



logbook fishing trips in one year of the qualifying period (2004 or 2005) that were reported under the applicant's ADF&G Business Owner License.<sup>6</sup> The minimum participation requirement for a transferable permit is fifteen bottomfish logbook fishing trips in one year of the qualifying period (2004 or 2005) with one vessel that were reported under the applicant's ADF&G Business Owner License.<sup>7</sup> Appellant reported twenty-six bottomfish logbook fishing trips with one vessel in 2004 and thirty-one bottomfish logbook fishing trips with one vessel in 2005.<sup>8</sup> Appellant therefore met the participation requirement in the qualifying period for a transferable permit.

In the IAD, RAM determined, however, that Appellant did not meet the minimum participation requirement in the recent period for a non-transferable permit (five halibut logbook fishing trips in 2008)<sup>9</sup> or a transferable permit (fifteen halibut logbook fishing trips with the same vessel in 2008).<sup>10</sup> According to the official charter record, Appellant did not report any halibut logbook fishing trips in 2008 under his ADF&G Business Owner License.<sup>11</sup>

On appeal, Appellant does not dispute that he did not submit any logbook trip reports to ADF&G for halibut logbook fishing trips that occurred in 2008. Appellant argues that he meets the requirements of the unavoidable circumstance regulation for 2008 based on his captain's failure to report Appellant's 2008 trips according to the weekly schedule in the logbook and based on ADF&G's unwillingness to accept Appellant's 2008 logbook trip reports for entry into the ADF&G database when he tried to report the trips in February 2009.<sup>12</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>13</sup> Therefore, RAM did not determine whether Appellant met the requirements of the unavoidable circumstance regulation.

Appellant can file this appeal because he is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b). Appellant has the burden to prove that the IAD is incorrect and that he meets the requirements for a charter halibut permit.

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<sup>6</sup> 50 C.F.R. § 300.67(b)(1)(i). An applicant chooses 2004 or 2005 as the "applicant-selected" year to determine if the applicant met the participation requirement for a permit. 50 C.F.R. § 300.67f)(1). Appellant chose 2005. Application at 2. But the result would be the same with 2004 trips.

<sup>7</sup> 50 C.F.R. § 300.67(b)(1)(i).

<sup>8</sup> Official Charter Halibut Record Summary for Appellant (May 5, 2010).

<sup>9</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>10</sup> 50 § 300.67(d)(1)(ii).

<sup>11</sup> Official Charter Halibut Record Summary for Appellant (May 5, 2010).

<sup>12</sup> Post-Hearing Brief by Appellant's Attorney (Oct. 3, 2011); Appellant's Post-Hearing Brief by Appellant (Oct. 3, 2011). Appellant's brief is undated but Appellant's attorney submitted it with the attorney's brief which was dated October 3, 2011.

<sup>13</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 the Proposed Rule.

On August 16 and 17, 2011, I held a hearing by telephone.<sup>14</sup> At the hearing, Appellant testified, as did Dora Sigurdsson, Sport Fish Biologist with Research and Technical Services, Division of Sport Fish, Alaska Department of Fish and Game (ADF&G). Ms. Sigurdsson is the ADF&G Staffperson in charge of the ADF&G charter logbook program and decides policy questions regarding the charter logbook program. Ms. Sigurdsson decides what logbook trip reports ADF&G accepts for entry into the ADF&G database and what late logbook trip reports ADF&G refers to State Fish and Wildlife Troopers for possible citation.<sup>15</sup> I will refer to Ms. Sigurdsson as ADF&G Staffperson 1.

On April 12, 2012, I held a supplemental hearing by telephone at which three persons testified: Appellant, Bob Powers and Mukhya Khalsa. Mr. Powers is a Research Analyst with the Division of Sport Fish, ADF&G, and works under Ms. Sigurdsson. Mr. Powers prepares reports on the ADF&G charter logbook database and prepared the ADF&G database for transmission to NMFS so NMFS could create the official charter halibut record. Mr. Powers is the computer data person for the ADF&G charter logbook program.<sup>16</sup> I will refer to Mr. Powers as ADF&G Staffperson 2.

Mukhya Khalsa is a Computer Specialist with the Information Services Division, NMFS Alaska Region. Ms. Khalsa received the ADF&G database from the State and used that data to create the official charter halibut record. I will refer to her as NMFS Computer Specialist.

I have carefully reviewed the entire record of this appeal. I conclude that the record contains sufficient information upon which to decide this appeal.<sup>17</sup> I therefore close the record and issue this decision.

For the reasons that follow, I conclude that that Appellant does not meet the unavoidable circumstance regulation for 2008 based on his captain's failure to report the trips to ADF&G because Appellant could have avoided that with reasonable supervision of the captain. However, I conclude that Appellant does meet the unavoidable circumstance regulation for 2008 because Appellant was prevented from reporting his trips in February 2009 by ADF&G policy that only accepted logbook trip reports at that date if the business had reported some trips earlier in the season. I conclude that Appellant meets the requirements for a transferable permit with an angler endorsement of six for use in IPHC Area 3A.

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<sup>14</sup> Order Scheduling Hearing (June 24, 2011).

<sup>15</sup> Testimony of ADF&G Staffperson 1, at 44 – 45 min. (Aug. 16, 2011); Testimony of ADF&G Staffperson 2, at 4 – 6 min. (Tape 1, April 12, 2012).

<sup>16</sup> Testimony of ADF&G Staffperson 2, at 20 min. (Tape 1, April 12, 2012).

<sup>17</sup> 50 C.F.R. § 679.43(g)(2).

## ISSUE

Did Appellant show by a preponderance of evidence in the record that he meets the requirements of the unavoidable circumstance regulation for 2008?

## FINDINGS OF FACT

1. Appellant has been a commercial fisherman in Alaska since 1981<sup>18</sup> and has operated a charter fishing business since 1999.<sup>19</sup>
2. Appellant reported the following number of trips taken under his ADF&G Business Owner Licenses in the following years:
  - 2004 – twenty-six bottomfish logbook fishing trips with *Vessel*;<sup>20</sup>
  - 2005 – thirty-one bottomfish logbook fishing trips with *Vessel*;<sup>21</sup>
  - 2006 – twenty-seven halibut logbook fishing trips with *Vessel*;<sup>22</sup>
  - 2007 -- twenty-nine halibut logbook fishing trips with *Vessel*;<sup>23</sup>
  - 2009 -- twenty-one halibut logbook fishing trips with *Vessel*;<sup>24</sup>
  - 2010 -- twenty-six halibut logbook fishing trips with *Vessel*.<sup>25</sup>
3. The greatest number of clients that Appellant reported on a trip with *Vessel* in 2004 and 2005 was six.<sup>26</sup>
4. Before 2008, Appellant operated the charter vessel himself.<sup>27</sup>

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<sup>18</sup> Testimony of Appellant at 37 min. (Aug. 16, 2011); Letter from Appellant to RAM (rec'd Feb. 18, 2010). I use February 18, 2010, as the date of this letter.

<sup>19</sup> Letter from Appellant to RAM (Feb. 18, 2010); Letter from Appellant to OAA (rec'd Feb. 24, 2011) with Memo from ADF&G, to Appellant (undated) showing the numbers of Appellant's Business Licenses, Guide Licenses and Logbooks from 1999 to 2004. I use February 24, 2011, as the date of this letter.

<sup>20</sup> Official Record Summary for Appellant (May 5, 2010). A bottomfish logbook fishing trip is a trip where the applicant reported in a logbook 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).

<sup>21</sup> Official Record Summary for Appellant (May 5, 2010).

<sup>22</sup> Letter from Appellant to OAA (Mar. 31, 2011) with ADF&G Printout of Appellant's Logbook Trips for 2006. In 2006 and after, ADF&G required operators to report halibut specifically. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009). 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).

<sup>23</sup> Letter from Appellant to OAA (Feb. 24, 2011) with ADF&G Printout of Appellant's 2007 Logbook Trips.

<sup>24</sup> Letter from Appellant to OAA (Feb. 24, 2011) with ADF&G Printout of Appellant's 2009 Logbook Trips.

<sup>25</sup> Letter from Appellant to OAA (Mar. 31, 2011) with ADF&G Printout of Appellant's 2010 Logbook Trips.

<sup>26</sup> Official Record Summary for Appellant (May 5, 2010).

<sup>27</sup> Letter from Appellant to RAM (Feb. 18, 2010); Testimony of Appellant at 36 min. (Aug. 16, 2011).

5. In 2008, Appellant decided that he was too spread out between commercial fishing in the summer, in particular the State water black cod opening, and the charter fishery, which also occurs in the summer.<sup>28</sup>
6. In 2008, for the first time, Appellant hired a captain to operate his charter vessel.<sup>29</sup>
7. Appellant hired Captain to operate *Vessel* in 2008. Captain was a capable charter vessel captain and had operated a charter vessel in Hawaii. The year 2008 was Captain's first year operating a charter vessel in Alaska.<sup>30</sup>
8. In 2008, as in other years, ADF&G made available Saltwater Charter Vessel Logbooks to businesses that held an ADF&G Business Owner License.<sup>31</sup> Each logbook had fifty pages and each page had a white original to send to ADF&G and a pink carbon copy for the owner to retain.<sup>32</sup> The front of each logbook had instructions and a weekly schedule for turning in logbook pages.<sup>33</sup>
9. In 2008, Appellant obtained two logbooks from ADF&G to report trips by *Vessel*: Logbook [REDACTED] and Logbook [REDACTED].<sup>34</sup>
10. At the beginning of the season, Appellant gave Captain a logbook and explained to him how to fill it out.<sup>35</sup>
11. Appellant believed and assumed that Captain would submit the logbook pages in accord with the instructions and schedule in the logbook.<sup>36</sup>
12. On appeal, Appellant submitted copies of pages from Logbooks [REDACTED]. Each page is signed by Captain or Appellant under "Guide Signature" and has the following certification: "I certify that the information contained in this document is true and correct to the best of my knowledge."
13. Between July 8 and August 17, 2008, Captain or Appellant took *Vessel* on twenty-four trips where anglers caught, or tried to catch, halibut.<sup>37</sup> Appellant or Captain

<sup>28</sup> Testimony of Appellant at 37 min. (Aug. 16, 2011).

<sup>29</sup> Letter from Appellant to RAM (Feb. 18, 2010); Testimony of Appellant at 41 min. (Aug. 16, 2011).

<sup>30</sup> Written Statement by Captain (Apr. 28, 2010); Testimony of Appellant at 39 min. (Aug. 16, 2011).

<sup>31</sup> 2008 ADF&G Logbook Instructions at ii: "(A logbook **WILL NOT** be issued without a current ADF&G Business License Number.) (emphasis in original), Exhibit 1 to Order Scheduling Hearing (June 24, 2011); Testimony of ADF&G Staffperson 1 at 8 min. (Aug. 16, 2011).

<sup>32</sup> Letter from Appellant to RAM (rec'd Feb. 18, 2010) with Appellant's copy of pages from Logbook [REDACTED] and Logbook [REDACTED]; Testimony of Appellant at 44 min. (Aug. 16, 2011)

<sup>33</sup> 2008 ADF&G Logbook Instructions at ii – v, Exhibit 1 to Order Scheduling Hearing (June 24, 2011).

<sup>34</sup> Letter from Appellant to RAM (Feb. 18, 2010) with Appellant's copy of pages from Logbook [REDACTED] and Logbook [REDACTED]

<sup>35</sup> Testimony of Appellant at 40 min. (Aug. 16, 2011).

<sup>36</sup> Letter from Appellant to RAM (Feb. 18, 2010); Testimony of Appellant at 41 min. (Aug. 16, 2011).

<sup>37</sup> Letter from Appellant to RAM (Feb. 18, 2010) with the following: Form 1099 to Appellant for 2008 (payment for trips by VESSEL); Outside Reservation Agent Reports for trips by VESSEL (July 18, 2008,

recorded those trips in Logbooks [REDACTED] Captain operated the vessel for sixteen trips and Appellant for eight trips.

14. For each trip, Captain or Appellant recorded information in Logbook [REDACTED] or Logbook [REDACTED] that would meet the definition of a halibut logbook fishing trip if the trip had been reported to ADF&G.<sup>39</sup> Captain or Appellant recorded one or more of the following pieces of information about each trip: the number of halibut kept, the number of halibut released, the statistical area where bottomfish fishing occurred or the number of hours that the vessel engaged in bottomfish fishing.<sup>40</sup>
15. Captain did not submit any logbook pages to ADF&G in 2008.<sup>41</sup>
16. On January 5, 2009, Appellant's children went back to school after the holiday break.<sup>42</sup> After that, Appellant went to Seward to inspect his boat and, he thought, to review **copies** of the logbook trip reports. He panicked when he discovered the **original** logbook trip reports from Logbook [REDACTED] on the boat.<sup>43</sup>
17. After Appellant discovered the original logbook pages, he called ADF&G, explained his problem and set up a meeting with ADF&G Staffperson 1.<sup>44</sup>
18. ADF&G Staffperson 1 is a Sport Fish Biologist with the Division of Sport Fish and has overseen the Sport Fish Logbook Program Statewide since 2004.<sup>45</sup> ADF&G Staffperson 1 determines whether ADF&G will accept late logbook submissions for entry into the ADF&G database and whether ADF&G Sport Fish will refer a person who submits late logbook pages to ADF&G Enforcement for possible citation.<sup>46</sup>

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Aug. 8, 2008, Aug. 24, 2008; Purchase Order for three charter trips (Aug. 10, 2008); Invoices to Clients (2008); Appellant's Copies of Logbook [REDACTED].

<sup>38</sup> For this finding, I rely on Appellant's copies of Logbook [REDACTED]. All pages have Appellant's ADF&G Business Owner License number recorded on them. Captain's pages also have Captain's Guide License recorded on them. Appellant's pages only have the ADF&G Business Owner License number. I assume that Appellant had a combined Business Owner/Guide License.

<sup>39</sup> Appellant's copies of Logbook [REDACTED]: each trip is signed by either Appellant or Captain as guide.

<sup>40</sup> 50 C.F.R. § 300.67(f)(3)(definition of halibut logbook fishing trip: an applicant must have reported the trip with one of those four items of information for the trip to be a halibut logbook fishing trip).

<sup>41</sup> Letter from Appellant to RAM (Feb. 18, 2010).

<sup>42</sup> School Calendar submitted by Attorney for Appellant (April 14, 2012).

<sup>43</sup> Testimony of Appellant at 44 min. (Aug. 16, 2011) ("That's when the panic button got hit."); Testimony of Appellant (Tape 1, April 12, 2012).

<sup>44</sup> Testimony of Appellant at 44 min. (Aug. 16, 2011); Testimony of Appellant at 21 – 22 min. (Tape 1, April 12, 2012).

<sup>45</sup> Testimony of ADF&G Staffperson 1 at 4 – 6 (Aug. 15, 2011); Testimony of ADF&G Staffperson 2 (April 12, 2012).

<sup>46</sup> Letter from Appellant to RAM (Feb. 18, 2010); Testimony of ADF&G Staffperson 1 at 44 – 45 min. (Aug. 16, 2011).

19. It was ADF&G policy to routinely accept logbook trip reports until ADF&G closed data entry for the year. It did not matter if the business was submitting the trips after the weekly reporting schedule in the logbook.<sup>47</sup>
20. ADF&G closed its database for routine acceptance of logbook trip reports for 2008 trips between January 15 and January 31 of 2009.<sup>48</sup>
21. Per ADF&G policy, ADF&G accepted logbook trip reports after ADF&G had closed the database for routine acceptance of logbook trip report, but before ADF&G prepared its annual data summary, if the person had submitted some trips during the year, the person contacted ADF&G Staffperson 1 prior to submission and the person provided an explanation why they were submitting the logbook pages that late.<sup>49</sup>
22. ADF&G entered trips into the ADF&G database for 2008 based on reports that ADF&G received on the following dates: 98 trips reported to ADF&G between January 1 and January 15, 2009; nine trips reported to ADF&G on January 16, 2009; and twenty-one trips reported to ADF&G on February 11, 2009.<sup>50</sup>
23. ADF&G accepted the twenty-one trips reported to ADF&G on February 11, 2009, in accord with ADF&G policy, namely the person(s) reporting those trips had submitted some trips during the 2008 season, the person(s) contacted ADF&G Staffperson 1 prior to submission and the person(s) provided an explanation why the trip reports were being submitted on that date.<sup>51</sup>

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<sup>47</sup> Testimony of ADF&G Staffperson 1 at 17 – 20 (Aug. 16, 2011).

<sup>48</sup> Testimony of ADF&G Staffperson 1 at 22 min. (Aug. 16, 2011) (“We usually stop receiving previous year data on the 15<sup>th</sup> of January of the next year. So 2008 data we would not accept any more data after January 15<sup>th</sup>, 2009.”) (Aug. 16, 2011); Testimony of ADF&G Staffperson 1 at 11 min. (Aug 16, 2011) (“Even if you fished in May and June of the previous year, if I get that data before the end of January of the following year, it would get submitted into the official data record, even though they are nearly five, six months late.”) (Aug. 17, 2011); Testimony of ADF&G Staffperson 2 at 5:30 min. (Tape 1, April 12, 2012 ([ADF&G Staffperson1] said in order for us to maintain this schedule [of issuing our final summary of the year’s data for 2008], all of 2008 logbook data must have been submitted by the industry by the end of January 2009.”).

<sup>49</sup> Testimony of ADF&G Staffperson 2 at 5 – 8 min. (Tape 1, April 12, 2012) (describing ADF&G policy for accepting logbook reports after ADF&G closed the database). See Scott Meyer, Bob Powers, ADF&G, Division of Sport Fish, “Evaluation of Alaska Charter Logbook Data for 2006 – 2008,” A Report to the North Pacific Fishery Management Council at 14 (Oct. 2009) (“Operators can and have been penalized for late logbooks, but this presents a paradox. If operators discover logbook pages that were inadvertently not submitted, their fear of being fined may deter them from submitting them late. The more aggressively the department pursues enforcement of late logbooks, the more likely late data will not be submitted, which could lead to underreporting of harvest. The department currently allows some late logbook submissions without penalty if accompanied by an explanation.”)

<sup>50</sup> Testimony of ADF&G Staffperson 2 at 18 – 23 min. (Tape 1, April 12, 2012).

<sup>51</sup> Testimony of ADF&G Staffperson 2 at 18 – 23 min. (Tape 1, April 12, 2012). Besides this policy, the record contains no other reason why ADF&G would have accepted twenty-one trips in February 2009.

24. Between February 2 and February 16, 2009, Appellant brought his logbook pages for his 2008 trips to the office of ADF&G Staffperson 1, met with her and explained why he had not submitted any trip reports for 2008.<sup>52</sup>
25. During the meeting, ADF&G Staffperson 1 told Appellant that she could not accept his logbook pages for entry into the ADF&G database.<sup>53</sup> ADF&G Staffperson 1 also told Appellant that, if she accepted them, she would refer him to ADF&G enforcement based on the late submission of these logbooks and a citation might result.<sup>54</sup>
26. Per ADF&G policy, ADF&G did not accept Appellant's 2008 logbook trip reports for entry into the ADF&G database in February 2009 because Appellant was attempting to report all, rather than some, of his trips for 2008.<sup>55</sup>
27. ADF&G transmitted its logbook trip database to NMFS on or about May 27, 2009.<sup>56</sup>
28. NMFS created the official charter halibut record of bottomfish logbook fishing trips and halibut logbook fishing trips from the ADF&G database. If a trip was in the ADF&G database, it was in the official charter halibut record.<sup>57</sup>

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<sup>52</sup> It was difficult to determine a likely date of this meeting. I find by a preponderance of evidence in the record that it was between February 2 and February 16, 2009, based on the following. Appellant went to check on his boat, which is a three hour's drive from his residence, after January 5, 2009; Appellant stayed there a few days; Appellant discovered the logbook pages and was alarmed at finding them; Appellant knew that a limited access program for the charter halibut fishery was in the works and would have been motivated to contact ADF&G regarding the logbook reports; Letter from Appellant to RAM (Feb. 18, 2010) ("I first realized the logbook data had not been submitted during the winter (January '09) when I was in Seward checking on my boat and found the logbook. I contacted [ADF&G Staffperson 1] with the ADF&G logbook program in Anchorage to determine what to do regarding a late submission."); Testimony of Appellant at 44 min. (Aug 16, 2011) ("perhaps not immediately but pretty soon afterward" of finding the logbooks, he telephoned ADF&G Staffperson 1 and went to her office with the logbook pages; if Appellant had tried to submit the logbook pages on before the end of January, ADF&G Staffperson 1 would have accepted the trip reports, testimony quoted in note 48.

<sup>53</sup> Letter from Appellant to RAM Feb. 18, 2010); Testimony of ADF&G Staffperson 1 at 22 min. (Aug. 16, 2011); Testimony of ADF&G Staffperson 1 at 4 – 7 min. (Aug. 17, 2011).

<sup>54</sup> Letter from Appellant to RAM (Feb. 18, 2010); Testimony of ADF&G Staffperson 1 at 11 min. (Aug. 17, 2011).

<sup>55</sup> I make this finding because ADF&G Staffperson 1 accepted twenty-one other trips from another person(s) on February 11, 2009, which was on or around the time that Appellant sought to submit his trips and because ADF&G Staffperson 2 testified that ADF&G Staffperson 1 would not accept trips after ADF&G closed its database if the applicant was seeking to report an entire season of trips. Testimony of ADF&G Staffperson 2 at 5 – 8 min., 18 – 20 min. (Tape 1, April 12, 2012). Appellant met the other requirements for submission after ADF&G closed its database, namely prior contact with ADF&G before coming into the office and an explanation.

<sup>56</sup> Testimony of ADF&G Staffperson 2 at 8 min. (Tape 1, April 12, 2012).

<sup>57</sup> Email from NMFS Computer Specialist to Mary Alice McKeen (April 9, 2012)(Question 3); Testimony of NMFS Computer Specialist at 3 – 10 min. (Tape 1, April 12, 2012); Proposed Rule, 74 Fed. Reg. 18,178, 18,184 (April 21, 2009) ("There are several reasons for relying only on the ADF&G charter vessel logbook database).

29. NMFS issued charter halibut permits to persons that met the participation requirements for transferable and non-transferable permits according to the participation data in the official record.<sup>58</sup>

## PRINCIPLES OF LAW

In March 2007, pursuant to section 773c(c) of The Halibut Act, 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.<sup>59</sup>

In January 2010, pursuant to section 773c of The Halibut Act, the Secretary of Commerce adopted the regulations implementing the Charter Halibut Limited Access Program (CHLAP).<sup>60</sup> The regulations are found at 50 C.F.R. §§ 300.61, 300.66, and 300.67.

NMFS may issue charter halibut permits only to applicants that meet the requirements for a charter halibut permit in the charter halibut regulations. The following is a brief description of the features of the CHLAP that are relevant to this appeal.

The official charter halibut record is the information prepared by NMFS on participation in charter halibut fishing that NMFS used to implement the CHLAP.<sup>61</sup> NMFS based the official charter halibut record on participation data it received from ADF&G.<sup>62</sup> NMFS accepts all claims that are consistent with the official charter halibut record.<sup>63</sup> If an applicant maintains that the official record is incorrect, the applicant has the burden to prove that the official record is incorrect.<sup>64</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 meet the minimum participation requirements for a permit.<sup>65</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,<sup>66</sup> and a recent participation period, which is the sport fishing season for halibut in 2008.<sup>67</sup>

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<sup>58</sup> Email from NMFS Computer Specialist to Mary Alice McKeen (April 9, 2012)(Question 3); Testimony of NMFS Computer Specialist at 3 – 10 min. (Tape 1, April 12, 2012); 50 C.F.R. § 300.67(h)(3) (“NMFS will create the official charter halibut record and will accept all application claims that are consistent with the official charter halibut record.”)

<sup>59</sup> Proposed Rule, 74 Fed. Reg. 18,178, 18,182 (Apr. 21, 2009). See Council Motion on Charter Halibut Moratorium in Area 2C and 3A (Mar. 31, 2007), available on NMFS Alaska Region website, [http://alaskafisheries.noaa.gov/npfmc/current\\_issues/halibut\\_issues/CharterHalibutMotion307.pdf](http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/CharterHalibutMotion307.pdf).

<sup>60</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

<sup>61</sup> 50 C.F.R. § 300.67(f)(5).

<sup>62</sup> Proposed Rule, 74 Fed. Reg. 18,178, 18,183 (Apr. 21, 2009).

<sup>63</sup> 50 C.F.R. § 300.67(h)(3).

<sup>64</sup> See 50 C.F.R. § 300.67(h)(4) & (5).

<sup>65</sup> 50 C.F.R. § 300.67(b)(1)(ii). A person can be an individual, a corporation, firm or association. 50 C.F.R. § 300.61 (definitions).

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 limits for reporting the trip in effect at the time of the trip.<sup>68</sup>

A bottomfish logbook fishing trip occurred in the qualifying period (2004, 2005). A halibut logbook fishing trip occurred in the recent period (2008).<sup>69</sup>

An applicant must prove different levels of participation to receive a non-transferable and a transferable permit. To receive a non-transferable charter halibut permit, an applicant must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005), and a minimum of five halibut logbook fishing trips in the recent participation period (2008).<sup>70</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, 2005), and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).<sup>71</sup>

Under the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), an applicant that met the participation requirement in the qualifying period, but not the recent period, may be treated as though the applicant met the participation requirement in the recent period, if the applicant proves 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>72</sup>

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<sup>66</sup> 50 C.F.R. § 300.67(f)(6).

<sup>67</sup> 50 C.F.R. § 300.67(f)(7).

<sup>68</sup> 50 C.F.R. § 300.67(f)(4).

<sup>69</sup> In 2004 and 2005, ADF&G did not require participants in the charter halibut fishery to report halibut specifically but did require participants to report halibut effort as bottomfish effort. Therefore, for 2004 and 2005, the regulation evaluates an applicant's participation by bottomfish logbook fishing trips, not halibut logbook fishing trips. Beginning in 2006, ADF&G required participants to report halibut specifically. Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

<sup>70</sup> 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

<sup>71</sup> 50 C.F.R. § 300.67(d)(1)(i)&(ii).

<sup>72</sup> 50 C.F.R. § 300.67(g)(1)(i) – (iv).

Appellant must satisfy each requirement in the unavoidable circumstance regulation and must prove any fact in support of his claim by a preponderance of evidence in the record.

## ANALYSIS

### **Did Appellant show by a preponderance of evidence in the record that he meets the requirements of the unavoidable circumstance regulation for 2008?**

Appellant reported twenty-six bottomfish logbook fishing trips with *Vessel* in 2004 and thirty-one bottomfish logbook fishing trips with *Vessel* in 2005. Based on either year, he meets the participation requirement in the qualifying period for a transferable permit.

In the recent participation period (2008), Appellant took twenty-four trips in 2008 with the same vessel where anglers caught, or tried to catch halibut.<sup>73</sup> Captain or Appellant recorded in ADF&G logbooks one or more of the following pieces of information about each of those twenty-four trips: the number of halibut caught, the number of halibut released, the statistical area where bottomfish fishing occurred and the number of boat hours that the vessel engaged in bottomfish fishing.<sup>74</sup> This was the information that had to be recorded in a logbook for a trip to be a halibut logbook fishing trip.<sup>75</sup>

But a trip not only had to be recorded in a logbook. It had to be reported. An applicant receives a non-transferable charter halibut permit under the standard participation requirements if the applicant “reported” five halibut logbook fishing trips that occurred in 2008 to ADF&G.<sup>76</sup> An applicant receives a transferable charter permit under the standard participation requirements if the applicant “reported” fifteen halibut logbook fishing trips that occurred in 2008 to ADF&G.<sup>77</sup> Appellant did not report any 2008 trips to ADF&G.

The only way that Appellant could receive a permit is if he proves he meets the requirements of the unavoidable circumstance regulation with respect to his lack of reported participation in 2008.<sup>78</sup> The typical unavoidable circumstance claim is where something prevented the applicant from actually taking the trips where anglers caught, or tried to catch, halibut. These are circumstances such as damage to a vessel, illness of a business owner or illness of a family member whom the business owner had responsibility to care for.<sup>79</sup>

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<sup>73</sup> Finding of Fact 13.

<sup>74</sup> Finding of Fact 14.

<sup>75</sup> 50 C.F.R. §300.67(f)(3).

<sup>76</sup> 50 C.F.R. § 300.67(b)(1)(ii)(B).

<sup>77</sup> 50 C.F.R. § 300.67(d)(1)(ii)

<sup>78</sup> 50 C.F.R. § 300.67(g)(1)(for applicants that met the standard participation requirement in the qualifying period but not the recent period)

<sup>79</sup> See, e.g., Decision in Appeal 10-0006 (Nov. 18, 2010)(applicant’s mother had [REDACTED]; Decision in Appeal 10-0005 (Mar. 15, 2011)(damage to vessel); Decision in Appeal 10-0049 (Dec. 30, 2011)

But an applicant can prove an unavoidable circumstance claim if an applicant took the trips but an unavoidable circumstance prevented the applicant from reporting the trips. In Appeal 10-0023, an applicant met the requirements of the unavoidable circumstance regulation because staff in a local ADF&G office would not sell the applicant an ADF&G Business Owner License, and provide him a logbook, in December 2005 because a redesigned logbook was due out at the beginning of January 2006.<sup>80</sup> The applicant took the trips in December 2005. The unavoidable circumstance was that ADF&G's actions in not selling the applicant a license prevented the applicant from reporting the trips.

Appellant states that two circumstances prevented him from reporting the trips: Captain's failure to report the trips in 2008 and ADF&G's unwillingness to accept his trip reports in February 2009. I examine each claim.

**A. Does Appellant meet the unavoidable circumstance regulation based on Captain's failure to submit logbook trip reports?**

I conclude that Captain's failure to submit logbook trips reports was not an unavoidable circumstance and was not a reasonably unforeseeable circumstance. Since an appellant must meet each requirement in the unavoidable circumstance regulation, I do not examine whether this circumstance meets the other requirements of the regulation.

Section (ii)(A). Was Captain's failure to report the trips an unavoidable circumstance? [50 C.F.R. § 300.67 (g)(1)(ii)(A)]

I conclude Captain's failure to report the trips was not an unavoidable circumstance, within the meaning of the unavoidable circumstance regulation, because this circumstance was avoidable with reasonable supervision by Appellant.

It was the business owner's responsibility to make sure the trips are reported. The ADF&G Logbook Instructions state: "It is the responsibility of the business owner (owner of the sport fish operator's license) to ensure that all data for fishing activities from January 1, 2008 through December 31, 2008 is submitted to ADF&G in the manner previously described."<sup>81</sup>

Here, Appellant hired a captain who was working in Alaska for the first time. Appellant testified that he explained to the Captain how to fill out the logbook pages – and they

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(applicant had [REDACTED]). These decisions are available on the NAO website:

<http://www.nmfs.noaa.gov/mb/appeals/decisionsbyissuancedate.htm>

<sup>80</sup> Decision in Appeal 10-0023 (Nov. 23, 2011). Appellant had a copy of this decision. Email from Mary Alice McKeen to Appellant's Counsel (Apr. 10, 2012). The Decision stated that ADF&G local staff twice dissuaded the applicant from purchasing a logbook in December 2005. Technically, a person purchases the ADF&G Business Owner License and Sport Fish Guide License, not the logbook. See AS (Alaska Statute) 16.40.260(a)(3); AS 16.40.270(a)(5). But a person must show proof of both these licenses before ADF&G will issue a logbook. ADF&G 2008 Logbook at ii, Exhibit 1 to Order Scheduling Hearing (June 24, 2011).

<sup>81</sup> ADF&G Logbook Instructions for 2008 at iii, Exhibit 1 to Order Scheduling Hearing (June 24, 2011).

are properly filled out – but he did not explain to Captain that Captain had to submit them to ADF&G or how to do that.<sup>82</sup> If he had, Captain would have submitted them. He did in subsequent years.<sup>83</sup>

Appellant assumed that Captain would read and follow the ADF&G Instructions. Captain did not. If Appellant himself had not turned in the logbook pages because he had not read the instructions, he could not claim an unavoidable circumstance, unless the failure to read or comprehend was due to an unavoidable circumstance, such as a medical condition. Appellant cannot be held to a lesser standard because he delegated his duty to submit the logbooks to his captain.

Appellant states that it is typical within the charter industry for business owners to rely on captains to submit logbook pages.<sup>84</sup> I accept that it is the industry practice for a business owner to rely on the captain to submit the logbook pages. But it is not credible that it is an industry practice to rely on a captain operating in Alaska for the first time to submit the logbook pages without making sure that the captain knew it was his job to do that and how to do it.

The circumstance of Captain not submitting the logbooks was avoidable if Appellant had expressly instructed Captain to turn in the logbooks, if Appellant had checked with Captain during the summer whether he was doing that or if Appellant had checked the logbooks themselves during the summer

Section (ii)(C). Was Captain's failure to report the trips reasonably unforeseeable? [50 C.F.R. § 300.67(g)(1)(ii)(C)]

Based on the same facts, I conclude Captain's failure to report the trips was not reasonably unforeseeable as required by 50 C.F.R. § 300.67(g)(1)(ii)(C). I conclude that it was not reasonably unforeseeable that a first-time captain in Alaska might not read the Logbook Instructions and realize that he had to turn the logbook pages into the State.

Appellant states: "The bottom line is that I made a bone headed mistake; one that could conceivably end my charter career."<sup>85</sup> After Appellant discovered his mistake, he sought to correct it and report the trips to ADF&G but was unable to do that. I examine whether Appellant meets the unavoidable circumstances regulations based on the facts surrounding those events.

**B. Does Appellant meet the unavoidable circumstance regulation based on ADF&G's unwillingness to accept Appellant's 2008 logbook trip reports in February 2009?**

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<sup>82</sup> Testimony of Appellant at 40 – 41min. (Aug. 16, 2011).

<sup>83</sup> Statement by Captain (Apr. 28, 2010)("After learning that I had failed to do what was required in 2008 I made sure that I sent in all of the log book entries in 2009 and I will continue to get those in for 2010.")

<sup>84</sup> Appellant's Post-Hearing Brief at 2 (Oct. 6, 2011).

<sup>85</sup> Letter from Appellant with application (Feb. 18, 2010).

Appellant met with ADF&G Staffperson 1 between February 2 and February 16, 2009.<sup>86</sup> ADF&G would not accept Appellant's logbook trips for entry into ADF&G's logbook database. If Appellant had left his logbook pages with ADF&G, ADF&G would keep the reports for approximately a year and then would have used them for recycled paper.<sup>87</sup> It is fair to say that ADF&G would not allow Appellant to report his 2008 trips to ADF&G in February 2009.

In order to have accurate harvest data, ADF&G works diligently with vessel operators and routinely accepts trip reports that are submitted after the weekly reporting deadlines. According to an ADF&G Report, prepared at the request of the North Pacific Fishery Management Council, ADF&G received 62,000 logbook records in 2008 and ADF&G received 22% of these records after the weekly due date.<sup>88</sup> But ADF&G must prepare an annual summary of logbook data and ADF&G closes its database for routine acceptance of reports of the prior year's trips sometime between January 15 and January 31 of the next year.

Even after ADF&G stops routinely accepting trip reports, ADF&G policy still allows a vessel operator to report trips if the vessel operator had reported some trips during the year, the vessel operator contacts ADF&G Staffperson 1 in advance of submitting the trips and the vessel operator has an explanation for why he is submitting the trips late.<sup>89</sup>

ADF&G allowed a person or persons to report twenty-one trips on February 11, 2009, based on that policy.<sup>90</sup> ADF&G did not allow Appellant to report his trips under that policy because he was attempting to submit all, not merely some, of his trips that occurred in 2008.<sup>91</sup>

Section (i). Did Appellant have a specific intent to operate a charter halibut fishing business in 2008? [50 C.F.R. § 300.67(g)(1)(i)]

Appellant clearly held a specific intent to operate a charter halibut fishing business in 2008. Appellant had all the necessary elements in place to operate a charter halibut fishing business in 2008 much as he had done since 1999. He owned the same vessel. He was operating out of Seward. He had the same contacts for clients. He obtained all the necessary licenses.

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<sup>86</sup> Finding of Fact 24

<sup>87</sup> Testimony of ADF&G Staffperson 1 at 11 – 14 (Aug. 17, 2011).

<sup>88</sup> Scott Meyer, Bob Powers, ADF&G, Division of Sport Fish, "Evaluation of Alaska Charter Logbook Data for 2006 – 2008," A Report to the North Pacific Fishery Management Council at Table 1 (Oct. 2009), hereinafter ADF&G Logbook Data Report. Table 5 shows that most logbook records that were submitted after the weekly due date were submitted within two weeks after the weekly due date. These logbook records were charter trips for all species: king salmon, coho salmon, lingcod, rockfish and halibut. The Report is available at <http://www.fakr.noaa.gov/npfmc/PDFdocuments/halibut/logbookeval909.pdf>.

<sup>89</sup> Finding of Fact 21.

<sup>90</sup> Finding of Fact 23.

<sup>91</sup> Finding of Fact 26.

Appellant changed one key facet of his operation for 2008. Instead of operating his charter vessel by himself, Appellant hired a charter captain whose duties included operating the vessel and reporting the trips to ADF&G. Appellant intended that the captain would report the trips to ADF&G.

And Appellant did operate a charter halibut business in 2008. Appellant or Captain took twenty-four charter halibut fishing trips with Vessel pursuant to the ADF&G Business Owner License issued to Appellant. But, as we have seen, the trips were not reported to AF&G.

Section (ii). Was Appellant's intent thwarted by the circumstance of ADF&G policy allowing a business to report some, but not all, of its 2008 trips in February 2009? [50 C.F.R. § 300.67 (g)(1)(ii)]

The test for thwarting is a "but for" test, namely whether but for the claimed circumstance, the applicant would have had met the participation requirement for a permit. Here, the question is whether, but for ADF&G policy, Appellant would have the participation requirement for a permit.<sup>92</sup>

After ADF&G closed its database for routine entry of data, ADF&G accepted logbook trip reports only if a business was attempting to report some, but not all, of its trips. ADF&G did not accept Appellant's trips in February 2009 because he was attempting to report all of season's trips at that time. If ADF&G had not applied that policy to Appellant, Appellant would have reported twenty-four halibut logbook fishing trips, the trips would have been entered into the ADF&G database and into the official charter halibut record, and Appellant would have met the participation requirement for a permit.<sup>93</sup> I conclude that ADF&G policy thwarted Appellant's reported participation for 2008.

Section (ii)(A). Was the ADF&G policy an unavoidable circumstance?  
[50 C.F.R. § 300.67(g)(1)(ii)(A)]

The ADF&G policy was beyond Appellant's control. Appellant could not insist that ADF&G allow him to report his trips and enter these trips into the ADF&G official database for inclusion in the NMFS official charter halibut record. I conclude the ADF&G policy was an unavoidable circumstance.

Section (ii)(B). Was ADF&G policy a unique circumstance as if affected Appellant? [50 C.F.R. § 300.67(g)(1)(ii)(B)]

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<sup>92</sup> Regional Administrator's Final Decision Granting Appellants A Charter Halibut Limited Access Permit, Appeal 10-0047 at 3 (Mar. 30, 2012): "Rather, I interpret the provision regarding whether one was thwarted from participation as creating a test under which the applicant must demonstrate that, but for the unavoidable circumstance the applicant would have met the minimum requirements to obtain a permit, i.e., they would have conducted at least five halibut logbook fishing trips in 2008."

<sup>93</sup> 50 C.F.R. § 300.67(h)(3) ("NMFS will create the official charter halibut record and will accept all application claims that are consistent with the official charter halibut record.")

I conclude that Appellant experienced a unique circumstance, namely he tried to submit his reports after ADF&G closed its database, but before ADF&G finalized its database for transmission to NMFS, and ADF&G did not accept his reports because he was attempting to submit all of his logbook trips reports for 2008 in February 2009. This was not a circumstance that affected the entire fleet or a segment of the fleet.

Section (ii)(C). Was ADF&G policy unforeseen and reasonably unforeseeable by Appellant? [50 C.F.R. § 300.67(g)(1)(ii)(C)]

Appellant did not foresee that ADF&G would not accept his logbooks for the reason that he was attempting to submit all, rather than some, of his logbooks in February 2009. Nor was it reasonably foreseeable that ADF&G would not accept his logbooks for that reason. ADF&G policy on this matter is not in a published regulation.

Section (iii). Did the circumstance occur of ADF&G not accepting Appellant's trip reports because he was seeking to report all, rather than some, of his trips in February 2009? [50 C.F.R. § 300.67(g)(1)(iv)]

ADF&G did not accept his logbooks for that reason. I conclude that the circumstance occurred.

Section (iv). Did Appellant take all reasonable steps to overcome ADF&G policy of not accepting his trips in February 2009 because he was seeking to report all, rather than some, of his trips? [50 C.F.R. § 300.67(g)(1)(iv)]

Appellant could not take any steps to overcome this policy. ADF&G has the authority to determine which trips it will enter into its database and which trips it will not. ADF&G would not accept Appellant's trips for entry into the database in February 2009. I conclude that Appellant meets all the requirements of the unavoidable circumstance regulation with respect to his lack of reported participation in 2008.

I acknowledge the obvious: Appellant would have met the participation requirement for a permit if Captain had reported the trips. And I have concluded that Captain's failure to report the trips was not an unavoidable circumstance but rather the result of Appellant's mistake in failing to monitor the captain. But Appellant discovered his mistake and would have been able to correct it, and report his trips in February 2009, but for the ADF&G policy that he could not report all his trips at that date.

I am not implying at all that ADF&G policy on accepting trip reports – accepting logbook trip reports from an operator who is submitting some, but not all, trip reports after ADF&G has closed the database – is not valid for ADF&G's purposes.

To repeat, ADF&G received trip data from 62,000 trips in 2008.<sup>94</sup> After ADF&G receives the trip data, it has the important and technically challenging tasks of entering that data, reviewing the data for mistakes, preparing an annual summary of the data

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<sup>94</sup> ADF&G Logbook Data Report. *supra* note 88, at Table 1.

and making that available to government agencies, stakeholders and the general public. ADF&G does an excellent job at these tasks.<sup>95</sup> ADF&G wishes to encourage reporting and it wishes to encourage reporting of trips at a time that allows ADF&G to meet its schedule of issuing a timely annual summary of logbook trip data.

But it is a different question whether NMFS should follow that policy in determining whether an applicant meets the requirements in the unavoidable circumstance regulation for a federal charter halibut permit. The unavoidable circumstance regulation is *only* available to the applicant that did not participate meaningfully in the charter halibut fishery in 2008.<sup>96</sup> The unavoidable circumstance regulation “is limited to person who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized.”<sup>97</sup> In the unavoidable circumstance provision, the charter halibut regulation provides a remedy to the applicant that has no reported trips and does not provide that remedy to the applicant that has some (five) reported trips.

This element of the unavoidable circumstance regulation suggests that the reason why ADF&G did not allow Appellant to report his trips in February 2009 -- because he was seeking to report all rather than some of his 2008 trips -- should not be the basis to deny Appellant a charter halibut permit.

Appellant has participated in the charter halibut fishery since 1999 and would be excluded from the charter halibut fishery entirely unless his unavoidable circumstance claim is recognized. He is the only appellant so situated. Only one other appellant stated that it tried to report logbook trips to ADF&G but could not because ADF&G had closed data entry for 2008.<sup>98</sup> That appellant received three non-transferable permits, was not excluded from the fishery and could not make an unavoidable circumstance claim on any grounds.

Once an applicant meets the requirements in sections (i) to (iv) in the unavoidable circumstance regulation with respect to its lack of participation in 2008, section (v) determines the number and type of permits the applicant will receive.<sup>99</sup>

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<sup>95</sup> ADF&G Logbook Data Report, *supra* note 88; D. Sigurdsson and B. Powers, Alaska Department of Fish and Game, Divisions of Sport Fish and Commercial Fisheries, “Participation, Effort and Harvest in the Sport Fish Business/Guide Licensing and Logbook Programs, 2006 – 2008” (Sep. 2009); D. Sigurdsson and B Powers, Alaska Department of Fish and Game, Divisions of Sport Fish and Commercial Fisheries, “Participation, Effort and Harvest in the Sport Fish Business/Guide Licensing and Logbook Programs, 2009” (Sep. 2010); D. Sigurdsson and B Powers, Alaska Department of Fish and Game, Divisions of Sport Fish and Commercial Fisheries, “Participation, Effort and harvest in the Sport Fish Business/Guide Licensing and Logbook Programs, 2010 (July 2011). ADF&G makes these reports available on its website: [www.sf.adfg.state.ak.us](http://www.sf.adfg.state.ak.us).

<sup>96</sup> An applicant must have less than five reported trips in 2008 to make an unavoidable circumstance claim. If an applicant had between five and fourteen trips in 2008, the applicant would receive a non-transferable permit and could not make an unavoidable circumstance claim to receive a transferable permit. 50 C.F.R. § 300.67(g).

<sup>97</sup> 50 C.F.R. § 300.67(g). This means excluded entirely from initial issuance of a permit.

<sup>98</sup> Decision in Appeal 11-0039 at 4, Finding of Fact 9 (Nov. 11, 2011) available at <http://www.nmfs.noaa.gov/mb/appeals/decisionsbyissuancedate.htm>

<sup>99</sup> 50 C.F.R. § 300.67(g)(1)(v); Proposed Rule, 74 Fed. Reg. 18,178, 18,187 (April 21, 2009).

An applicant receives the number and type of permits based on the applicant's participation in the qualifying period. Appellant took fifteen or more bottomfish logbook fishing trips with one vessel in his applicant-selected year, 2005, and therefore should receive a transferable permit.<sup>100</sup> The highest number of clients that Appellant reported on a trip in 2004 or 2005 was six anglers.<sup>101</sup> Therefore, Appellant's permit should have an angler endorsement of six.<sup>102</sup>

## CONCLUSIONS OF LAW

1. Appellant has shown by a preponderance of evidence in the record that he meets the requirements of the unavoidable circumstance regulation with respect to his lack of reported halibut logbook fishing trips in 2008.
2. Captain's failure to report the logbook trips to ADF&G during the 2008 season is not a circumstance that was unavoidable or reasonably unforeseeable within the meaning of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(1)(ii)(A) and (C).
3. Appellant had a specific intent to operate a charter halibut fishing business in 2008 within the meaning of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(1)(i).
4. ADF&G policy to allow a business to report logbook trips in February 2009 only if the business had reported some trips prior to February 2009 thwarted Appellant's specific intent to operate a charter halibut fishing business in 2008 within the meaning of 50 C.F.R. § 300.67(g)(1)(ii).
5. ADF&G policy to allow a business to report logbook trips in February 2009 only if the business had reported some trips prior to February 2009 is an circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable within the meaning of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(1)(ii)(A), (B) and (C).
6. ADF&G did not allow Appellant to report his logbook trips in February 2009 because Appellant had not reported any trips prior to February 2009; therefore this is at circumstance that occurred within the meaning of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(1)(iii).
7. Appellant took all reasonable steps to overcome ADF&G policy to accept logbook trip reports in February 2009 only if the person had reported trips prior to February

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<sup>100</sup> Finding of Fact 2. Appellant also took fifteen or more trips in 2004.

<sup>101</sup> Finding of Fact 3.

<sup>102</sup> 50 C.F.R. § 300.67(e)(1).

2009 within the meaning of the unavoidable circumstance regulation at 50 C.F.R. § 300.67(g)(1)(iv).

8. Appellant is eligible to receive a transferable charter halibut permit with an angler endorsement of six for use in IPHC Area 3A.

#### DISPOSITION

The IAD that is the subject of this appeal is VACATED. This Decision takes effect on August 24, 2012, unless by that date the Regional Administrator orders review of the Decision.

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, August 6, 2012. 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.

  

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Mary Alice McKeen  
Administrative Judge

Date issued: July 25, 2012