

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

In re Application of)
)
) Appeal No. 10-0124
)
) DECISION
)
 Appellant)

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] (Appellant). Appellant appeals an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM) program on December 8, 2010.² In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP) because his application was not submitted timely.³

The application referred to in the IAD was received by RAM on December 7, 2010.⁴ The deadline for filing an application for a CHP was April 5, 2010.⁵ Attached to the application was a statement from Appellant which indicated that it had been in operation since 1989 but had no knowledge that it needed to log saltwater trips until 2005. Appellant stated he was ticketed on multiple occasions, including in 2004 and 2005, for failing to log his charter vessel trips, and that these citations should be considered as evidence that he took the requisite trips needed to be eligible for a CHP.⁶

¹ 50 C.F.R. § 679.43

² Case File, Pleadings Tab, Appellants' appeal submission signed and dated on December 28, 2010; Original File Tab, IAD dated December 8, 2010.

³ Original File Tab, IAD dated December 8, 2010.

⁴ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

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

⁶ Original File, Letter from Appellant received on December 7, 2010.

On December 8, 2010, RAM issued the IAD at issue in this appeal. In the IAD, RAM denied Appellant's application for a CHP.⁷ RAM indicated that it lacked the authority under the CHLAP regulations to accept Appellant's late-filed application for processing.⁸ RAM also notified Appellant of his right to appeal the IAD to OAA.⁹

On December 28, 2010, OAA received Appellant's timely appeal of the IAD.¹⁰ In the appeal, Appellant indicates that it had not been notified of the CHLAP program and was unaware of the program until later in the year after the deadline for submission had passed.¹¹ Appellant attributes its lack of knowledge to the fact that it operated its business out of Oregon in the winter months and does not come to Alaska until June 1 for the start of the season.¹² Appellant also asserts that it believes it was not informed of the CHLAP program due to its failure to log any trips in 2004 and 2005.¹³

On March 3, 2011, NAO acknowledged Appellant's appeal and gave him until April 4, 2011 to submit any additional documentation.¹⁴ NAO received no additional documentation from Appellant.

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.¹⁵

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.

⁷ Original File Tab, IAD dated December 8, 2010.

⁸ Original File Tab, IAD dated December 8, 2010.

⁹ Original File Tab, IAD dated December 8, 2010.

¹⁰ Pleadings File Tab, Appellants' appeal letter received on December 28, 2010.

¹¹ Pleadings File Tab, Appellants' appeal letter received on December 28, 2010.

¹² Pleadings File Tab, Appellants' appeal letter received on December 28, 2010.

¹³ Pleadings File Tab, Appellants' appeal letter received on December 28, 2010.

¹⁴ Appeals Correspondence, NAO Acknowledgment letter dated March 3, 2011.

¹⁵ See 50 C.F.R. § 679.43 (g) and (k).

FINDINGS OF FACT

1. On January 12, 2010, NMFS published a Notice in the Federal Register that announced the application period for the CHP.¹⁶
2. The application period for submission of a CHP application started on February 4, 2010 and ended on April 5, 2010.¹⁷
3. Applications were to be obtained via internet or by requesting a CHP application from NMFS.¹⁸
4. In 2004, Appellant reported no logbook fishing trips to ADF&G.¹⁹
5. In 2005, Appellant reported no logbook fishing trips to ADF&G.²⁰
6. In 2005, Appellant was cited by ADF&G for its failure to log saltwater trips.²¹
7. In 2008, Appellant reported eleven logbook fishing trips to ADF&G.²²
8. On December 7, 2010, RAM received Appellant's CHP application signed on November 30, 2010 by Appellant.²³
9. On December 8, 2010, RAM issued its IAD and denied Appellant's application for a CHP because it was not filed timely.²⁴

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.²⁵ The CHLAP regulations further state that NMFS will deny any application submitted after the last day of the application period.²⁶

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.²⁷

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

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

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

¹⁹ Original File Tab, Print summary generated January 26, 2010.

²⁰ Original File Tab, Print summary generated January 26, 2010.

²¹ Pleadings File Tab, Appellants' appeal letter received on December 28, 2010

²² Original File Tab, Print summary generated January 26, 2010

²³ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

²⁴ Original File Tab, IAD dated December 8, 2010.

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

²⁶ 50 C.F.R. § 300.67(h)(1).

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

ANALYSIS

The regulation governing the CHLAP require that CHP applications be submitted within the application period and that applications submitted after the application deadline are deemed untimely and denied.²⁸ 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.²⁹

By publishing this announcement, NMFS put possible applicants on notice of the deadline. Appellant in this case indicates that he failed to file on time because he was unaware of the CHLAP program. On December 7, 2010, Appellant filed an application for a CHP. On the application, Appellant did not indicate the number of trips it took during the participation years. Appellant instead attached a letter to explain that he had no knowledge that he needed to log saltwater trips until 2005 when he was cited for failure to do so. As a result, Appellant had only properly reported its 2008 trips. In any case, after the April 5, 2010 deadline, 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.

In his appeal, Appellant acknowledges his late filing but attributed it to his prior mishaps in logging his trips in 2004 and 2005. Appellant believes that since he was cited for his failure to log trips during those years, those citations could serve as proof that he was charter fishing during the participation period. However, upon review of the ADF&G summary report of the trips taken by Appellant, the alleged trips taken by Appellant have not been entered into the ADF&G database. Therefore, even if Appellant's application was accepted as timely, he would still not be eligible to receive a CHP.

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.

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

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

ORDER

The IAD dated December 8, 2010 is upheld. This decision takes effect thirty days from the date issued, November 18, 2011,³⁰ 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 reverse, modify, or remand 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, October 31, 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: October 19, 2011

³⁰ 50 C.F.R. § 679.43(k) and (o).