



I requested that RAM state whether they sent any direct mailing to Appellants.<sup>4</sup> RAM stated that it did not send application material to Appellants in its direct mailing because, according to the official charter halibut record, neither Appellant met the participation requirements for a charter halibut permit.<sup>5</sup> RAM also provided a description of NMFS's public information and outreach efforts.<sup>6</sup>

I provided RAM's response to Appellants and established a deadline for them to submit additional argument or evidence on whether NMFS had any basis to accept the application for a permit that they filed after the application deadline.<sup>7</sup>

Appellants submitted a statement that they did not know of the application deadline because they were not in Alaska during the time NMFS put announcements on radio stations and in newspapers and they were not sent any application materials.<sup>8</sup>

I conclude that the record contains sufficient information upon which to decide this appeal.<sup>9</sup> I did not hold a hearing because Appellants have not alleged facts that, if true, would authorize me to take the action they request.<sup>10</sup> I close the record and issue a decision.

#### ISSUES

1. Is a timely application for a charter halibut permit a requirement for a charter halibut permit?
2. Does the unavoidable circumstance provision in the Charter Halibut Limited Access Program, 50 C.F.R. § 300.67(g), authorize NMFS to accept the application submitted by Appellants after the application deadline?
3. Does NMFS have authority to accept the late application submitted by Appellants because they did not know about the application deadline?

#### SUMMARY

Pursuant to the regulation establishing eligibility for a charter halibut permit, 50 C.F.R. § 300.67(b)(1), an applicant for a charter halibut permit must meet two requirements: [1] a timely application, which is an application filed within the application period for a charter

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<sup>4</sup> Email from Mary Alice McKeen to RAM Supervisory Permit Specialist, RAM (Dec. 15, 2010). I provided this email to Appellants in Exhibit 3 to Order Providing Documents to Appellants and Establishing Deadline for Additional Evidence and Argument (hereinafter Order) (Dec. 15, 2010).

<sup>5</sup> Email from RAM Supervisory Permit Specialist to Mary Alice McKeen (Dec. 15, 2010), Exhibit 3 to Order.

<sup>6</sup> Email from RAM Supervisory Permit Specialist to Mary Alice McKeen (Dec. 2, 2010), Exhibit 1 to Order; email from RAM Program Administrator to Mary Alice McKeen (Dec. 3, 2010), Exhibit 2 to Order. This email had as an attachment a "media plan."

<sup>7</sup> Order (Dec. 15, 2010).

<sup>8</sup> Statement by Appellants (received Jan. 21, 2011).

<sup>9</sup> 50 C.F.R. § 679.43(g)(2).

<sup>10</sup> 50 C.F.R. § 679.43(g)(3).

halibut permit, and [2] a participation requirement, which is participation in the charter halibut fishery through reported logbook fishing trips at a minimum level in one year in the qualifying period (2004, 2005) and in the recent participation period (2008). A timely application is a requirement for a charter halibut permit. The unavoidable circumstance regulation allows an applicant an alternate way to satisfy one period of the participation requirement, but not an alternate way to satisfy the requirement for a timely application. NMFS does not have authority to accept the late application submitted by Appellants on the grounds that they did not know about the application deadline.

## ANALYSIS

In their appeal, Appellants stated:

We recognize that the timeliness of our application may be an issue as you are receiving this well after the April 5, 2010 deadline. We respectfully request that you consider our permit request as there were unavoidable circumstances that we could not anticipate. We are being totally honest and forthright when we say that we simply did not know about the program and the application process. We received no written communication from you or the Alaska Department of Fish and Game (ADF&G). We only heard of this program at the beginning of this season and we heard about it from our fellow charter operators when launching at the Deep Creek area here on the Kenai Peninsula.

The permit that we are applying for is very important to us to maintain the economic viability of our father and son business that we have engaged in for over 20 years. We therefore would have applied for this permit immediately had we known of the applicable documentation required and the submission deadline for this documentation. We therefore respectfully request that you accept this application because of unavoidable circumstances. Again, those circumstances were that we simply were not aware of the particulars of this program and had received no notification of same.

As soon as we heard of the program, we contacted you and you immediately sent up the forms that we have completed as quickly as possible and are attached. Thank you very much for sending the forms so quickly!<sup>11</sup>

They conclude their appeal statement, “Again, we would have responded prior to the deadline, but we simply did not know about this application process until we heard about it from our fellow halibut charter operators here in Area 3A.”<sup>12</sup> Area 3A refers to International Pacific Halibut Commission [IPHC] regulatory area 3A, which is roughly Southcentral Alaska.<sup>13</sup>

In response to the material from RAM regarding NMFS’s publicity efforts, Appellants stated:

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<sup>11</sup> Letter to NMFS Alaska Region, RAM (dated July 4, 2010).

<sup>12</sup> *Id.*

<sup>13</sup> The precise coordinates of Area 3A are specified at 50 C.F.R. § 300.61.

We appreciate the efforts of the NMFS (National Marine Fisheries Service), Alaska Region, trying to communicate and provide information to all charter entities via Alaskan local radio advertising, yet because we were not in Alaska during the time frame the ads were run, we had no knowledge of the deadlines for applications.<sup>14</sup>

I accept as true that Appellants did not know about the application deadline and that, if they had known about it, they would have submitted a timely application.

The Secretary of Commerce, pursuant to the Northern Pacific Halibut Act of 1982, promulgated the regulations establishing the Charter Halibut Limited Access Program.<sup>15</sup> In adopting these regulations, the Secretary followed the notice-and-comment rule making procedure in the Administrative Procedure Act.<sup>16</sup> As an administrative judge, my responsibility is to interpret and apply these regulations to this appeal.

**1. Is a timely application for a charter halibut permit a requirement for a charter halibut permit? Yes.**

I examine the language of the charter halibut regulation in light of the purpose of the regulation.

**A. Language of regulation: 50 C.F.R. § 300.67(b)(1).**

The regulation establishing the Charter Halibut Limited Access Program sets out the basic qualifications for a permit in 50 C.F.R. § 300.67(b)(1):

(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.

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<sup>14</sup> Statement by Appellants (received Jan. 21, 2011).

<sup>15</sup> Final Rule, 75 Fed. Reg. 554, 554 (Jan. 5, 2010).

<sup>16</sup> 5 U.S.C. § 553.

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

(B) Reported five (5) halibut logbook fishing trips or more during the recent participation period.<sup>17</sup>

The regulation lists a timely application as the first requirement and lists it as a co-equal requirement to the participation requirement for a minimum number of logbook fishing trips.

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

(h)(1) 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.*<sup>18</sup>

NMFS published notice of the application in the Federal Register on January 12, 2010:

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.*<sup>19</sup>

By their terms, the regulation and the Federal Register notice do not provide any exception to the requirement that a timely application is a requirement for receiving a charter halibut permit.<sup>20</sup>

## **B. Purpose and regulatory history.**

In 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

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<sup>17</sup> 50 C.F.R. § 300.67(b)(1)(i) & (ii). Subsection (iii) has special rules for an applicant who is a successor-in-interest either to an individual, because the individual has died, or to a non-individual entity, such as a corporation, because the corporation has dissolved.

<sup>18</sup> 50 C.F.R. § 300.67(h)(1)(emphasis added).

<sup>19</sup> Notice of application period, 75 Fed. Reg. 1595, 1595 (Jan. 12, 2010) (emphasis added).

<sup>20</sup> 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).

would be to apply during an application period. An application period of no less than 60 days would be announced in the **Federal Register**.<sup>21</sup>

During the notice-and-comment period on the proposed rule, NMFS received no public comment on the application deadline.<sup>22</sup> 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: they do not.<sup>23</sup>

The only change in the final rule that involved the application deadline was that NMFS clarified 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 one year in the qualifying period (2004, 2005) and five trips in the recent period (2008). This was Change # 12, which NMFS described 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 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.*<sup>24</sup>

The regulatory history reinforces the language of the regulation, namely, that the purpose of 50 C.F.R. § 300.67(b)(1) is to establish a timely application as a requirement for NMFS to issue a charter halibut permit to an applicant. I therefore conclude that a timely application is a requirement for NMFS to issue a charter halibut permit to an applicant.

**2. Does the unavoidable circumstance provision in the charter halibut regulation, 50 C.F.R. § 300.67(g), authorize NMFS to accept the application submitted by Appellants after the application deadline? No.**

In their appeal statement, Appellants stated: “We therefore respectfully request that you accept this application because of unavoidable circumstances. Again, those circumstances were that we simply were not aware of the particulars of this program and had received no notification of same.”<sup>25</sup>

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<sup>21</sup> Proposed Rule, 74 Fed. Reg. 18,178, 18,184 (Apr. 21, 2009) (italics and bold in original).

<sup>22</sup> Final Rule, 75 Fed. Reg. 554, 563 – 595 (Jan. 5, 2010). NMFS analyzed and responded to 157 public comments.

<sup>23</sup> *Id.* at 580-81 (Comment 84).

<sup>24</sup> Final Rule, 75 Fed. Reg. 554, 596 (Jan. 5, 2010) (emphasis added).

<sup>25</sup> Letter from Appellants to RAM (July 4, 2010).

I interpret this as an argument by the Appellants that the charter halibut regulation at 50 C.F.R. § 300.67(g), which contains the term “unavoidable circumstance,” authorizes NMFS to accept their late application. I conclude the unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), is not relevant to late applications and does not authorize NMFS to accept a late application.

To understand why, a brief explanation of the unavoidable circumstance regulation is necessary. To receive a charter halibut permit, an applicant must submit a timely application and must meet a minimum participation level of five charter halibut logbook fishing trips in two periods: one year in the qualifying period (2004, 2005) and the recent participation period, which is one year, namely 2008.<sup>26</sup>

Pursuant to the unavoidable circumstance regulation, if an applicant did not meet the participation requirement for the qualifying period *or* the recent participation period, NMFS may treat the applicant as though the applicant participated in the missed period, if the applicant proves the following: the applicant specifically intended to participate in the missed period (the qualifying period or the recent period); the applicant’s specific intent to participate was thwarted by a circumstance that was unavoidable, unique to the applicant, unforeseen and reasonably unforeseeable by the applicant; the circumstance occurred; the applicant took all reasonable steps to overcome the circumstance.<sup>27</sup>

Appellants do not contend that their lack of knowledge of the application deadline prevented them from participating in the qualifying period or the recent participation period. Appellants contend that their lack of knowledge prevented them from submitting a timely application.

The unavoidable circumstance regulation only authorizes NMFS to examine whether an unavoidable circumstance thwarted an applicant’s intent to participate in the charter halibut fishery in the qualifying period or the recent period. It does *not* authorize NMFS to evaluate whether an unavoidable circumstance prevented an applicant from submitting a timely application. And other provisions of the charter halibut regulation – 50 C.F.R. § 300.67(b)(1) and 50 C.F.R. § 300.67(h)(i) – direct NMFS to issue permits only to persons who apply within the application period and to deny applications that are submitted after the application deadline.<sup>28</sup>

**3. Does NMFS have authority to accept the late application submitted by Appellants because the Appellants did not know about the application deadline? No.**

I accept, as true, that Appellants did not know about the need to apply for a charter halibut permit by the application deadline of April 5, 2010. The charter halibut regulation does not provide an exception to the requirement for a timely application for any reason, including the reason that the applicants did not know about the application deadline.

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<sup>26</sup> 50 C.F.R. § 300.67(b)(1)(i) & (ii).

<sup>27</sup> 50 C.F.R. § 300.67(g).

<sup>28</sup> See pages 4 – 5 *supra*.

Appellants state that “neither application materials nor deadline dates were mailed to our business address or to any current halibut license holder.”<sup>29</sup> The charter halibut regulation does not have any provision that requires NMFS to send application materials to potential applicants.<sup>30</sup>

The regulation does require that, to receive a charter halibut permit, a person had to apply for a permit “within the application period specified in the **Federal Register**.”<sup>31</sup> NMFS was under a legal obligation to publish this provision as a proposed, and final, rule in the Federal Register, which it did.<sup>32</sup> The regulation clearly imposes on NMFS an obligation to publish a separate notice of the application period in the Federal Register. NMFS did that.<sup>33</sup>

RAM stated, in the IAD, that NMFS did more than publish notice in the Federal Register:

In addition to the Federal Register Notice and direct mailings, NMFS/RAM undertook an extensive public information and outreach effort, designed to provide opportunity for all persons with an interest in the CHP [Charter Halibut Program] to receive notice of the application period and the application deadline.<sup>34</sup>

I examine the direct mailing and NMFS’s public information and outreach efforts as they apply to this appeal.

#### **A. Direct mailing.**

In light of the assertion in the IAD about direct mailings, I asked RAM to state whether it sent Appellants a direct mailing. RAM stated that, by “direct mailings,” it meant that it sent application packets to persons if, according to the official charter halibut record, that person met the minimum participation requirements to receive a permit.<sup>35</sup> RAM stated that it did not send either Appellant an application packet because, according to the official charter halibut record, neither Appellant met the minimum participation requirements to receive a permit.<sup>36</sup>

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<sup>29</sup> Statement by Appellants (received Jan. 21, 2011).

<sup>30</sup> Final Rule, 75 Fed. Reg. 554 (Jan. 5, 2010), *codified at* 50 C.F.R. §§ 300.61, 300.66, and 300.67, primarily § 300.67.

<sup>31</sup> 50 C.F.R. § 300.67(b)(1)(i)(bold in original).

<sup>32</sup> Proposed Rule, 74 Fed. Reg. 18,178, 18,194 (Apr. 21, 2009), *proposing* 50 C.F.R. § 300.67(b)(3)(i); Final Rule, 75 Fed. Reg. 554, 600 (Jan. 5, 2010), *adopting* 50 C.F.R. § 300.67(b)(1)(i). The proposed and final rule also contained the provision that any application submitted after the last day of the application period “will be denied.” Proposed Rule, 74 Fed. Reg. 18,178, 18,195 (Apr. 21, 2009), *proposing* 50 C.F.R. § 300.67(h)(1); Final Rule, 75 Fed. Reg. 554, 602 (Jan. 5, 2010), *adopting* 50 C.F.R. § 300.67(h)(1).

<sup>33</sup> Notice of application period, 75 Fed. Reg. 1595 (Jan. 12, 2010), quoted at page 5 *supra*.

<sup>34</sup> IAD at 1.

<sup>35</sup> Emails from RAM Supervisory Permit Specialist to Mary Alice McKeen (Dec. 2, 2010, Dec. 25, 2010), Exhibits 1 & 3 to Order (Dec. 15, 2010).

<sup>36</sup> *Id.* Federal regulation 50 C.F.R. § 300.67(f)(5) provides: “*Official charter halibut record* means the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.”

The minimum participation requirements for a charter halibut permit is that a person reported at least five bottomfish logbook fishing trips in one year in the qualifying period (2004, 2005) under their ADF&G Business Owner License and at least five halibut logbook fishing trips in the recent participation period (2008) under their ADF&G Business Owner License.<sup>37</sup>

According to the official charter halibut record, [REDACTED] reported 22 bottomfish logbook fishing trips in 2005 under its ADF&G Business Owner License but no trips in 2008.<sup>38</sup> According to the official charter halibut record, [REDACTED] reported 22 bottomfish logbook fishing trips under its ADF&G Business Owner License in 2008 but no halibut logbook fishing trips in 2004 or 2005.<sup>39</sup>

Appellants argue that their trips should be combined because they are father and son and co-owned and co-operated their two businesses. But their trip histories are not combined in the official charter halibut record because each appellant had a different ADF&G Business Owner license. Therefore, RAM followed its policy on direct mailings when it did not send an application packet to either Appellant.<sup>40</sup>

#### **B. Public information and outreach efforts.**

RAM provided a description of NMFS's publicity and outreach efforts: posting on the NMFS Alaska Region website everything NMFS published in the Federal Register – the proposed rule, the final rule, the notice of the application period; three press releases regarding the application period and the application deadline; posting the application packet from the direct mailing on the NMFS Alaska Region website, minus information that was specific to the potential applicant's logbook fishing trip history; paid advertisements on the radio and in newspapers; and sending applications to anyone who requested an application.<sup>41</sup>

In response to these materials, Appellants state that they were not in Alaska during the time that NMFS took these steps:

We appreciate the efforts of the NMFS (National Marine Fisheries Service), Alaska Region, trying to communicate and provide information to all charter entities via Alaskan local radio advertising, yet because we were not in Alaska

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<sup>37</sup> 50 C.F.R. § 300.67(b)(1)(ii).

<sup>38</sup> Official Record Summary for [REDACTED] (created Jan. 26, 2010)(RAM file), Exhibit 4 to Order (Dec. 15, 2010). This summary shows no trips reported by [REDACTED] in 2004.

<sup>39</sup> Official Record Summary for [REDACTED] (created Jan. 26, 2010) (RAM file), Exhibit 5 to Order (Dec. 15, 2010).

<sup>40</sup> I do not imply any conclusion as to whether a late applicant, who met the participation requirement for a permit based on their logbook fishing trip history in the official charter halibut record, would have grounds to file a late application if RAM had not sent them an application packet.

<sup>41</sup> Emails from RAM Supervisory Permit Specialist to Mary Alice McKeen (Dec. 2, 2010, Dec. 15, 2010); email from RAM Program Administrator to Mary Alice McKeen (Dec. 3, 2010). These are Exhibits 1, 2 and 3 to Order (Dec. 15, 2010).

during the time frame the ads were run, we had no knowledge of the deadlines for applications.<sup>42</sup>

It does appear that the radio and newspaper ads were on Alaska radio stations and in Alaska newspapers,<sup>43</sup> although the material on the NMFS Alaska Region website can be accessed online, from anywhere. But, here too, the charter halibut regulation does not provide an exception to the requirement for a timely application for persons who did not know about the deadline because they were out of State during the application period.

I conclude that NMFS does not have the authority to accept the late application filed by Appellants on the grounds that Appellants did not know about the application deadline.

Appellants make two arguments as to why they meet the participation requirements for a charter halibut permit. First, I have referred to their argument that the logbook fishing histories under each of their ADF&G Business Owner licenses should be combined. Second, Appellants state that the father had severe health problems in 2005, which demanded that the son take over the business in 2005 and that, in 2008, the father was sufficiently recovered to run the business himself. That, Appellants state, is the reason why the son has reported logbook fishing trips in 2005 and the father has reported logbook fishing trips in 2008.

If Appellants had submitted a timely application, I would evaluate both of these claims and, under the second argument, I would evaluate whether the father's severe health problems constituted an unavoidable circumstance that thwarted his intent to operate a charter halibut business in 2005. But I regret that I do not get to that question – whether the Appellants meet the participation requirement for a permit – because they do not meet the first requirement for a permit – a timely application.

#### FINDING OF FACT

RAM did not send either Appellant an application packet because, according to the official charter halibut record, neither Appellant met the minimum participation requirements for a charter halibut permit.

#### CONCLUSIONS OF LAW

1. A timely application for a charter halibut permit is a requirement for NMFS to issue a charter halibut permit.
2. The unavoidable circumstance regulation, 50 C.F.R. § 300.67(g), does not provide a basis for NMFS to issue a permit to an applicant who did not apply for a permit by the application deadline.
3. NMFS does not have the authority to accept the late application filed by Appellants on the grounds that the Appellants did not know about the application deadline.

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<sup>42</sup> Statement of Appellants (received Jan. 21, 2011).

<sup>43</sup> Exhibit 2 to Order at pages 2 – 4 (Dec. 15, 2010).

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This decision takes effect on March 3, 2011, unless by that date the Regional Administrator orders review of the Decision.

Appellants 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, February 11, 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 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.



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Mary Alice McKeen  
Administrative Judge