

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 10-0003
)
██████████)
Appellant)
)
August 13, 2010
_____)

STATEMENT OF THE CASE

On May 6, 2010, the Office of Administrative Appeals (OAA) received a timely appeal from ██████████. ██████████ appealed an Initial Administrative Determination (IAD) prepared by the Restricted Access Management (RAM) Program dated April 22, 2010. The IAD denied ██████████ application for a charter halibut permit under the Charter Halibut Limited Access Program (CHLAP).¹

RAM received ██████████ application for a charter halibut fishing via facsimile on April 8, 2010. The application period for charter halibut permits was from February 4, 2010 through April 5, 2010.² The IAD held that ██████████ application for a charter halibut permit could not be accepted for processing because he did not apply by the application deadline of April 5, 2010. ██████████ appealed the determination.

I conclude that the record contains sufficient information upon which to decide this appeal.³ Mr. ██████████ did not request a hearing and I did not hold a hearing because ██████████ has not alleged facts that, if true, would authorize the action he requests.⁴ I close the record and issue a decision.

ISSUE

Does the regulation establishing the Charter Halibut Limited Access Program, 50 C.F.R. § 300.67, require that NMFS deny ██████████ application for a charter halibut permit because he submitted it after the application deadline?

ANALYSIS

In his appeal, ██████████ explained that he was in Florida during the entire application period, that when he left Alaska on January 7, 2010, he was not aware of the pendency of the application

¹ The Charter Halibut Limited Access Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67, primarily § 300.67. This regulation, and all the regulations relating to NMFS, Alaska Region, are available on the NMFS Alaska Region website: www.alaskafisheries.noaa.gov/regs/summary.htm.

² Notice, 75 Fed. Reg. 1595 (Jan. 12, 2010).

³ 50 C.F.R. § 679.43(g)(2).

⁴ 50 C.F.R. § 679.43(g)(3).

period, and that he did not return to his home in Seward until April 7, 2010 (two days after the end of the application period). ██████ stated: “We spend the winter away from Alaska each year and do not have our mail forwarded.”⁵ I accept as true the statements made by ██████ in his appeal.

██████ is aware that his application was submitted after the application period but, citing his long involvement in the business, the small scale of his charter operation but the importance of the income from it to supplement his retirement income, and his ignorance of the application period, he requests that his appeal be approved and that he be issued a charter halibut fishing permit.⁶

The issue is whether the regulation establishing the Charter Halibut Limited Access Program requires that NMFS deny ██████ application for a charter halibut permit because he submitted it after the application deadline of April 5, 2010. I examine the language of the regulation, the purpose of the provision and the treatment of late applications in other limited access programs. I conclude that the regulation requires that NMFS deny ██████ application.

A. Language of Regulation.

The regulation establishing the Charter Halibut Limited Access Program sets out the basic qualifications for a permit:

(b) *Qualifications for a charter halibut permit.* A charter halibut permit for IPHC regulatory area 2C must be based on meeting the participation requirements in area 2C. A charter halibut permit for IPHC regulatory area 3A must be based on meeting participation requirements in area 3A. Qualifications for a charter halibut permit in each area must be determined separately and must not be combined.

(1) *NMFS will issue a charter halibut permit to a person who meets the following requirements:*

(i) *The person applies for a charter halibut permit within the application period specified in the **Federal Register** and completes the application process pursuant to paragraph (h) of this section. [italics added]*

(ii) The person is the individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the AF&G Business Owner Licenses that authorized log book fishing trips that met the minimum participation requirements described in paragraphs (b)(1)(ii)(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.

(A) Reported five (5) bottomfish logbook fishing trips or more during one year of the qualifying period;

⁵ Statement of ██████ (received by Office of Administrative Appeals, May 6, 2010).

⁶ *Id.*

(B) Reported five (5) halibut logbook fishing trips or more during the recent participation period. . . .⁷

The regulation contains no exception to the requirement for a timely application.

The requirement for a timely application is reinforced by the regulatory provision that establishes the application process:

(h)(i) An application period of no less than 60 days will be specified by notice in the Federal Register during which any person may apply for a charter halibut permit. Any application that is submitted . . . after the last day of the application period will be denied.⁸

The Notice in the Federal Register stated:

All persons are hereby notified that they must obtain an application on the Internet or request a charter halibut application from NMFS (see ADDRESSES). The application period for charter halibut permits begins at 8 a.m., A.l.t. on February 4, 010, and ends at 5 p.m. A.l.t. on April 5, 2010. Applicants with incomplete applications will be notified in writing of the specific information necessary to complete the application. *Charter halibut permit applications submitted to NMFS (see ADDRESSES) after 5 p.m. A.l.t. on April 5, 2010, will be considered untimely and will be denied.*⁹

Thus, the language in the regulation and in the Federal Register does not suggest that NMFS may accept an application filed after the application deadline of April 5, 2010.¹⁰

B. Purpose and regulatory history.

In the background for the proposed rule, NMFS describes a timely application as a basic standard for eligibility:

Timely application. The application process is discussed more fully below; however, a basic standard for eligibility to receive an initial charter halibut permit would be to apply during an application period. An application period of no less than 60 days would be announced in the **Federal Register**.¹¹

⁷ 50 C.F.R. § 300.67(b)(1)(i) & (ii). Section (iii) has special rules for an applicant who is a successor-in-interest either to an individual, because the individual has died, or a non-individual entity, such as a corporation, because the corporation has dissolved. 50 C.F.R. § 300.67(b)(1)(iii).

⁸ 50 C.F.R. § 300.67(h)(1)(i).

⁹ Notice, 75 Fed. Reg. 1595, 1595 (Jan. 12, 2010) (italics added).

¹⁰ The only other provision in the charter halibut rule that applies specifically to late applications is that an applicant who files after the application deadline, and then appeals the denial of a permit, will not receive an interim permit pending final agency action on the appeal. 50 C.F.R. § 300.67(h)(6)(i).

¹¹ Proposed Rule, 74 Fed. Reg. 18,178, 18,184 (Apr. 21, 2009) (italics and emphasis in original).

During the notice-and-comment period on the proposed rule, NMFS received no public comment on the application deadline.¹² The only comment that concerned applications was a request that NMFS clarify whether charter halibut permit holders had to apply annually to renew their permit.¹³ They do not.¹⁴

The only change in the final rule that involved the application deadline was a change NMFS made to clarify that, in the sequence of NMFS processing an application, the first step was that the applicant had to have submitted a timely application and meet the minimum participation requirement of five trips in the qualifying period, which is 2004/2005.¹⁵ NMFS described Change # 12 in the final rule as follows:

12. In § 300.67, paragraphs (b) and (d) are revised to clarify the order of determining whether an applicant for one or more charter halibut permits is eligible for any permits, and if so, how many, and whether any will be designated as transferable. . . . The revised paragraphs also better reflect the explanation in the preamble to the proposed rule than did the proposed regulatory text in paragraphs (b) and (d). *The revised paragraphs make no substantive changes in the qualifying criteria, but rather reorganize the proposed rule text of these paragraphs to make clear the following sequence. First, to qualify for any type of permit—non-transferable or transferable—an applicant must apply within the application period and meet the logbook fishing trip requirements described in paragraph (b)(1). Second, if the applicant meets the standards described in paragraph (b), then the number of permits will be determined as described in paragraph (c), which is unchanged from the proposed rule.*¹⁶

The regulatory history reinforces the language of the regulation, namely, that to receive a charter halibut permit, an applicant must submit an application by the application deadline.

C. Prior limited access programs

In prior limited access programs, the Regional Administrator¹⁷ upheld denials of limited access permits where the applicants filed late applications because they were unaware of the

¹² Final Rule, 75 Fed. Reg. 554, 563 – 595 (Jan. 5, 2010). NMFS analyzed and responded to 157 public comments.

¹³ *Id.* at 580-81 (Comment 84).

¹⁴ *Id.*

¹⁵ 50 C.F.R. § 300.67(b)(1)(ii)(A). The qualifying period is the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005. 50 C.F.R. § 300.67(b)(1)(ii)(f)(6).

¹⁶ *Id.* at 596 (emphasis added).

¹⁷ The decisions by an appellate officer with OAA become final agency action after thirty days, unless the Regional Administrator for the Alaska Region takes action to modify or reverse the decision. 50 C.F.R. § 679.43(k); 50 C.F.R. § 679.43(o). All OAA decisions cited in this decision became final agency action. All OAA decisions are available at the “Administrative Appeals” section of the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/appeals/default.htm>.

requirement to file because the applicant was out of the country during the application period,¹⁸ or was in a remote location in this country.¹⁹ These applicants were in essentially the same position as [REDACTED]

Based on the language of the regulation, the purpose and regulatory history, and the decisions in prior limited access programs, I conclude that the regulation establishing the Charter Halibut Limited Access Program requires that NMFS deny [REDACTED] application because it was submitted after the application deadline.

I note that, in prior limited access programs, the Regional Administrator accepted late applications in three limited circumstances, none of which apply to the facts in this appeal. First, the Regional Administrator let stand decisions by appellate officers that applied the doctrine of equitable tolling to accept three late applications under the Individual Fishing Quota Program for Pacific halibut and sablefish,²⁰ and one late application in the Crab Rationalization Program.²¹ Under the doctrine of equitable tolling, an agency may accept a late application if allowing equitable tolling is a valid interpretation of the regulations for that particular program and the applicant proves that he or she was facing such extreme circumstances that the applicant was effectively unable to apply by the application deadline. It is an extremely limited doctrine and is only meant to provide relief to persons facing extraordinary obstacles to filing a timely application.

I do not analyze whether the doctrine of equitable tolling could apply to the Charter Halibut Limited Access Program because [REDACTED] has not stated facts that show he was facing extreme circumstances. [REDACTED] states that he customarily spends the winter away from Alaska each year and does not have his mail forwarded. These facts do not represent extreme circumstances that effectively made [REDACTED] unable to apply for a permit during the application period.

¹⁸ [REDACTED] Appeal No. 95-0003 (Aug. 6, 1996) (late applicant in the South Pacific and Hawaii during IFQ application period), *aff'd sub nom Foss v. NMFS*, 161 F. 3d 584 (9th Cir. 1998); [REDACTED] Appeal No. 07-0004 (Jan. 11, 2008) (late applicant in Norway during Crab Rationalization Program application period).

¹⁹ [REDACTED] Appeal No. 95-0014 (Sep. 1, 1998) (late applicant in remote rural town in California during the IFQ application period)

²⁰ In [REDACTED], the applicant was prevented from submitting a timely application because he was suffering from addiction to heroin and then was in a rehabilitation program that imposed a blackout on information. Appeal No. 94-0012, Decision on Reconsideration at 13 – 15 (May 24, 1996). In [REDACTED], the applicant was the wife of a deceased fisherman whose depression was caused by the death of her husband from a massive heart attack in her home and the death of her father three days later. The applicant, a nurse, felt special guilt and remorse because her husband died at home and she was unable to help him. The applicant was unable to function normally and was treated for depression. Appeal No. 95-0035 at 2 – 3 (Aug. 1, 1997). In [REDACTED], the applicant's depression was caused by the brutal murder of his mother, his stepfather's trial for that murder, and the effect on him from these events. Appeal No. 95-0044 at 5 (Sep. 5, 1997). The IFQ program is primarily at 50 C.F.R. §§ 640, 641 and 642.

²¹ In [REDACTED], the applicant did not apply because he was depressed, unable to care for himself and then hospitalized for depression. Appeal No. 07-0006 (Mar. 1, 2010). The Crab Rationalization Program is at 50 C.F.R. § 680.

Second, in the License Limitation Program [LLP], NMFS was required, by regulation, to send application materials to potential applicants using the last known address in NMFS records, if NMFS's records showed that the applicant met the eligibility requirements for a license.²² An applicant's failure to file a timely LLP application was excused because NMFS did not notify the applicant.²³ I do not analyze whether NMFS has any similar obligation under the charter halibut program because, assuming for the purposes of argument that NMFS did, the IAD states that RAM sent [REDACTED] application materials and [REDACTED] does not dispute that.

The IAD states that RAM sent [REDACTED] two applications packets and a reminder postcard:

On February 4, 2010, we mailed an application packet to you at [REDACTED] Seward, Alaska 99664. Unfortunately, this application packet was returned to RAM by the U.S. Postal Service marked "unable to forward." On February 9, 2010, we re-mailed the application packet to [REDACTED] Seward, Alaska 99664. Additionally, during the week of March 5, 2010, we mailed you a postcard reminding you to apply before the April 5, 2010 application deadline.²⁴

[REDACTED] does not argue that RAM sent the application material to the wrong address or that he had notified RAM to use a different address. The appeal that [REDACTED] filed with OAA uses the address, "Box 1654, Seward, Alaska 99664." [REDACTED] acknowledges: "I am not disputing your efforts to notify the public of the requirements, but I did not receive any of them until my return from Florida."²⁵

Third, the Regional Administrator has accepted actions by applicants taken before the application deadline as meeting the application deadline, even if the applicants did not submit a formal application until after the deadline. But in facts very similar to [REDACTED] – the applicant faxed an application for an IFQ permit two days after the application deadline²⁶ – the Regional Administrator stated that the application had to be denied because the applicant had taken no steps before the application deadline:

By definition, any one-time application period must end at some specific point in time. Also, it can be reasonably predicted and expected that no matter when the deadline is set, there will be those who file late. Both the agency and previous decisions have applied the application deadline in as liberal a fashion as possible. In each of these situations, however, this has been accomplished by finding that the appellant has complied with the requirements of the regulations as a matter of law through performance of some significant act in furtherance of filing his/her application prior to expiration of the deadline, whether it be the treatment of a timely-filed Request for Application (RFA) as a timely-filed application, the placing of the application in the mail, or the acceptance of faxed applications. Neither [REDACTED] nor [REDACTED] have met this liberalized standard. They

²² 50 C.F.R. § 679.4(k)(6)(i).

²³ [REDACTED] Appeal No. 00-0008 (Feb. 8, 2001); [REDACTED] Appeal No. 00-0008, Decision on Reconsideration (March 20, 2001).

²⁴ Initial Administrative Determination at 2 (April 22, 2010).

²⁵ Statement of [REDACTED] (received by Office of Administrative Appeals, May 6, 2010).

²⁶ [REDACTED] Appeal No. 94-0008 at 1 (Mar. 21, 1995).

took no action whatsoever, significant or otherwise, until after expiration of the deadline. The decision of both the RAM Division not to process their applications, and the decision of the Appeals Officer to affirm those initial decisions, are therefore correct and are hereby AFFIRMED.²⁷

I acknowledge that, according to the official charter halibut record, [REDACTED] meets the participation requirements for a non-transferable charter halibut permit with an angler endorsement of six.²⁸ I acknowledge that [REDACTED] received actual notice of the application period on April 7, 2010, and that he was as diligent as humanly possibly in applying after he learned about the application period, namely he applied by fax on April 8, 2010.

But [REDACTED] appeal goes to a policy decision embodied in the regulation, namely that an application by the deadline is a requirement for a charter halibut permit. And [REDACTED] circumstances do not fall within any of the extremely limited situations in which the Regional Administrator has approved acceptance of late applications. I simply do not have the authority to order that NMFS accept [REDACTED] late application based on the small scale of his operation, his need for the income from this business or his ignorance of the application period. I conclude that NMFS must deny [REDACTED] application for a charter halibut fishing permit

FINDINGS OF FACT

I find by a preponderance of the evidence in the record that:

1. [REDACTED] applied for a charter halibut permit on April 8, 2010.
2. [REDACTED] did not take any significant acts to apply for a charter halibut permit before April 8, 2010.
3. RAM sent [REDACTED] an application packet at the address for [REDACTED] that was in RAM's records.
4. [REDACTED] had not provided RAM with any other address.

CONCLUSIONS OF LAW

1. [REDACTED] application for a charter halibut permit may not be accepted for processing because he submitted it after the application deadline specified in the Federal Register.
2. Assuming that the doctrine of equitable tolling may be applied to the application deadline in the Charter Halibut Limited Access Program, [REDACTED] has not alleged facts sufficient to warrant equitable tolling of this application deadline.
3. As an appellate officer, I do not have the authority to order that NMFS accept [REDACTED] late application based on the small scale of his charter operation, his need for the income or his ignorance of the application period.
4. The regulation establishing the Charter Halibut Limited Access Program, 50 C.F.R. § 300.67, requires that NMFS deny [REDACTED] application for a charter halibut permit.

²⁷ [REDACTED] Appeal No.94-0008 & Appeal No. 94-0002, Decision on Review by Regional Administrator, Alaska Region, at 3 - 4 (Apr. 21, 2005) (footnotes omitted), available at <http://alaskafisheries.noaa.gov/appeals/radecisionsbynumber.htm>

²⁸ Summary of Official Charter Halibut Record (Jan. 28, 2010).

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on September 13, 2010, unless by that date the Regional Administrator orders review of the Decision.

The 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 Time, on the tenth day after the date of this Decision, August 23, 2010. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

A black rectangular redaction box covers the signature of the Chief Administrative Judge. A horizontal line is drawn below the redaction, and a small flourish or mark is visible at the end of the line.

Mary Alice McKeen
Chief Administrative Judge (acting)