

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

In re Application of

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Appeal No. 11-0061

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 [REDACTED] on behalf of [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 his application was not submitted timely.

The application referred to in the IAD was received by RAM on January 24, 2011.³ The deadline for filing an application for a CHP was April 5, 2010.⁴ Appellant stated in a letter attached to his application that he did not apply timely for a CHP because he was given incorrect information from a State of Alaska Fish and Game Program Technician indicating that he did not need to apply for such a permit, and because his mailing address changed.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 his right to appeal the IAD to NAO.

¹ 50 C.F.R. § 679.43

² Original File Tab, Appeal submission received January 24, 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, Letters from Appellant received on January 24, 2011.

On March 11, 2011, NOA received Appellant's timely appeal of the IAD.⁶ In the appeal, Appellant indicated that he did not apply timely for a CHP because he was given incorrect information from a State of Alaska Fish and Game Program Technician, and because his mailing address changed.⁷

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.⁸

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.⁹
2. The application deadline for submission of a CHP application was from February 4, 2010 until April 5, 2010.¹⁰
3. Applications were to be obtained via internet or by requesting a CHP application from NMFS.¹¹
4. On January 24, 2011, RAM received Appellant's CHP application signed and dated on January 20, 2011.¹²

⁶ Pleadings File Tab, type-written appeal letter received on March 11, 2011.

⁷ Pleadings File Tab, type-written appeal letter received on March 11, 2011.

⁸ See 50 C.F.R. § 679.43 (g) and (k).

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

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

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

¹² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A (Application).

5. On January 25, 2011, RAM issued its IAD and denied Appellant's application for a CHP because it was not filed timely.¹³

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.¹⁴ The CHLAP regulations further state that NMFS will deny any application submitted after the last day of the application period.¹⁵

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.¹⁶

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.¹⁷

In the appeal, Appellant explains that he did not apply timely for a CHP because he was given incorrect information from a State of Alaska Fish and Game Program Technician indicating that he did not need to apply for such a permit, and because his mailing address changed.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 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, IAD dated January 25, 2011.

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

¹⁵ 50 C.F.R. § 300.67(h)(1).

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

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

¹⁸ Pleadings File Tab, type-written appeal letter received on March 11, 2011.

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

By publishing this announcement, NMFS put possible applicants on notice of the deadline. However, Appellant submitted his application on January 24, 2011, approximately nine months after the deadline. Appellant's explanation that he did not apply timely for a CHP because he was given incorrect information by an Alaskan State official is not sufficient. Similarly, Appellant's explanation that he did not apply timely for a CHP because his mailing address changed is not sufficient to overturn the IAD. There are no circumstances in which a CHP application filed after April 5, 2010, may be approved. By the time Appellant submitted his application on January 24, 2011, 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 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 January 25, 2011 is upheld. This decision takes effect thirty days from the date issued, October 13, 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, September 23, 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.

Steven Goodman
Administrative Judge

Date Issued: September 13, 2011

²⁰ 50 C.F.R. § 679.43 (k) and (o).