

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0075

DECISION

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On October 22, 2010, a legal representative (Representative) for [REDACTED] dba [REDACTED] [REDACTED] (Appellant) timely filed an appeal with the Office of Administrative Appeals, challenging a National Marine Fisheries Service (NMFS) Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated August 25, 2010.¹ In that determination, RAM notified Appellant that it denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP).²

In its IAD, RAM notified Appellant that he met the minimum participation requirements in both qualifying years, 2004 and 2005, but that he did not meet the minimum participation requirements for the recent participation period in 2008 because he did not

¹ Case File, Pleadings Tab, Appellant's appeal submission received October 22, 2010, Original File Tab, IAD dated August 25, 2010.

² The CHLAP regulations became effective in 2010 and will be codified at 50 C.F.R. § 300.67. At present, the regulations can be obtained by accessing the Electronic Code of Federal Regulations (e-CFR), a current and updated version, but not an official legal edition, of the CFR. Citations to the CHLAP are to the e-CFR, unless otherwise noted.

report to Alaska Department of Fish and Game (ADF&G) a minimum of five halibut logbook fishing trips. RAM explained that, according to information in the Official Record, Appellant timely reported only four halibut logbook fishing trips in the ADF&G Saltwater Charter Vessel Logbook issued to him in 2008. RAM also explained that the unavoidable circumstance claim Appellant raised with regard to his 2008 participation in the fishing industry needed to be determined by OAA, provided Appellant files an appeal with OAA to pursue his claim.³

In his appeal, Appellant argues that an unavoidable circumstance occurred in 2008, namely the engine failure of his vessel, ██████████ (Appellant's Vessel), which compromised his ability to operate his charter business for the remainder of the 2008 charter fishing season. Appellant states he tried to have the engine repaired, but efforts were unsuccessful. Appellant also considered replacing the engine, but states he could not have obtained the replacement parts and completed installation in time to complete the fishing season. As a last resort, Appellant borrowed another fishing charter's vessel, ██████████ (Borrowed Vessel), which he used to complete six fishing charters he had booked for the remainder of the 2008 fishing season. Unfortunately for Appellant, as explained by RAM, those six trips could not be credited to Appellant in 2008 because Borrowed Vessel had been operated by another charter fishing business, which was the entity issued the ADF&G business owner's license that was authorized to conduct logbook fishing trips for Borrowed Vessel.⁴

I have reviewed Appellant's appeal and the case record and I have determined that the record contains sufficient information on which to reach final judgment. Accordingly, I close the record and issue this decision without ordering a hearing. See 50 C.F.R. § 679.43(g)(2) and (k).

ISSUES

At issue in this appeal is whether Appellant is qualified to receive a CHP. To resolve this issue, I must evaluate whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. §§ 300.67(b)(1)(ii)(A) and (B) and 300.67(d)(1). If Appellant does not meet these minimum participation requirements then I must determine whether the unavoidable circumstance provisions of the CHLAP regulations, set out in 50 C.F.R. § 300.67(g)(1), qualify Appellant to receive a CHP in lieu of such participation. If I determine Appellant has met the criteria of 50 C.F.R. § 300.67(g)(1) then I must also

³ Case File, Original File Tab, IAD dated August 25, 2010.

⁴ Case File, Pleadings Tab, Appellant's appeal submission received October 22, 2010, Original File Tab, IAD dated August 25, 2010, April 28, 2010 Notice of Opportunity to Submit Evidence from RAM.

determine the number and type of CHP Appellant is qualified to receive, meaning a transferable or non-transferable permit, and the angler endorsement for that permit.

FINDINGS OF FACT

1. Appellant has been in the halibut charter fishing business since 2002.⁵
2. In 2004, the Official Record confirms that Appellant reported thirty-two (bottomfish) logbook fishing trips for Area 3A on Appellant's Vessel. The maximum number of anglers reported on these trips was six anglers.⁶
3. In 2005, the Official Record confirms that Appellant reported twenty-five (bottomfish) logbook fishing trips for Area 3A on Appellant's Vessel. The maximum number of anglers reported on these trips was six anglers.⁷
4. In 2008, the Official Record confirms that Appellant timely reported four (halibut) logbook fishing trips using Appellant's Vessel. Appellant conducted an additional five charter fishing trips on Appellant's Vessel in mid-June 2008, but he did not timely report these trips to the ADF&G. Appellant did not report these five trips to ADF&G until February 2010.⁸
5. Subsequent to the fishing trips Appellant conducted in mid-June 2008, Appellant's Vessel became inoperable due to engine failure and the engine could not be repaired. Appellant investigated ordering a new engine and manifold, however the items were out of stock. The timeframe for obtaining a new engine and manifold and completing installation would have been longer than two to three months and would not have allowed Appellant to complete the 2008 fishing season.⁹
6. Appellant had many remaining halibut charter fishing trips that were booked for his business for the remainder of the 2008 fishing season. Since Appellant's Vessel was no longer operational, Appellant investigated use of another vessel for the remainder of the season.¹⁰

⁵ Case File, Original File Tab, Appellant's letter received by RAM on March 4, 2010, Pleadings Tab, Appellant's appeal submission received October 22, 2010.

⁶ Case File, Original File Tab, summary of Official Record for Appellant.

⁷ Case File, Original File Tab, summary of Official Record for Appellant.

⁸ Case File, Original File Tab, Appellant's letter received by RAM on May 13, 2010, Pleadings Tab, Appellant's appeal submission received October 22, 2010.

⁹ Case File, Original File Tab, Appellant's letter received by RAM on May 13, 2010, Pleadings Tab, Appellant's appeal submission received October 22, 2010.

¹⁰ Case File, Original File Tab, Appellant's letter received by RAM on May 13, 2010, Pleadings Tab, Appellant's appeal submission received October 22, 2010.

7. Appellant used Borrowed Vessel to complete the remainder of the 2008 fishing season. Appellant conducted approximately thirty-eight charter fishing trips using Borrowed Vessel.¹¹
8. Earlier in the 2008 season, Borrowed Vessel had been operated by another charter fishing business, to which the ADF&G issued a business owner's license that was authorized to conduct logbook fishing trips for Borrowed Vessel. As a result, the logbook fishing trips Appellant conducted using Borrowed Vessel did not count toward Appellant's 2008 fishing history.¹²
9. On February 26, 2010, Appellant signed a completed "Application for Charter Halibut Permit(s) For IPHC Regulatory Areas 2C and 3A." On the application, Appellant identified the use of Appellant's Vessel for 2004, 2005, and 2008, and the use of Borrowed Vessel for 2008. Appellant also selected 2005 for Area 3A as his "Applicant Selected Year."¹³
10. In a letter dated April 28, 2010, RAM sent Appellant a "Notice of Opportunity to Submit Evidence." In that letter, RAM notified Appellant that review of the Official Record revealed that Appellant met the participation requirements in 2004 and 2005, but that Appellant did not meet the recent participation requirements of 2008. RAM also noted that the CHLAP regulations do not allow "two businesses to match logbook history to qualify for one or more charter halibut permits." Additionally, RAM outlined the criteria for an unavoidable circumstance claim for the 2008 recent participation period.¹⁴
11. Appellant responded to RAM's notice dated April 28, 2010 explaining the circumstances he encountered in 2008. RAM received Appellant's response on May 13, 2010.¹⁵
12. RAM subsequently issued its IAD, dated August 25, 2010. In the IAD, RAM notified Appellant that although he met the minimum participation requirements in 2004 and 2005, he did not meet the minimum participation requirements for the recent participation period in 2008 because he did not timely report a minimum of five halibut logbook fishing trips. RAM also explained that OAA was responsible for making a determination regarding the unavoidable circumstance claim Appellant raised with regard to his 2008 participation.¹⁶

¹¹ Case File, Original File Tab, Appellant's letter received by RAM on May 13, 2010, Appellant's CHP application dated February 26, 2010, letter dated March 1, 2010 from Borrowed Vessel's owner, Pleadings Tab, Appellant's appeal submission received October 22, 2010.

¹² Case File, Original File Tab, Appellant's letter received by RAM on May 13, 2010, IAD dated August 25, 2010, Notice of Opportunity to Submit Evidence dated April 28, 2010, Pleadings Tab, Appellant's appeal submission received October 22, 2010.

¹³ Case File, Original File Tab, Appellant's CHP application dated February 26, 2010.

¹⁴ Case File, Original File Tab, Notice of Opportunity to Submit Evidence dated April 28, 2010,

¹⁵ Case File, Original File Tab, Appellant's letter received by RAM on May 13, 2010.

¹⁶ Case File, Original File Tab, IAD dated August 25, 2010.

13. On October 22, 2010, Appellant timely filed an appeal with NAO.¹⁷

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or non-individual entity, to which the ADF&G issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet minimum participation requirements. 50 C.F.R. § 300.67(b)(1)(ii).

Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during the recent participation period, namely 2008. 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7).

For a transferable permit, minimum participation criteria for a transferable permit are as follows: an applicant must have reported fifteen bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period, namely 2004 or 2005, and must have reported fifteen halibut logbook fishing trips or more from the same vessel during the recent participation period, namely 2008. 50 C.F.R. § 300.67(d)(1)(i) and (ii). The number of transferable CHPs issued to an applicant will be equal to the lesser of the number of vessels that met the minimum transferable permit qualifications described above. 50 C.F.R. § 300.67(d)(2).

A “logbook fishing trip” means 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. 50 C.F.R. § 300.67(f)(4).

A “bottomfish logbook fishing trip” means a logbook fishing trip in the qualifying period that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: 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).

A “halibut logbook fishing trip” means a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was 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).

¹⁷ Case File, Pleadings Tab, Appellant’s appeal submission received October 22, 2010.

“Applicant selected year” means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and nontransferable permits. 50 C.F.R. § 300.67(f)(1).

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing in Area 2C and Area 3A, which NMFS will use to implement the CHLAP and evaluate applications for charter halibut permits. 50 C.F.R. § 300.67(f)(5).

An applicant that meets the participation requirements will be issued the number of charter halibut permits equal to the lesser of the number of permits as follows: (1) The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business License in the applicant-selected year divided by five, and rounded down to a whole number; or (2) The number of vessels that made the bottomfish logbook fishing trips in the applicant-selected year. 50 C.F.R. § 300.67(c)(1) and (2).

The angler endorsement number for the first transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area. 50 C.F.R. § 300.67(e)(1).

An applicant for a CHP that meets the participation requirement for the qualifying period (2004 or 2005) but does not meet the participation requirement for the recent participation period (2008), may receive one or more permits if the applicant proves the following: the applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period; the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business; the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period. 50 C.F.R. § 300.67(g)(1)(i)-(iv). If the applicant proves the foregoing, the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in 50 C.F.R. § 300.67 (b) through (f).

If an applicant is able to successfully demonstrate that he met the criteria for an unavoidable circumstance claim under 50 C.F.R. § 300.67(g)(1), the preamble to the Proposed Rule for the CHLAP regulations states:

NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that substituting the qualifying period participation for actual participation during the recent participation period best reflects what

the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.

See 74 Fed. Reg. 18187 (April 21, 2009). The preamble to the Final Rule implementing the CHLAP restated this intent as follows: "The preamble to the proposed rule (74FR 18178, April 21, 2009) on page 18187 contains a detailed description of the unavoidable circumstances exception to the qualification requirements." See 75 Fed. Reg. 586 (January 5, 2010)(response to comment 109).

ANALYSIS

The first issue I must resolve in this case is whether Appellant has established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, as set out in 50 C.F.R. §§ 300.67(b)(1)(ii)(A) and (B) and 300.67(d)(1). The case record before me reveals he does not.

To qualify for a CHP, certain minimum participation requirements need to be met. For a non-transferable permit, an applicant must have reported five or more bottomfish logbook fishing trips during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut logbook fishing trips during 2008, the recent participation period. For a transferable permit, an applicant must have reported fifteen bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period, namely 2004 or 2005, and must have reported fifteen halibut logbook fishing trips or more from the same vessel during 2008, the recent participation period. 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(d)(1)(i) and (ii); and 50 C.F.R. § 300.67(f)(6) and (7).

The case record, which contains the Official Record summary, reveals that Appellant reported thirty-two trips in 2004 and twenty-five trips in 2005. Thus, Appellant satisfied the minimum participation requirements for the qualifying period. However, Appellant only timely reported four trips in 2008, which meant he fell short of meeting the minimum participation requirements for the recent period. As set out in the CHLAP regulations, NMFS will rely on the Official Record to implement the CHLAP and evaluate applications for CHPs. Consequently, the evidence in this case demonstrates that Appellant did not timely report a sufficient number of halibut logbook fishing trips in 2008 to qualify for a CHP.

Since Appellant does not meet the minimum participation requirements previously discussed, namely with regard to the 2008 recent participation period, I must now determine whether the unavoidable circumstance provision of the CHLAP regulations,

set out in 50 C.F.R. § 300.67(g)(1), qualifies Appellant to receive a CHP in lieu of such participation.

The CHLAP regulations provide, specific to the issue at hand, that an applicant for a CHP that meets the participation requirement for the qualifying period (2004 or 2005), but does not meet the participation requirement for the recent participation period (2008), may receive one or more permits if the applicant proves certain elements contained in 50 C.F.R. § 300.67(g)(1)(i)-(iv). I will now address each element.

Fifty C.F.R. § 300.67(g)(1)(i) requires that the applicant had a specific intent to operate a charter halibut fishing business in the recent participation period (2008). The evidence presented shows that Appellant intended to operate a charter halibut fishing business in 2008. Appellant has been in the charter fishing business since 2002, and has used Appellant's Vessel successfully for many years. Appellant's Vessel was used in the 2008 fishing season, until it encountered engine failure and became inoperable. The evidence shows Appellant had approximately thirty-eight fishing charters booked for the remainder of the season, necessitating the use of Borrowed Vessel to fulfill his business obligations. Thus, the preponderance of the evidence presented in this case convinces me that Appellant had a specific intent to operate a charter halibut fishing business in 2008.

Fifty C.F.R. § 300.67(g)(1)(ii)(A)-(C) requires that the applicant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business. Fifty C.F.R. § 300.67(g)(1)(iii) requires that the circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred. The evidence presented establishes that Appellant's intent to operate a charter halibut fishing business in 2008 was thwarted by the engine failure on Appellant's Vessel that occurred while the 2008 fishing season was already underway. The engine failure of Appellant's Vessel was unavoidable, unique to Appellant, and unforeseen and reasonably unforeseeable by Appellant. There is no indication in the record that Appellant could have avoided or prevented the engine failure that occurred. The engine failure of Appellant's Vessel was also unique to Appellant and uniquely affected him. Appellant's Vessel was the only vessel Appellant used in his fishing operation and the fact that it became inoperable had a direct adverse affect on Appellant's business and livelihood. Appellant had many charters booked for the remainder of the 2008 fishing season that were compromised by the inoperability of Appellant's Vessel. The fact that the engine on Appellant's Vessel failed was unforeseen and reasonably unforeseeable by Appellant. Appellant had no reason to question the condition of the engine, as it had functioned without problems in past

years. Moreover, it was not foreseeable to Appellant that he would not be able to repair or promptly replace the engine on Appellant's Vessel in time to resume his participation in the 2008 fishing season.

The case record also establishes that the circumstance that prevented Appellant from operating a charter halibut fishing business in 2008--the failure of the engine on Appellant's Vessel that could not be repaired or promptly replaced--actually occurred. The preponderance of the evidence presented in this case convinces me that Appellant's specific intent was thwarted by a circumstance that was unavoidable, unique to the owner of the charter halibut fishing business, and unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business, and was a circumstance that actually occurred.

Fifty C.F.R. § 300.67(g)(1)(iv) requires that the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period. The evidence presented shows that Appellant made a reasonable effort to overcome the challenges he faced when the engine on Appellant's Vessel failed in 2008. When Appellant realized the engine could not be repaired, he investigated replacement of the engine and manifold. However, the replacement items he needed to order were out of stock. The timeframe for obtaining a new engine and manifold and completing installation would have been longer than two to three months and would not have allowed Appellant to complete the 2008 fishing season. To salvage his situation and fulfill his charter fishing bookings for the remainder of the season, Appellant looked for another vessel to use. Appellant was able to borrow a vessel from another charter fishing business and utilized Borrowed Vessel for the remainder of the season. Since Borrowed Vessel was operated by another charter fishing business, to which ADF&G had issued a business owner's license and which was the business authorized to conduct logbook fishing trips for Borrowed Vessel, the fishing trips Appellant conducted using Borrowed Vessel could not be considered part of Appellant's fishing history or operation of a charter halibut fishing business in 2008. The preponderance of the evidence presented in this case convinces me that Appellant took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in 2008.

Having determined Appellant meets the criteria of 50 C.F.R. § 300.67(g)(1), I must now determine the number and type of CHP Appellant is qualified to receive, meaning a transferable or non-transferable permit, and the angler endorsement for that permit. See 50 C.F.R. § 300.67(g)(1)(v), and 50 C.F.R. § 300.67 (b) through (f). As to the number of permits Appellant is qualified to receive, 50 C.F.R. § 300.67(c) specifies that the number of permits allowed will be the lesser of two factors, one of which is "the

number of vessels that made the bottomfish logbook fishing trips in the applicant selected year.” Appellant’s “applicant selected year” is 2005. In this case, there is no dispute that Appellant used only one vessel, Appellant’s Vessel, for the bottomfish logbook fishing trips he made in 2005. Hence, Appellant is qualified to receive one CHP.

As to the type of permit Appellant is qualified to receive, the preamble to the Proposed Rule and to the Final Rule of the CHLAP provide guidance on these issues. The preamble to the Proposed Rule for the CHLAP regulations states:

NMFS proposes to award the applicant the number and type of permits that the applicant would have received if its participation during the recent participation period had been the same as its participation during the qualifying period. The Council did not address this issue. However, NMFS determined that substituting the qualifying period participation for actual participation during the recent participation period best reflects what the Council was trying to achieve by recommending that an unavoidable circumstance exception be included in this program.

See 74 Fed. Reg. 18187 (April 21, 2009). The preamble to the Final Rule restated this intent as follows: “The preamble to the proposed rule (74FR 18178, April 21, 2009) on page 18187 contains a detailed description of the unavoidable circumstances exception to the qualification requirements.” See 75 Fed. Reg. 586 (January 5, 2010)(response to comment 109).

Thus, for purposes of resolving the type of permit Appellant is qualified to receive, I must examine the extent of Appellant’s participation during the qualifying period, 2004 or 2005, as a substitute for Appellant’s participation in 2008. In 2004, Appellant reported thirty-two logbook fishing trips for Area 3A. In 2005, Appellant reported twenty-five logbook fishing trips for Area 3A. In both years, the number of logbook fishing trips Appellant reported exceeded the minimum fifteen trips required for a transferable permit. See 50 C.F.R. § 300.67(d). Accordingly, I conclude Appellant is qualified to receive one transferable CHP for Area 3A.

With regard to the angler endorsement issue, the CHLAP regulations provide that the angler endorsement number for the first transferable permit for an area issued to an applicant will be the greatest number of charter vessel anglers reported on any logbook trip in the qualifying period in that area. 50 C.F.R. § 300.67(e)(1). In 2004 and 2005, the qualifying period, the maximum number of anglers reported was six anglers.

Accordingly, I conclude that Appellant's transferable CHP for Area 3A will be endorsed for six anglers.

CONCLUSIONS OF LAW

Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. §§ 300.67(b)(1)(ii)(A)-(B) and 300.67(d)(1) since Appellant did not meet the minimum participation requirement for the recent participation period of 2008. However, in lieu of such participation, Appellant has proven the elements of 50 C.F.R. § 300.67(g)(1) and has established his qualifications for a transferable CHP for Area 3A with an angler endorsement number of six.

ORDER

The IAD dated August 25, 2010 is vacated. RAM is directed to issue Appellant a transferable CHP for Area 3A with an angler endorsement number of six. This decision is effective thirty (30) days from the date issued and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made or the Regional Administrator elects to review this decision.¹⁸

[REDACTED]

Christine D. Coughlin
Administrative Judge

Date Issued: April 8, 2011

¹⁸ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm> ; 50 C.F.R. § 679.43(k) and (o).