC website to find that Appellant operated a charter business for at least these nine years.

<sup>10</sup> Testimony of Appellant (Mar. 1, 2011); Written Statement from [REDACTED] (Appellant's Stepfather) (Jan. 23, 2011); Email from USCG Staff to Mary Alice McKeen (Sep. 15, 2011).

<sup>11</sup> Memo from NMFS Computer Specialist to Mary Alice McKeen (Jan. 19, 2011)(summary of official charter halibut record).

<sup>12</sup> ADF&G printout of Appellant's logbook trips (received Mar. 30, 2010)

<sup>13</sup> Memo from NMFS Computer Specialist to Mary Alice McKeen (Jan. 19, 2011).

<sup>14</sup> Memo from NMFS Computer Specialist to Mary Alice McKeen (Jan. 19, 2011).

<sup>15</sup> Letter from Appellant to RAM (Mar. 26, 2010); Petition for Dissolution of Marriage at 5 (Mar. 16, 2006)(VESSEL categorized as joint property).

<sup>16</sup> Testimony of Appellant (Mar. 1, 2011); Medical Record (Sep. I, 2006) submitted with Letter from Appellant to RAM (May 17, 2010); Letter from Vocational Rehabilitation Counselor III to NMFS (Oct. 21, 2010)(Appellant has [REDACTED])

<sup>17</sup> Testimony of Appellant (Mar. 1, 2011); Petition for Dissolution of Marriage at 1 (Mar. 16, 2006) (Appellant's occupation is "Mechanic/Project Manager."

- [REDACTED]
10. In the fall of 2007, Appellant made an agreement with [REDACTED] (Partner) to use Partner's vessel, a twenty-six foot cabin cruiser, [REDACTED], in a joint charter business that would begin with the 2008 charter season. The vessel was a twenty-six foot 1968 Uniflite Cabin Cruiser that needed a new engine and upgrades to be suitable as a charter vessel.<sup>20</sup>
11. Appellant and Partner agreed that Partner would contribute the vessel to the joint venture. Appellant would install a new outboard engine, make upgrades to the vessel, and supply the rods and reels needed for clients to engage in charter fishing. Appellant would run the business, arrange for a captain, handle bookings, keep the boat running and in good repair, act as deckhand, clean the fish and attend to the clients during the cruise, by providing snacks, conversation and assistance with fishing.<sup>21</sup>
12. Appellant installed a new engine in the vessel and arranged for a captain of the vessel. The captain was a person who had worked as a captain for Appellant in the past.<sup>22</sup>
13. Appellant's stepfather made available \$10,000 as a loan to provide startup capital for the business.<sup>23</sup>
14. [REDACTED]
15. As a result of this episode, Appellant did not operate a charter halibut fishing business in 2008. Appellant's stepfather withdrew his offer of start-up capital until Appellant could get his condition stabilized and Appellant could obtain a larger vessel. Appellant withdrew from his agreement with Partner.<sup>25</sup>

---

<sup>18</sup> Medical Record (Sep. 1, 2006), submitted with Letter from Appellant to RAM (May 17, 2010).

<sup>19</sup> Testimony of Appellant (Mar. 1, 2011).

<sup>20</sup> Written Statement of Partner (received Feb. 23, 2011).

<sup>21</sup> Testimony of Appellant (Mar. 1, 2011); Written Statement of Partner (received Feb. 23, 2011); Prehearing Brief (Feb. 23, 2011).

<sup>22</sup> Testimony of Appellant (Mar. 1, 2011).

<sup>23</sup> Written Statement of Appellant's Stepfather (Jan. 23, 2011).

<sup>24</sup> Testimony of Appellant (Mar. 1, 2011).

<sup>25</sup> Testimony of Appellant (Mar. 1, 2011); Written Statement of Partner (received Feb. 23, 2011); Written Statement of Appellant's Stepfather (Jan. 23, 2011).

17. [REDACTED] Appellant concluded he needed a larger vessel so he could live on the vessel during the halibut season, reduce his driving, and so the vessel would have a safe, quiet space to which he could withdraw [REDACTED]

<sup>27</sup>

18. In 2009, Appellant located a larger, thirty-three foot vessel in the Seattle area that he could afford. It had a private space but it needed to be repowered. Appellant purchased it with financial assistance from his stepfather, had it repowered and brought the vessel to Alaska.<sup>28</sup>

19. Appellant timely applied for a charter halibut permit on March 30, 2010.<sup>29</sup>

#### 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.<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup>

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

<sup>26</sup> Testimony of Appellant (Mar. 1, 2011).

<sup>27</sup> Testimony of Appellant (Mar. 1, 2011).

<sup>28</sup> Testimony of Appellant (Mar. 1, 2011); Alaska Boat Registration (Oct. 26, 2009).

<sup>29</sup> Application (received March 30, 2010). The application period was February 4 – April 5, 2010. Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010).

<sup>30</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

<sup>31</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>32</sup> 50 C.F.R. § 300.67(f)(6)-(7).

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.<sup>33</sup>

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.<sup>34</sup>

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.<sup>35</sup> If an applicant meets a minimum participation trip level in the qualifying period (2004 or 2005), but not the recent 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).<sup>36</sup>

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.<sup>37</sup>

For an applicant that did not participate in the recent period, section (i) through (iv) of 50 C.F.R. § 300.67(g)(1), 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 the recent period (2008);

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.

---

<sup>33</sup> 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. § 300.679f)(3)(definition of halibut logbook fishing trip).

<sup>34</sup> 50 C.F.R. § 300.67(d)(1).

<sup>35</sup> 50 C.F.R. § 300.67(g).

<sup>36</sup> 50 C.F.R. § 300.67(g)(1).

<sup>37</sup> 50 C.F.R. § 300.67(g)(2).

## ANALYSIS

**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)?**

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.

Appellant arranged for a vessel to use as a charter vessel for the 2008 season. Appellant arranged to use a vessel owned by Partner. It was a twenty-six foot 1968 Uniflite Cabin Cruiser and needed a new engine and upgrades to be suitable as a charter vessel. Appellant installed a new engine in the vessel. Appellant lined up a captain, a person he had hired as a captain in the past. Appellant obtained financing from his stepfather for startup costs. Appellant intended to run the business, keep the vessel in good repair, assist the clients, and act as deckhand.

Appellant's claim that he intended to do and could have done those things is strengthened by the fact that he had operated a charter business for at least nine years between 1994 and 2004; he had experience with assembling the elements of a functioning charter business. In 2004, the only year for which the record has definite numbers, Appellant took twenty-seven combined salmon/charter halibut trips and twenty-three salmon-only charter trips for a total of fifty trips between the dates of June 7 and August 22, 2004. 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?**

The evidence in the record convinces me that Appellant's intent to operate a charter halibut business in 2008 was thwarted by the occurrence of [REDACTED] and its resulting effects. The record contains evidence of no other circumstance that intervened to prevent Appellant's plan from coming to fruition.

The evidence in the record further convinces me that Appellant's medical condition is unavoidable, unique, unforeseen, and reasonably unforeseeable. His medical condition

is unavoidable. His medical condition is 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.

His condition was unforeseen:

[REDACTED]

Appellant and his family realized that he had to take further steps to deal with his problem. Because of [REDACTED] Appellant's stepfather withdrew his financing for the joint venture until Appellant's condition stabilized and until Appellant obtained a larger vessel. I conclude that within the meaning of the unavoidable circumstance regulation, Appellant faced a reasonably unforeseeable circumstance.

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

Appellant experienced [REDACTED]

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

The evidence in the record also convinces me that Appellant took all reasonable steps to overcome the circumstance . The occurrence of [REDACTED] in March 2008 was a wake-up call for Appellant and his family.

[REDACTED]

Appellant and his family concluded that he needed to take steps to reduce the likelihood of [REDACTED]

39

Appellant realized he needed a larger vessel so he could live on the vessel for his short, hectic charter season This living arrangement would reduce his need to drive back and forth every day between his home and the vessel, at all hours, often in a tired state, and after a full day of charter fishing and working on the vessel. Appellant also concluded that he needed a larger vessel so he would have a safe, quiet space to which he could withdraw, especially during a trip, [REDACTED]

[REDACTED]

38

[REDACTED]

Testimony of Appellant (Mar. 1, 2011).

I found Appellant's testimony consistent and credible with respect to why [REDACTED] derailed his plans to operate a charter halibut business in the 2008 season:

Question: Do you know how long [REDACTED] lasted or did you come to afterwards?

Answer: I was by myself when I came to and I really don't know how long it lasted.

Question: What about this [REDACTED] was different from other [REDACTED] you had experienced?

Answer: [REDACTED] to be honest, I was in denial. This time, there was no lying to myself anymore. [REDACTED]<sup>40</sup>

\* \* \* \*

Question: When you had this [REDACTED] what changed?

Answer: [REDACTED]

\* \* \* \*

[REDACTED]

<sup>40</sup> Appellant's Testimony at 7 min. (Mar. 1, 2011).

<sup>41</sup> Appellant's Testimony at 37 min. (Mar. 1, 2011).

Appellant therefore withdrew from his agreement to use Partner's twenty-six foot vessel and took steps to obtain a larger vessel, which would be suitable for his needs. Appellant found such a vessel in 2009 in the Seattle area. It was a thirty-three foot vessel with a private space. With financial assistance from his stepfather, Appellant bought the vessel in 2009, had necessary work done on it and brought it to Alaska. From these facts, I conclude, under the circumstances, that Appellant took all reasonable steps to overcome the circumstance that thwarted his intent to operate a charter halibut business in 2008.

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

Once an applicant meets the requirements in sections (i) through (iv) of 50 C.F.R. § 300.67(g)(1) with respect to why he did not participate in the recent period, section (v) governs whether the applicant will receive a transferable or non-transferable permit. Section (v) states:

(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.

The criteria in paragraphs [50 C.F.R. § 300.67] (b), (c), (d), (e) and (f) are the criteria that applies to an applicant's actual participation. Since this type of applicant, by definition, did not participate in the recent period or participated at an insufficient level, NMFS can only apply this criteria to an applicant's participation in the qualifying period. Section (v) thus directs NMFS to award the applicant a transferable or non-transferable permit by substituting the applicant's actual participation in the qualifying period for the applicant's lack of participation in the recent period.<sup>43</sup>

The participation requirement for a transferable permit in the qualifying period is fifteen bottomfish logbook fishing trips with the same vessel in 2004 or 2005.<sup>44</sup> Appellant took twenty-seven bottomfish logbook fishing trips with the same vessel in 2005. NMFS

<sup>42</sup> Appellant's Testimony at 39 min. (Mar. 1, 2011).

<sup>43</sup> Proposed Rule, 75 Fed. Reg. 18,178, 18,187 (Apr. 21, 2009) ("Assuming that the applicant is able to successfully demonstrate that it meets the criteria for an unavoidable circumstance, NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that *substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.*") (emphasis added).

<sup>44</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A).

substitutes Appellant's participation in the qualifying period for his participation in the recent period. I conclude Appellant's permit should be designated as transferable.

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

If an applicant proves an unavoidable circumstance in the qualifying period, section (v) of 50 C.F.R. § 300.67(g)(1), quoted above, directs NMFS to determine the angler endorsement on the applicant's permit based on the applicant's participation in the qualifying period. Further, the standard rule for an angler endorsement is that the angler endorsement on a permit is the highest number of anglers that the applicant took on a bottomfish logbook fishing trip in the qualifying period (2004, 2005).<sup>45</sup> Appellant's highest number of anglers on a bottomfish logbook fishing trip in the qualifying period was six anglers.<sup>46</sup> Thus, whether by virtue of section (v) or by virtue of the standard rule for angler endorsements, I conclude that the proper angler endorsement on Appellant's permit is six.

#### CONCLUSIONS OF LAW

1. Appellant meets the minimum participation requirement for a transferable charter halibut permit in the qualifying period in 50 C.F.R. § 300.67(d)(1)(i), namely he reported fifteen or more bottomfish logbook fishing trips from the same vessel in 2004 or 2005.
2. Appellant satisfies sections (i) through (iv) of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(1).
3. If an applicant satisfies sections (i) through (iv) of the unavoidable circumstance 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.
4. The angler endorsement on Appellant's permit should be the highest number of anglers that Appellant took on a bottomfish logbook fishing trip in 2004 or 2005.
5. Appellant qualifies for a transferable charter halibut permit, endorsed for six anglers, for use in IPHC Area 3A.

---

<sup>45</sup> 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).

<sup>46</sup> Email from NMFS Computer Specialist to Mary Alice McKeen (Jan. 19, 2011).

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 October 17, 2011, unless by that date the Regional Administrator reverses, remands, or modifies this decision pursuant to 50 C.F.R. § 679.43(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 26, 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 15, 2011