

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

In re Application of

██████████

Appellant

)
)
)
)
)
)
)
)
)
)

Appeal No. 11-0048

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, 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 ██████████ (Appellant). Appellant appeals an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM) program on February 17, 2011.² In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP) regulations because his application was not submitted timely.

The application referred to in the IAD was received by RAM on February 16, 2011.³ The deadline for filing an application for a CHP was April 5, 2010.⁴ Appellant stated on his application that he was applying for a CHP based on an unavoidable circumstances claim and because NOAA did not have a right to deny him a permit without just compensation.⁵ Appellant did not address why he filed his application late.

On February 17, 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 his right to appeal the IAD to OAA.

¹ 50 C.F.R. § 679.43

² Case File, Pleadings Tab, Appellant's appeal submission received February 28, 2011; Original File Tab, IAD dated February 17, 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, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

On February 28, 2011, OAA received Appellant's timely appeal of the IAD.⁶ In his appeal letter, Appellant renewed his claim that he was being denied a permit without just compensation.⁷ Appellant also listed in his appeal letter various adverse effects of a denial.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 he filed his 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 his 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 period for submission of a CHP application started on February 4, 2010 and ended on April 5, 2010.¹¹
3. Applications were to be obtained via internet or by requesting a CHP application from NMFS.¹²
4. On February 16, 2011, RAM received Appellant's CHP application signed and dated on February 12, 2011.¹³

⁶ Pleadings File Tab, Appellants' type-written appeal letter received on February 28, 2011.

⁷ Pleadings File Tab, Appellants' type-written appeal letter received on February 28, 2011.

⁸ Pleadings File Tab, Appellants' type-written appeal letter received on February 28, 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).

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

5. On February 17, 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 provide 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 regulations governing the CHLAP require that CHP applications be submitted within the application period and that applications submitted after the application deadline be deemed untimely and denied.¹⁸

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

By publishing this announcement, NMFS put possible applicants on notice of the deadline. Without explanation for the delay, Appellant submitted his application on February 16, 2011, approximately ten months after the deadline. By that time, RAM had no authority under CHLAP regulations to accept Appellant's application for processing. Similarly, under CHLAP regulations, NAO has not been authorized to accept late applications. Therefore, I conclude Appellant's application was not filed in a

¹⁴ Original File Tab, IAD dated February 17, 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).

timely manner and RAM correctly followed its regulations and properly denied Appellant's application for a CHP.

In reaching my decision, I have carefully reviewed Appellant's appeal letter as well as the entire file. I understand Appellant believes he should receive a permit because of his history in Alaska fishing, his concern about the economic effects of the CHLAP, the effect this may have on his finances, and his belief that the CHLAP violated the fifth amendment to the United States Constitution. However, none of those arguments address the fact that Appellant did not meet one of the most basic prerequisites for eligibility for a permit, namely a timely file application.

CONCLUSIONS OF LAW

Appellant did not file timely file his 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 February 17, 2011 is upheld. This decision takes effect thirty days from the date issued, September 19, 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 29, 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 19, 2011

²⁰ 50 C.F.R. § 679.43(k) and (o).