

period (2004 or 2005) and five halibut logbook fishing trips in the recent participation period (2008) in Area 2C.⁵ RAM concluded that Appellant did meet the minimum participation requirement for the recent period (2008).⁶

However, RAM determined that did not meet the minimum participation requirement in the qualifying period. According to the official charter halibut record, Appellant reported no bottomfish logbook fishing trips under his Alaska Department of Fish and Game (ADF&G) Business Owner License in 2004 or 2005.

Appellant acknowledges this but states that he has participated in the charter halibut fishery since 1999 and he did not participate with his own vessel in 2005 due to an unavoidable circumstance, namely that he was unable to complete the purchase of his vessel, [REDACTED] (VESSEL), until after the 2005 fishing season had ended.⁷ Appellant contends that he reached an agreement to purchase VESSEL on the eve of his very busy charter season and was not able to finalize his purchase of VESSEL until September 2005, when the charter season was over.

A claim under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), must be decided by an appellate officer, not by RAM.⁸ 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 23, 2011.⁹ Appellant participated by telephone, as did his attorney and three witnesses. [1] [REDACTED] (Seller) is the person who sold VESSEL to Appellant. Seller owned [REDACTED] and hired Appellant as a captain to operate VESSEL in 2004 and 2005. [2] [REDACTED] (Client) met Appellant as a client when Appellant took him charter fishing in 2004. [REDACTED] testified concerning Appellant's desire to own his own charter vessel and Appellant's agreement to purchase VESSEL. [3] [REDACTED] (Charter Captain) is a fellow charter captain of Appellant and testified about Appellant's desire to own his own vessel, Appellant's agreement to purchase VESSEL and the hours of a charter boat operator in the summer charter season in Sitka, Alaska. I will refer to the Alaska Department of Fish and Game as ADF&G.

⁵ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

⁶ IAD at 2. Appellant reported sixty-nine halibut logbook fishing trips in 2008. Official Record Summary (Jan. 26, 2010). The participation requirement for a transferable permit in 2008 is fifteen halibut logbook fishing trips reported under the applicant's ADF&G Business Owner License. 50 C.F.R. § 300.67(d)(1)(ii). Appellant therefore met the participation requirement *in the recent period* for a transferable permit.

⁷ Letter from Appellant to RAM (Feb. 12, 2010); Affidavit of Appellant (Aug. 15, 2010).

⁸ 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 the Proposed Rule.

⁹ Order Scheduling Hearing (Jan. 25, 2011). The prior administrative judge, Philip Smith, was working on a contract with NMFS and the contract ended. The appeal was then assigned to the undersigned judge. All testimony that I cite will be testimony from the hearing on February 23, 2011.

I have carefully considered the record in this appeal and conclude that the record contains sufficient information upon which to decide this appeal.¹⁰ I therefore close the record and issue this decision.

For the reasons that follow, I conclude that Appellant may not meet the participation requirement in the qualifying period with trips that were reported under another person's ADF&G Business Owner License. I further conclude that Appellant does not meet the unavoidable circumstance regulation with respect to his lack of participation in the qualifying period. I therefore conclude that Appellant does not meet the requirements in federal regulation to receive a charter halibut permit.

ISSUES

1. Does NMFS have authority to credit trips that were taken and reported under one person's ADF&G Business Owner License to another person?
2. Does Appellant meet the requirements of the unavoidable circumstance regulation with regard to his lack of participation in 2005?

FINDINGS OF FACT

1. Appellant began participating in the charter halibut fishery as a charter boat captain, or sport fishing guide, in 1999. Appellant held a sport fishing guide license issued by ADF&G in 1999, 2000, 2001, 2002, 2003, and 2004.¹¹
2. Appellant formed Appellant Corporation at the end of 1999.¹² Appellant Corporation was registered as a sport fish charter business with ADF&G in 2000, 2001, 2002 and 2004.¹³
3. Appellant operated a vessel as a charter captain in 2000 and 2001. The vessel was owned by Appellant Corporation. The vessel was sold in 2002.¹⁴
4. Since Appellant Corporation sold that vessel, Appellant wanted to have his own vessel again and operate his own charter fishing business.¹⁵

¹⁰ 50 C.F.R. § 679.43(g)(2).

¹¹ Letter from ADF&G Program Technician to Appellant (undated, received by RAM Feb. 18, 2010).

¹² Affidavit of Appellant at ¶ 3 (Aug. 15, 2010); State of Alaska, Department of Commerce, Division of Corporations at commerce/Alaska/gov/CBP/Main_Corporation, *visited* Dec. 31, 2011. The corporation was formed December 27, 1999 and its current status is "Good Standing."

¹³ Letter from ADF&G Program Technician to Appellant (undated, received by RAM Feb. 18, 2010). ADF&G required "business registration" before 2005 and began requiring ADF&G Business Owner Licenses in 2005. Final Rule, 75 Fed. Reg. 554, 580 (Jan. 5, 2010)(Comment 83). NMFS put a provision in the final rule that business registration counted as an ADF&G Business Owner License. 50 C.F.R. § 300.67(b)(3).

¹⁴ Affidavit of Appellant at ¶ 6, ¶ 7 (Aug. 15, 2010).

5. Appellant operated a vessel as a charter captain for another charter fishing company in 2002.¹⁶
6. In 2004, Seller hired Appellant to operate VESSEL, a vessel owned by Seller. Appellant reported ninety-four trips between May 31 and September 1, 2004, to ADF&G under the ADF&G Business Owner License issued to Seller. Appellant reported these trips in Logbook 41387. Seventy-eight trips were bottomfish logbook fishing trips. Sixteen trips were trips where Appellant reported salmon data only.¹⁷
7. In 2005, Seller hired Appellant to operate VESSEL, a vessel owned by Seller. Appellant reported eighty-seven trips between May 18 and September 25, 2005, to ADF&G under the ADF&G Business Owner License issued to Seller. Appellant reported these trips in Logbook 51772. Fifty-nine trips were bottomfish logbook fishing trips. Twenty-eight trips were trips where Appellant reported salmon data only.¹⁸
8. Appellant has held a combined ADF&G Guide License/Business Owner License from 2005 to the present.¹⁹
9. In May of 2005, just before the 2005 fishing season, Appellant and Seller reached a verbal agreement that Appellant would purchase VESSEL and the gear on board the vessel for \$85,000.²⁰
10. Appellant has a hectic work schedule in the summer. On days when he has a charter trip, he usually works twelve to thirteen hours a day arriving at the boat before the clients, taking the clients for a full day of fishing and cleaning the boat and getting it ready for the next day.²¹

¹⁵ Testimony of Appellant at 13 min., 14 min. (“I didn’t want to be just a hired skipper.”); Testimony of Seller at 50 – 51 min. (“From the getgo, he had always expressed, why, I’d sure like to do my own thing again.” “He had expressed it since I had known him that he wanted to take it to the next step.”); Testimony of Charter Captain at 78 min. (witness talked with Appellant “about his desire to own another vessel.”)

¹⁶ Affidavit of Appellant at ¶ 8 (Aug. 15, 2010).

¹⁷ Testimony of Appellant and Seller ; ADF&G Logbook [REDACTED] (2004). I rely on Appellant’s copy of Logbook [REDACTED] for this finding. If I concluded that NMFS had authority to reassign trips from Seller to Appellant, I would have gotten a printout of NMFS’s official record for bottomfish logbook fishing trips reported in Logbook [REDACTED]. A bottomfish logbook fishing trip is a trip where the applicant reported one or more of the following pieces of information about the trip: 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. 50 C.F.R. § 300.67(f)(2).

¹⁸ Testimony of Appellant and Seller ADF&G Logbook [REDACTED] (2005). I rely on Appellant’s copy of Logbook [REDACTED] for this finding. The same caveat in the previous note applies to this finding.

¹⁹ Letter from ADF&G Program Technician to Appellant (undated, received by RAM Feb. 18, 2010) (ADF&G records through 2009); Testimony of Appellant.

²⁰ Testimony of Appellant; Testimony of Seller; Testimony of Client.

²¹ Testimony of Appellant at 23 – 24 min.; Testimony of Charter Captain at 82 min.

11. In the charter season in 2005, Appellant worked five or more days a week for nine of seventeen weeks:²²

<u>Beginning date of week (Sunday)</u>	<u># of days of fishing in the week</u> ²³
5/15	1 [5/18]
5/22	2 [5/25, 5/27]
5/29	4 [5/30, 5/31, 6/1, 6/4]
6/5	6 [6/5, 6/6, 6/8, 6/9, 6/10, 6/11]
6/12	4 [6/12, 6/13, 6/14, 6/15]
6/19	1 [6/25]
6/26	6 [6/27, 6/28, 6/29, 6/30, 7/1, 7/2]
7/3	2 [7/6, 7/7]
7/24	5 [7/26, 7/27, 7/29, 7/29, 7/30]
7/31	6 [7/31, 8/1, 8/2, 8/3, 8/4, 8/5]
8/7	7 [8/7, 8/8, 8/9, 8/10, 8/11, 8/12, 8/13]
8/14	7 [8/14, 8/15, 8/16, 8/17, 8/18, 8/19, 8/20]
8/21	7 [8/21, 8/22, 8/23, 8/24, 8/25, 8/26, 8/27]
8/28	2 [8/28, 8/29]
9/4	3 [9/8, 9/9, 9/10]
9/11	7 [9/11, 9/12, 9/13, 9/14, 9/15, 9/16, 9/17]
9/18	7 [9/18, 9/19, 9/20, 9/21, 9/22, 9/23, 9/24]

12. Appellant submitted a request for a loan from a local bank for purchase of VESSEL on September 2, 2005.²⁴

13. VESSEL was surveyed on September 2, 2005, while afloat in the harbor in Sitka. The surveyor prepared a Confidential Survey Report on September 9, 2005.²⁵

14. Appellant completed purchase of VESSEL on September 30, 2005.²⁶

15. In 2004 and 2005 Appellant reported no bottomfish logbook fishing trips under an ADF&G Business Owner License issued to him or Appellant Corporation.²⁷

²² Appellant's copy of Logbook [REDACTED] (2005). There are actually nineteen weeks covered in Logbook [REDACTED]. I did not consider the weeks of July 10 and July 17 because Appellant reported zero trips. I thought it was possible that Appellant might have been using a different vessel or might have not taken trips due to some unusual circumstance and the topic was not the subject of testimony at the hearing. I also did not consider the week of September 25 because Appellant reported a trip on one day that week, namely, September 25, 2005, a Sunday, which was his last day of fishing for the year.

²³ This is based on the dates of salmon and bottomfish fishing trips recorded in Logbook [REDACTED].

²⁴ Customer Information Form for Loan Applicant (signed by Appellant, Sep. 2, 2005). On the form, Appellant stated the amount of the loan he was requesting and the purpose: "Purchase Boat."

²⁵ Confidential Survey Report (Sep. 9, 2005), Survey # [REDACTED].

²⁶ Testimony of Appellant at 26 min.; Affidavit of Appellant at ¶ 17 (Aug. 15, 2010).

16. In 2008, Appellant reported sixty-nine halibut logbook fishing trips under an ADF&G Business Owner License issued to Appellant Corporation.²⁸

PRINCIPLES OF LAW

In March 2007, the North Pacific Fishery Management Council (Council) recommended that the Secretary of Commerce adopt a program of limited entry for the charter halibut fisheries in IPHC Areas 2C and 3A.²⁹ In January 2010, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP) pursuant to section 773c of The Halibut Act.³⁰ These regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67.

If an applicant does not meet the requirements in federal regulation for a charter halibut permit, NMFS may not issue the applicant a permit. The following is a description of the features of the CHLAP relevant to this appeal.

The official charter halibut record is the information prepared by NMFS on participation in the charter halibut fishery that NMFS used to implement the CHLAP.³¹ NMFS based the official charter halibut record on participation data in saltwater charter logbooks submitted to the Alaska Department of Fish and Game (ADF&G).³² If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.

To receive a charter halibut permit, an applicant must prove participation 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 2008.³³

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).³⁴

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

²⁷ Official Record Summary (Jan. 26, 2010). Appellant does not contest this.

²⁸ Official Record Summary (Jan. 26, 2010). A halibut logbook fishing trip is a trip that is reported with one or more 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. 50 C.F.R. § 300.67(f)(3).

²⁹ Council Motion on Charter Halibut Moratorium in Area 2C and 3A, (Mar. 31, 2007), available at http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

³⁰ Final Rule, 75 Fed. Reg. 554 (Jan. 5, 2010).

³¹ 50 C.F.R. § 300.67(f)(5).

³² Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

³³ 50 C.F.R. § 300.67(f)(6)(qualifying period); 50 C.F.R. § 300.67(f)(7)(recent participation period).

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

period (2004 or 2005), and fifteen halibut logbook fishing trips with one vessel in the recent participation period (2008).³⁵

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirement in one participation period.³⁶ If an applicant meets a minimum participation requirement 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).³⁷

Similarly, if an applicant meets a minimum participation requirement 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.³⁸

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

An applicant must meet each of the requirements of the unavoidable circumstance regulation and must prove any facts to support his claim by a preponderance of evidence in the record.

An administrative judge must interpret and apply the regulations, as adopted by the Secretary of Commerce, to decide an appeal of the denial of a charter halibut permit.³⁹

³⁵ 50 C.F.R. § 300.67(d)(1)(i)-(ii).

³⁶ 50 C.F.R. § 300.67(g).

³⁷ 50 C.F.R. § 300.67(g)(1).

³⁸ 50 C.F.R. § 300.67(g)(2).

³⁹ Pursuant to 50 C.F.R. § 679.43, the decision of an appellate becomes final agency action thirty days after it is issued, subject to the authority of the Regional Administrator for the Alaska Region to reverse, remand or modify it. 50 C.F.R. § 679.43 (k), (o).

ANALYSIS

1. Does NMFS have authority to credit trips that were taken and reported under one person's ADF&G Business License to another person

In the official record, NMFS credited the trips by VESSEL to Seller because these trips were taken and reported to ADF&G under Seller's ADF&G Business Owner License. Appellant does not state that he reported any trips in 2005 under an ADF&G Business Owner License issued to Appellant or Appellant Corporation.

Rather, Appellant argues that for several reasons he, rather than Seller, should get credit for trips by VESSEL in 2005. Appellant argues that falls within the class of persons that the charter halibut regulation seeks to protect because he has participated in the fishery since 2000 and has had an ADF&G Business Owner License, either individually or through his corporation, since 2000. Since 2001, Appellant wished to operate his own charter fishing business with his own vessel. Appellant made an agreement to purchase VESSEL in May 2005 and did not finalize it until September 2005. Appellant invested money in the charter halibut fishery by buying VESSEL before the control date of December 9, 2005. Appellant therefore was not on notice that the fishery might be limited when he bought VESSEL.

Appellant's arguments do not address the language of the charter halibut regulation and do not show how Appellant meets the requirements for a permit in the regulation as the regulation was adopted by the Secretary of Commerce. The issue is whether, ***under that regulation***, NMFS has authority to reassign credit for trips that were taken pursuant to one person's ADF&G Business Owner License to another person based on facts such as Appellant describes.

In the IAD, RAM determined that it did not have authority to do that. Relying on 50 C.F.R. 300.67(b)(1)(ii), RAM denied Appellant's application because "you were not the person ***to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner Licenses that authorized logbook fishing trips on [VESSEL]***."⁴⁰ RAM concluded that it was not enough that an Appellant had an ADF&G Business Owner License in 2005, but Appellant had to have taken and reported the required number of trips pursuant to Appellant's ADF&G Business Owner License.

I analyze the language of the regulation in light of the purpose of the regulation. I conclude that, either initially or on appeal, NMFS does not have authority to credit a trip to an applicant unless the trip was taken and reported pursuant to the applicant's ADF&G Business Owner License.⁴¹ I reach this conclusion based on the language of the regulation, the purpose of the regulation and the absence of any provision stating that NMFS has the authority to reassign trips or how NMFS would exercise it.

⁴⁰ IAD at 2 (emphasis in original)

⁴¹ I note the limited exception in the successor-in-interest provision, which I discuss at page 10 - 11 *infra*.

I rely first and foremost on the language of the charter halibut regulation. The charter halibut regulation at 50 C.F.R. § 300.67(b) begins by describing who receives charter halibut permits. The language of the regulation is clear:

NMFS will issue a charter halibut permit to a person who . . . [is the] individual or non-individual entity **to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner License that authorized logbook fishing trips that meet the minimum participation requirements described** in paragraphs (b)(1)(A) and (b)(1)(ii)(B) of this section for one or more charter halibut permits, unless the person is applying as a successor-in-interest.⁴²

It is true that Appellant had an ADF&G Business Owner License in 2005 that authorized him to take and reports trips that would have met the minimum participation requirements for a charter halibut permit. But he did not do that. He did not take trips, pursuant to his ADF&G Business Owner License, “that meet the minimum participation requirements” for a permit. The language of the regulation supports the conclusion that the applicant had to have been the holder of the ADF&G Business Owner License **and** had to have reported the required number of trips pursuant to that ADF&G Business Owner License.

The regulatory history reinforces that conclusion. It shows that the purpose of the regulation, 50 C.F.R. § 300.67(b), quoted above, was to require that NMFS credit each trip to the person who held the ADF&G Business Owner License pursuant to which the trip was taken and reported. In the proposed rule, NMFS explained:

Licensed business owner. Charter halibut permits would be issued to the ADF&G licensed business owner. The Council’s moratorium recommendation and this action propose eligibility for a charter halibut permit to be limited to the holder of an ADF&G business owner license because information on participation in the charter vessel fishery for halibut is organized by this license. Hence, a person would not meet this standard and qualify for a charter halibut permit if he or she held only a guide license or owned a charter vessel but did not hold an ADF&G business owner license during the qualifying and recent participation years.

Issuing charter halibut permits only to qualified holders of ADF&G business owner licenses is appropriate for several reasons. First, the owner of the charter vessel fishing business had to obtain a business owner license from ADF&G. Second, the business owner was required to register with ADF&G the vessel to be used as a charter vessel. Third, the ADF&G business owner license number was required to be recorded on each sheet of the logbook because this license authorized the guide to

⁴² 50 C.F.R. § 300.67(b)(1)(ii)(emphasis added). Paragraph (b)(1)(A) is the participation requirement in the qualifying period. Paragraph (b)(1)(B) is the participation requirement in the recent period.

provide fishing guide services to the charter vessel anglers. Finally, the business owner was responsible for submitting the logbook sheets to ADF&G within the required time limits. ***In summary, every charter vessel fishing trip was authorized by, and made pursuant to, an ADF&G business owner license.***⁴³

The link between each trip and the ADF&G license that authorized each trip was the keystone in creating the official record: “The official record would link each logbook fishing trip to an ADF&G business owner license and to the person – individual, corporation, partnership or other entity – that obtained the license.”⁴⁴

If NMFS had authority to reassign trips from one ADF&G License to another, based on facts such as an agreement to purchase the vessel that took the trips, the regulation would likely specify that authority and, in some way, address when and why NMFS could reassign trips. The regulation does not address in any way whether this fact, or any other fact, authorizes NMFS to reassign trips from one ADF&G Business Owner License to another. Instead, the regulation establishes a bright line as to who receives credit for each trip: the person that held the ADF&G Business Owner License pursuant to which the trip was taken and reported.⁴⁵

Appellant makes three additional arguments. First, Appellant argues that he falls within the class of persons to be protected by the charter halibut regulation because he has historically participated in the fishery and he, or his Corporation, has had an ADF&G Business Owner license since 2000.⁴⁶ But the charter halibut regulation specifies that the “participation” must have been as a ADF&G Business Owner License holder and must have been in specified periods: the qualifying period and the recent period.

Second, Appellant argues that his situation is analogous to a successor-in-interest.⁴⁷ The successor-in-interest provision allows a person to apply for a permit standing in the shoes of either a deceased individual, or a dissolved corporation, if the individual or corporation met the participation requirements in both periods for a permit before the individual died or the corporation dissolved.⁴⁸

Appellant’s situation is not like a successor-in-interest under the charter halibut regulation. The successor-in-interest applicant can apply for a charter halibut permit because the person that earned the permit is either an individual, who has died, or a legal entity, such as a corporation, that has dissolved. The successor-in-interest

⁴³ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009)(emphasis added).

⁴⁴ Proposed Rule, 75 Fed. Reg. at 18,178, 18,186 (Apr. 21, 2009).

⁴⁵ 50 C.F.R. § 300.67(b)(1)(emphasis added).

⁴⁶ Appeal at 3 – 6 (Aug. 16, 2010).

⁴⁷ Appeal at 6 – 7 (Aug. 16, 2010)..

⁴⁸ 50 C.F.R. § 300.67(b)(1)(iii) (“If the person is applying as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet the participation requirements described in paragraphs (b)(1)(ii) of this section for one or more charter halibut permits, NMFS will required the following written documentation. . . .”) The participation requirements in paragraphs (b)(1)(ii) are paragraph (b)(1)(ii) (A) the participation requirement in the qualifying period and paragraph (b)(1)(ii)(B) the participation requirement in the recent period.

provision does not enable an applicant to combine trips by the deceased individual or dissolved corporation in the qualifying period with the applicant's own trips in the recent period. That is what Appellant wishes to do: combine trips reported under one person's ADF&G Business Owner License in 2005 (Seller's License) with trips reported under another person's ADF&G Business Owner License in 2008 (Appellant's License). The regulation does not allow combining of trips by two persons.⁴⁹

Third, Appellant emphasizes that he purchased the vessel, and invested a sizeable amount of money in the charter fishery, before the control date.⁵⁰ The control date was December 9, 2005, and was initially adopted by the Council. It was the subject of a notice that NMFS published in the Federal Register on February 8, 2006, which stated, in part: "This notice announces that anyone entering the charter sport fishery for Pacific halibut in and off Alaska after December 9, 2005 (control date) will not be assured of future access to that fishery if a management regime that limits the number of participants is developed and implemented under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act)."⁵¹

I understand Appellant's point. The control date notice gave notice to persons who invested in the fishery *after* December 9, 2005, or possibly February 8, 2006, that the fishery might be limited and Appellant invested in the fishery on September 30, 2005.

Nonetheless, this is not a basis for me to recommend that he receive a permit. I can only do that if the applicant meets the requirements in federal regulation to receive a permit. The charter halibut regulation does credit all participation that occurred before the control date of December 9, 2005, but the regulation credits participation as an ADF&G licensed business owner.⁵² The regulation, as adopted, does not award permits on *investment* in the charter halibut fishery before the control date, only *participation* before the control date.

The only basis for an applicant to receive a charter halibut permit who does not have actual participation in the qualifying period, but who does have actual participation requirement in the recent period (2008), is through the unavoidable circumstance regulation.

2. Does Appellant meet the requirements of the unavoidable circumstance regulation with regard to his lack of participation in 2005?

I conclude that Appellant has not shown that he had a specific intent to operate a charter halibut fishing business in 2005, that the circumstance of a busy work schedule was reasonably unforeseeable, that he took all reasonable steps to overcome the

⁴⁹ 50 C.F.R. § 300.67(b)(1) ("NMFS will issue a charter halibut permit to **a person** who meets the following requirements; . . .)(emphasis added). See Proposed Rule, 74 Fed. Reg. 18,178, 18-182 – 18,183 (2009)

⁵⁰ Appeal at 3 – 6 (Aug. 16, 2010).

⁵¹ Advance notice of proposed rulemaking; control date, 71 Fed. Reg. 6442, 6442 (Feb. 8, 2006).

⁵² This was in accord with the Council Motion, Issue 3, states: "Permits would be issued to an ADF&G licensed fishing guide business owner." Council Motion on Charter Halibut Moratorium, (Mar. 31, 2007), http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf.

circumstance of a busy work schedule, that the lack of knowledge that the charter halibut fishery might be limited is a circumstance that was unique to Appellant and that the lack of knowledge that the charter halibut fishery might be limited is a circumstance that falls within the unavoidable circumstance regulation.

A. Did Appellant show that he had a specific intent to operate a charter halibut business in 2005?⁵³

Appellant established that he operated his own vessel in 2000 and 2001 and had an interest in getting back into the fishery as an owner/operator since that time.⁵⁴ Appellant operated VESSEL for Seller in 2004 and reached an agreement with Seller to purchase VESSEL in May 2005. Appellant and Seller did not transfer title to VESSEL until September 2005. Appellant reported trips with VESSEL under his own ADF&G Business Owner License with VESSEL in 2006.

To prove specific intent, the applicant must show more than a general interest in operating a charter halibut business. The applicant must show “a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period.”⁵⁵ An applicant who had a specific intent to operate a charter halibut fishing business 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 charter business in place, by the charter halibut season when a circumstance interferes to remove one or more essential element.

Appellant did not have a vessel for the 2005 season that he could use to operate his own charter halibut fishing business. Although Appellant reached a verbal agreement with Seller to purchase VESSEL in May 2005, Appellant did not show that Appellant and Seller ever intended that Appellant would own the vessel for the 2005 season and operate his own charter business for the 2005 season. The close proximity of the verbal agreement to the beginning of the fishing season is strong evidence that that both parties envisioned that Seller would actually sell VESSEL to Appellant after the 2005 season and that is what happened. Appellant does not state that he took any steps to finalize the sale of the vessel before the 2005 season.

Appellant states that he did not do this because of the lack of time due to his busy charter schedule. But Appellant also states unequivocally that if he had known that 2005 would be a qualifying year, he could have, and would have, finalized the sale before May.⁵⁶ Appellant is saying that if he had a business reason to complete the sale, he could have, and would have, made the time to purchase the boat before the 2005 season. If Appellant did not have business reasons to purchase VESSEL for the 2005 season, apart from wanting to get a permit, I conclude that Appellant did not have a specific intent to operate a charter halibut fishing business in 2005 within the meaning of the unavoidable circumstance regulation.

⁵³ 50 C.F.R. § 300.67(g)(2)(i).

⁵⁴ Findings of Fact 3, 4.

⁵⁵ 50 C.F.R. § 300.67(g)(2)(i).

⁵⁶ Testimony of Appellant at 27 min., 28 min; Affidavit of Appellant at ¶ 19, 20.

Since Appellant could have finalized the sale before the 2005 season, Appellant's schedule did not thwart, or prevent, his participation. What Appellant states thwarted his participation was his lack of knowledge that the charter fishery would be limited. I examine that in Section D below. But first I examine Appellant's claim regarding his work schedule.

B. Was the circumstance of Appellant's work schedule reasonably unforeseeable?

The circumstance that thwarted the applicant's intent to participate must be unforeseen and reasonably unforeseeable.⁵⁷ Appellant's lack of time during the charter season was completely foreseeable. He operated a charter vessel in 2000 and 2001 and 2002.⁵⁸ In 2004, Appellant worked for Seller as a hired skipper and, on behalf of Seller, reported ninety-four trips with VESSEL for Seller. He was working for Seller in the same capacity in 2005. I conclude that Appellant's work schedule, and his limited time to do other things, was reasonably foreseeable.

C. Did Appellant take all reasonable steps to overcome his hectic work schedule?

An applicant must take all reasonable steps to overcome the circumstance that thwarted the applicant's intent to participate.⁵⁹ I understand that the summer is a busy time for charter operators. But I conclude that Appellant did not take all reasonable steps to overcome his busy schedule. First, based on the trips in Logbook [REDACTED] Appellant had eight weeks where he worked less than five days a week:

<u># of Days Charter Fishing</u>	<u>Beginning date of week</u>
1	Two weeks: 5/15, 6/19. ⁶⁰
2	Four weeks: 5/15, 5/22, 7/3, 8/28
3	One week: 9/4
4	Two weeks: 5/29, 6/12

Second, Appellant stated that VESSEL needed to be hauled out of the water to be surveyed.⁶¹ But the survey was conducted on September 2, 2005, while VESSEL was afloat in Sitka Harbor.⁶² Furthermore, Appellant finalized the sale in September and September was just as busy, if not busier than, May, June and July.⁶³ Appellant began fishing the week of May 15 and for the three weeks in May Appellant had trips on two days, two days and four days. Appellant had five weeks where he fished seven days a week and two of them were in September. If Appellant finalized the sale in September, I

⁵⁷ 50 C.F.R. § 300.67(g)(2)(ii)(C). I do not make a finding whether the circumstance was actually foreseen by Appellant.

⁵⁸ Affidavit of Appellant at ¶ 8 (Aug. 16, 2010).

⁵⁹ 50 C.F.R. § 300.67(g)(2)(iv).

⁶⁰ Appellant's Logbook [REDACTED] (2005). As noted, I did not count the two weeks where Appellant reported zero trips -- the week of 7/10 and 7/17 -- because I thought it was possible that he was fishing another vessel or that some unusual circumstance prevented him from fishing those weeks.

⁶¹ Testimony of Appellant at 24 min. (Feb. 23, 2011).

⁶² Confidential Survey Report, Survey # [REDACTED] (Sep. 9, 2005).

⁶³ I listed Appellant's trips, by week, in Finding of Fact 11.

conclude that he could have taken reasonable steps to finalize the sale in May, June or July.

But, as noted, that is also what Appellant states, namely that he would have made time to finalize the sale if he had known that 2005 would be a qualifying year. This is really the central point of Appellant's claim.

- D. An applicant's failure to purchase a vessel, and operate his own charter halibut fishing business in a qualifying year, due to lack of knowledge that the government might require participation in that year to receive a limited access permit is not a circumstance that falls within the unavoidable circumstance regulation.

Appellant is stating that the circumstance that actually thwarted Appellant's participation was his lack of knowledge in 2005 that 2005 would be a qualifying year because, if he had known that, he would have finalized the sale before the 2005 season. Appellant states that it was not reasonably foreseeable that NMFS would limit the charter halibut fishery and that waiting three months to finalize the sale would make any difference.⁶⁴ Appellant's claimed unavoidable circumstance is lack of knowledge in 2005 as to the future requirements for a charter halibut permit.

As to the circumstance of lack of knowledge, it would have been impossible for Appellant to know, in 2005, that the charter halibut fishery *would* be limited and that 2005 *would* be a qualifying year because that did not happen until the Secretary of Commerce adopted the final rule in January 2010.⁶⁵

I construe Appellant's claim to be that he did not know that the charter halibut fishery *might* be limited and that 2005 *might* be a qualifying year. Under the unavoidable circumstance regulation, the claimed circumstance must be unique to the applicant.⁶⁶ This is not a circumstance that was unique to Appellant. In 2005, every participant in the charter halibut fishery was faced with uncertainty as to whether, and how, the charter halibut fishery might be limited in the future.

Appellant's testimony illustrates that. Appellant testified at one point that he had no way that charter halibut fishery would be limited.⁶⁷ But later in the hearing, in response to a question by the administrative judge whether Appellant thought he was disadvantaged compared to others in the fleet to know something was coming "down the pike," Appellant responded: "I don't believe I was disadvantaged. You know, I guess, in the fisheries, in the fishing industry, until something is really going to be in stone, [indecipherable phrase] it's almost like hearsay."⁶⁸

⁶⁴ Appeal at 9 – 11; Affidavit of Appellant at ¶ 19 (Aug. 15, 2010).

⁶⁵ Final Rule, 75 Fed. Reg. 554 (Jan. 5, 2010).

⁶⁶ 50 C.F.R. § 300.67(g)(2)(ii)(B).

⁶⁷ At the hearing, the following exchange occurred: "Question from Appellant's Attorney: [D]id you have any way to know at that time that this fishery might be on as limited entry? Answer by Appellant: No, none." Testimony of Appellant at 26 min.

⁶⁸ Testimony of Appellant at 41 min.

Appellant is saying that if he had known that 2005 might be a qualifying year, he would have participated in the charter halibut fishery to receive a permit. That is considered speculative participation and NMFS generally seeks to discourage speculative participation.⁶⁹

The unavoidable circumstance regulation is designed to be a “limited” exception to actual participation, patterned after the unavoidable circumstance provision in the License Limitation Program.⁷⁰ The types of situations recognized in the License Limitation Program were circumstances such as significant damage to an applicant’s vessel or serious medical problems.⁷¹ These are circumstances beyond the control of the applicant; these circumstances prevent the applicant from participating in the fishery; these circumstances remove an essential element necessary for the applicant’s participation, such as a functioning vessel or a vessel operator. In the final charter halibut rule, NMFS recognizes damage to vessels as the type of problem that could be an unavoidable circumstance.⁷²

Appellant’s position would convert the unavoidable circumstance regulation from a limited exception, based on proof about relatively objective events, such as catastrophic damage or serious illness, to a wide-open exception that could be based on proof about an applicant’s lack of subjective knowledge about the possibility of limited access and gradations of that knowledge.

If lack of knowledge that 2005 might be a qualifying year were an unavoidable circumstance, almost every applicant who began a charter halibut fishing business in 2006, and was still operating a business in 2008, would have an unavoidable circumstance claim because no doubt many would have started their businesses in 2005 if they had known they would qualify for a permit if they did that.

If lack of knowledge that 2005 would or might be a qualifying year were an unavoidable circumstance, and a basis for NMFS to issue a permit to an applicant that did not participate in the qualifying period, it would seriously undermine the requirement for actual participation in the qualifying period as a condition to receive a permit.

In comments on the charter halibut rule, many persons who participated in 2006, but not 2004 or 2005, objected to participation in 2004 or 2005 as a requirement for a permit.⁷³

⁶⁹ That is why NMFS published the control date notice. Final Rule, 75 Fed. Reg. 554, 571, 574 (Jan. 5, 2010) (NMFS response to Comment 40 and Comment 49).

⁷⁰ Final Rule, 75 Fed. Reg. 554, 557 (Jan. 5, 2010).

⁷¹ See, e.g., OAA Appeal No. 00-0013 (Apr. 12, 2002)(significant damage to vessel); OAA Appeal No. 02-0040 (June 14, 2005)(applicant undergoing [REDACTED]). These decisions are available on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/index/appeals/decisionsbynumber.asp>

⁷² Final Rule, 75 Fed. Reg. 554, 575 (Jan. 5, 2010)(Comment 54)(“A major breakdown of a charter vessel within [the qualifying period or the recent period] could prevent a business from qualifying for a transferable or non-transferable permit. Such cases may be appealed pursuant to 50 C.F.R. 679.43.”).

⁷³ The exclusion of applicants from initial issuance of one or additional charter halibut permits if they began, or expanded, their charter business in 2006 was the subject of intense public comment on the

NMFS did not modify or eliminate the requirement for participation in the qualifying period (2004, 2005). Under the charter halibut regulation, I do not have grounds to treat this applicant differently from the many other persons who participated in the charter halibut fishery as a business owner in 2006, 2007 and 2008 but could not receive a permit because they did not participate as a business owner in 2004 or 2005.

I therefore conclude that Appellant is not eligible for a charter halibut permit through initial issuance.⁷⁴

CONCLUSIONS OF LAW

1. NMFS does not have authority to credit trips that were taken and reported under one person's ADF&G Business License to another person.
2. Appellant does not meet several requirements of the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g)(2), with respect to his lack of participation in 2005.
3. Appellant did not have a specific intent to operate a charter halibut fishing business in 2005 within the meaning of 50 C.F.R. § 300.67(g)(2)(i).
4. Appellant's busy schedule during the charter halibut season was not reasonably unforeseeable within the meaning of 50 C.F.R. § 300.67(g)(2)(ii)(c).
5. Appellant did not take all reasonable steps to overcome his busy schedule within the meaning of 50 C.F.R. § 300.67(g)(2)(iv).
6. Appellant's lack of knowledge that 2005 would or might be a qualifying year for a charter halibut permit was not a circumstance that was unique to Appellant within the meaning of 50 C.F.R. § 300.67(g)(ii)(B).
7. An applicant's failure to purchase a vessel, and operate his own charter halibut fishing business, in a qualifying year due to lack of knowledge that the government might require participation in that year as a requirement for a limited access permit is not a circumstance that falls within the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g).
8. Appellant does not meet the requirements in federal regulation to receive a charter halibut permit through initial issuance.

proposed rule. Comments 3, 4, 5, 45, 49, 51, 76, 108, 142, 143, 151, 156 touched on this subject. NMFS responded to each comment. Final Rule, 75 Fed. Reg. 554, 563 – 595 (Jan. 5, 2010).

⁷⁴ The provision for obtaining a permit by transfer is at 50 C.F.R. § 300.67(i). RAM's website has information on permit transfers under "Summary of CHP [charter halibut permit] Transfers: http://www.fakr.noaa.gov/ram/charter/apps_permits.htm.

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on March 15, 2012, 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 February 24, 2012, 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 issuance of a Decision on Reconsideration.



Mary Alice McKeen
Administrative Judge

Date issued: February 14, 2012