

In his appeal, Appellant acknowledges that his CHP application was not filed by the deadline of April 5, 2010, and explains that the filing delay was due to the fact that RAM sent an application packet to the physical location of his lodge in ██████████ Alaska (Lodge). Appellant states he did not receive the application packet until the deadline had already passed. Appellant explains that Lodge has a physical address (hereinafter referred to as Lodge Address), but no mail receptacle. As a consequence, the postal service held any mail to be delivered to Appellant at Lodge, which included RAM's mailing of the CHP application packet, until Appellant returned to Lodge for the summer charter season in June 2010. Appellant used Lodge Address, for Alaska Department of Fish and Game (ADF&G) purposes, in 2007 and 2008. However, Appellant resides in ██████████ (Residing State) and uses his permanent address in Residing State (hereinafter referred to as Residing State Address), as his permanent address on license applications. Appellant also maintains an "in season" post office box mailing address in ██████████ (hereinafter referred to as In Season Address), which he has listed as the address to which licenses should be mailed. Appellant asserts that had he received the CHP application package at his Permanent Address, he would have filed his application by the deadline.⁴

Appellant requests a hearing in this matter "at which he can present testimony regarding the addresses he used in his guided sport fishing business in applying for his sport fish business owner licenses, and when he received the mailing from RAM." Appellant also expects to present at a hearing agency witnesses "to testify regarding the February 4, 2010 memo [referring to a document, the subject of which is the methodology for consolidating and loading data for the Charter Halibut Program], and the addresses the agency used in mailing him a CHP application package and his Official Record summary." Appellant also states that he "reserves the right to submit additional evidence at this hearing."⁵

Pursuant to 50 C.F.R. § 679.43(g), the appellate officer has the discretion to proceed in a case by, for example, issuing a decision on the merits of the appeal without ordering a hearing, or by ordering a hearing under certain circumstances. I have reviewed Appellant's appeal and request for a hearing. I have determined that the record contains sufficient information on which to reach final judgment and, accordingly, I close the record and issue this decision without ordering a hearing.⁶

ISSUES

At issue in this appeal is whether RAM correctly denied Appellant's application for a CHP. To resolve this issue, I must evaluate whether the CHLAP regulations, namely 50 C.F.R. §§ 300.67(b)(1)(i) and 300.67(h)(1), support the denial of an application that was not filed within the application period as specified in the Federal Register.

⁴ Case File, Pleadings Tab, Appellant's appeal received on September 17, 2010 and submission of additional materials received on December 27, 2010.

⁵ Case File, Pleadings Tab, Appellant's appeal received on September 17, 2010 and submission of additional materials received on December 27, 2010.

⁶ 50 C.F.R. §§ 679.43(g)(2) and (k)

FINDINGS OF FACT

1. Appellant has operated a charter halibut business since 1992. Appellant offered guided sport fishing services to clients at Lodge every summer until June 1, 2007, at which time Lodge burned down. Appellant began rebuilding Lodge in 2008 and recently completed the project. In the fall and winter months, Appellant has provided guided sport fishing services to clients in Residing State.⁷
2. In 2007 and 2008, Appellant used Lodge Address as his permanent mailing address for ADF&G purposes.⁸
3. In 2009, Appellant used Residing State Address as his permanent mailing address for ADF&G purposes.⁹
4. In 2010, Appellant used Residing State Address as his permanent mailing address for the ADF&G 2010 Sport Fish Business Owner/Guide Renewal License Application; however, the ADF&G “look-up” computer screen shows Lodge Address as Appellant’s permanent mailing address.¹⁰
5. According to a February 4, 2010 document to RAM from “ISD Applications” addressing the subject of “Methodology for consolidating and loading data for the Charter Halibut Program,” RAM and ISD Applications staff chose the most current year of information from business data sent by ADF&G to determine permanent and mailing addresses to be used.¹¹
6. The application deadline for submission of a CHP application was April 5, 2010. Applications were to be obtained via the Internet or by requesting a CHP application from NMFS.¹²
7. In June 2010, Appellant received a CHP application package that RAM mailed to him at Lodge Address.¹³
8. On June 28, 2010, Appellant signed a completed CHP application, which RAM received on June 30, 2010. The upper portion of the first page of the CHP

⁷ Case File, Pleadings Tab, Appellant’s appeal received on September 17, 2010, and submission of additional materials received on December 27, 2010.

⁸ Case File, Pleadings Tab, Appellant’s appeal received on September 17, 2010, submission of additional materials received on December 27, 2010.

⁹ Case File, Pleadings Tab, Appellant’s appeal received on September 17, 2010, submission of additional materials received on December 27, 2010.

¹⁰ Case File, Pleadings Tab, Appellant’s appeal received on September 17, 2010, submission of additional materials received on December 27, 2010.

¹¹ Case File, Pleadings Tab, Appellant’s submission of additional materials received on December 27, 2010.

¹² 50 C.F.R. §§ 300.67(b)(1)(i) and (h)(1) and (2); 75 Fed. Reg. 1595 (January 12, 2010).

¹³ Case File, Pleadings Tab, Appellant’s appeal received on September 17, 2010, submission of additional materials received on December 27, 2010.

application states: "Applications must be received by April 5, 2010. Late applications will be denied."¹⁴

9. On his CHP application, Appellant stated that Lodge burnt down in 2007 and that rebuilding would be complete by the fall of 2010. He also stated the CHP application was sent to the wrong address and that he did not receive it until June 2010.¹⁵
10. RAM issued its IAD on July 23, 2010. In that decision, RAM notified Appellant that it denied Appellant's application for a CHP under the CHLAP because the application was not timely filed.¹⁶

PRINCIPLES OF LAW

The regulations governing CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that a person applies for a CHP by submitting a CHP application within the application period as specified in the Federal Register. 50 C.F.R. §§ 300.67(b)(1)(i) and 300.67(h)(1). The CHLAP regulations further state that NMFS will deny any application submitted after the last day of the application period. 50 C.F.R. § 300.67(h)(1).

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 (Notice). Notice specified an application period beginning on February 4, 2010, and ending on April 5, 2010. It also informed the public how to obtain a CHP application, namely, by accessing an internet website address from which an application could be obtained or by requesting an application from NMFS. Lastly, Notice stated that CHP applications submitted to NMFS after the deadline "will be considered untimely and will be denied." 75 Fed. Reg. 1595 (January 12, 2010).

ANALYSIS

The regulations governing CHLAP require that CHP applications are to be submitted within the application period and that applications submitted after the application deadline are deemed untimely and will be denied. 50 C.F.R. § 300.67(h)(1); Fed. Reg. 1595 (January 12, 2010).

In the instant case, Appellant does not dispute that he submitted his CHP application after the April 5, 2010 deadline, namely on June 30, 2010. Rather, Appellant argues that the reason for his untimely filing is due to the fact that RAM mailed a CHP application package to him at Lodge Address, where Appellant would be reached only during the summer fishing season. As a consequence, Appellant did not receive the

¹⁴ Case File, Original File Tab, CHP Application, Pages 1 through 10.

¹⁵ Case File, Original File Tab, CHP Application, Page 2 of 10.

¹⁶ Case File, Original File Tab, Revised IAD dated July 23, 2010.

application until June, when he arrived for the summer charter season, which was well past the application filing deadline. Appellant argues that RAM should have been aware of his Residing State Address since that was the address he listed as his permanent address in 2009 for a sport fish business owner/guide license.

While Appellant acknowledges that, in general, the late filing of applications is not excused, he asserts there are exceptions to late-filed applications under the doctrine of equitable tolling that should be applied to his case. To this end, Appellant argues that the agency failed to provide him with individual notice as a potential applicant for a CHP, which Appellant asserts was an implied requirement of CHLAP regulations.¹⁷

I am not persuaded by Appellant's arguments on appeal. NMFS' publication of the CHLAP regulations and Notice in the Federal Register provided constructive notice to Appellant of the program requirements. Specifically, Appellant was on notice that he had to submit a CHP application to NMFS by April 5, 2010, or else NMFS would deny the application as untimely. Further, Appellant was on notice that he could obtain an application on his own through the Internet or by requesting an application from NMFS. Thus, irrespective of RAM's actions in mailing Appellant a CHP application to an address he uses only seasonally, Appellant could have obtained an application directly from the Internet or by requesting an application from NMFS in sufficient time to timely submit a CHP application for consideration. Under the CHLAP regulations, RAM is not required to send CHP applications to potential applicants. The CHLAP regulations do not impose a duty on NMFS to send applications to potential applicants or a duty to ensure that an individual actually receives an application sent to him or her by NMFS. In this case, RAM's attempt to mail Appellant a CHP application package was done as a courtesy, not in fulfillment of a regulatory requirement. Consequently, RAM's failure to timely provide Appellant with a CHP application does not establish error or relieve Appellant of his obligation to have familiarized himself with the published CHLAP program requirements for obtaining a permit.

Appellant was not prevented from obtaining a CHP application from the Internet or from NMFS and from submitting an application by the deadline. Consequently, Appellant's arguments do not convince me that RAM erred in its July 23, 2010 revised IAD when it denied Appellant's application for a CHP permit. My review of the case record in this matter reveals that RAM correctly followed its regulations, namely those found at 50 C.F.R. §§300.67(b)(1)(i) and 300.67(h)(1), and properly denied Appellant's application for a CHP.

I considered the equitable arguments Appellant raised on appeal and I reviewed the cases Appellant cited in support of his arguments. I note that the cases cited did not pertain to CHLAP, but related to other programs. In any event, CHLAP regulations do not authorize relief under equitable principles. Neither the undersigned nor NAO has the authority to grant equitable claims under applicable regulations. See NAO Appeal No. 10-0065.

¹⁷ Case File, Pleadings Tab, Appellant's appeal received on September 17, 2010.

CONCLUSIONS OF LAW

RAM correctly followed its regulations governing the CHLAP, namely those found at 50 C.F.R. §§ 300.67(b)(1)(i) and 300.67(h)(1), when it denied Appellant's application for a CHP.

ORDER

The IAD dated July 23, 2010 is AFFIRMED. 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



—
Christine D. Coughlin
Administrative Judge

Date Issued: March 15, 2011

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