

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

In re Application of)
)
) Appeal No. 11-0055
)
) DECISION
)
 Appellants)
)
)

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, Maryland 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 OAA.¹

This case comes before NAO based on a timely appeal filed by [REDACTED] doing business as [REDACTED] (Appellant). Appellant appeals an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM) program on January 25, 2011.² In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP) because her application was not submitted timely.

The application referred to in the IAD was received by RAM on January 21, 2011.³ The deadline for filing an application for a CHP was April 5, 2010.⁴ Appellant stated in a letter attached to her application that she was applying for a CHP based on an unavoidable circumstances claim and that NOAA had violated various federal laws by implementing CHLAP.⁵

On January 25, 2011, RAM issued the IAD at issue in this appeal. In the IAD, RAM denied Appellant's application for a CHP. RAM indicated that it lacked the authority under the CHLAP regulations to accept Appellant's late-filed application for processing. RAM also notified Appellant of her right to appeal the IAD to NAO.

¹ 50 C.F.R. § 679.43

² Case File, Pleadings Tab, Appellants' appeal submission received March 7, 2011; Original File Tab, IAD dated January 25, 2011.

³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

⁴ 75 Fed. Reg. 1595 (January 12, 2010).

⁵ Original File Tab, Letter from Appellants received on January 21, 2011.

On March 7, 2011, OAA received Appellant's timely appeal of the IAD.⁶ In the appeal, Appellant indicated that her husband had died recently in an accident.⁷ Appellant also renewed her claim that NOAA had violated various federal laws by implementing CHLAP.⁸

Upon review of Appellant's appeal and case record, I have determined that the record contains sufficient information on which to reach a final judgment. There is no disputed material issue of fact, and no need for a hearing for testimony on disputed factual issues. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.⁹

ISSUES

At issue in this appeal is whether RAM correctly denied Appellant's application for a CHP. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence that she filed her application for a CHP by the April 5, 2010 application deadline specified in the Federal Register?

If the answer to the question is "no," I must conclude that Appellant did not timely file her application for a CHP and therefore uphold the IAD.

FINDINGS OF FACT

1. On January 12, 2010, NMFS published a Notice in the Federal Register that announced the application period for the CHP.¹⁰
2. The application deadline for submission of a CHP application was from February 4, 2010 until April 5, 2010.¹¹
3. Applications were to be obtained via internet or by requesting a CHP application from NMFS.¹²
4. On January 21, 2011, RAM received Appellant's CHP application signed and dated on January 19, 2011.¹³

⁶ Pleadings File Tab, Appellants' type-written appeal letter received on March 7, 2011.

⁷ Pleadings File Tab, Appellants' type-written appeal letter received on March 7, 2011.

⁸ Pleadings File Tab, Appellants' type-written appeal letter received on March 7, 2011.

⁹ See 50 C.F.R. § 679.43 (g) and (k).

¹⁰ 75 Fed. Reg. 1595 (January 12, 2010).

¹¹ 75 Fed. Reg. 1595 (January 12, 2010).

¹² 75 Fed. Reg. 1595 (January 12, 2010).

5. On January 25, 2011, RAM issued its IAD and denied Appellant's application for a CHP because it was not filed timely.¹⁴

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 applies for a CHP by submitting a CHP application within the application period (not less than 60 days) as specified in the Federal Register.¹⁵ The CHLAP regulations further state that NMFS will deny any application submitted after the last day of the application period.¹⁶

In accordance with its regulations, on January 12, 2010, NMFS informed the public of the CHP application period through publication of a notice in the Federal Register. The notice specified the application period beginning February 4, 2010, and ending April 5, 2010. In the notice, NMFS also informed the public that it could obtain an application on the internet or by requesting an application from NMFS. Lastly, all CHP applications submitted after the deadline would be considered untimely and denied.¹⁷

ANALYSIS

The regulation governing the CHLAP require that CHP applications must be submitted within the application period and that applications submitted after the application deadline are deemed untimely and denied.¹⁸

In the appeal, Appellant does not explain why her application was late. Instead, Appellant states that her husband recently died unexpectedly.

On January 12, 2010, NMFS published a Notice in the Federal Register that announced the application period for a CHP. The Notice provided the following:

...The application period for charter halibut permits under the Charter Halibut Limited Access Program begins on February 4, 2010, and ends at the close of business on April 5, 2010... Applications postmarked after April 5, 2010, or delivered after the close of business on April 5, 2010, will be denied.¹⁹

¹³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

¹⁴ Original File Tab, IAD dated January 25, 2011.

¹⁵ 50 C.F.R. § 300.67 (b)(1)(i) and 300.67 (h)(1).

¹⁶ 50 C.F.R. § 300.67(h)(1).

¹⁷ 75 Fed. Reg. 1595 (January 12, 2010).

¹⁸ 50 C.F.R. § 300.67(h)(1); 75 Fed. Reg. 1595 (January 12, 2010).

¹⁹ 75 Fed. Reg. 1595 (January 12, 2010).

By publishing this announcement, NMFS put possible applicants on notice of the deadline. However, for reasons unknown, Appellant submitted her application on January 21, 2011, approximately nine months after the deadline. By that time, RAM had no authority under the CHLAP regulations to accept Appellant's application for processing. Similarly, under the CHLAP regulations, NAO has not been authorized to accept late applications. Therefore, I conclude that Appellant's application was not filed in a timely manner and RAM correctly followed its regulations and properly denied Appellant's application for a CHP.

CONCLUSIONS OF LAW

Appellant did not file timely file her application for a CHP.

RAM correctly followed its regulations governing the CHLAP when it denied Appellant's application for a CHP.

ORDER

The IAD dated January 25, 2011 is upheld. This decision takes effect thirty days from the date issued, September 12, 2011,²⁰ and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, August 22, 2011. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.



Eileen G. Jones
Chief Administrative Judge

Date Issued: August 12, 2011

²⁰ 50 C.F.R. § 679.43(k) and (o).