

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

In re Application of

████████████████████

Appellant

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Appeal No. 12-0001

DECISION

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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, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals, Alaska Region, and is charged with processing appeals that were filed with the Office of Administrative Appeals, Alaska Region. The undersigned is the administrative judge assigned to review and decide this matter pursuant to the federal regulation that is published in the Code of Federal Regulations at 50 C.F.R. § 679.43.

On December 30, 2011, ██████████ (Appellant) timely filed an appeal with NAO, challenging a National Marine Fisheries Service (NMFS) Restricted Access Management Program (RAM) Initial Administrative Determination (IAD) dated November 30, 2011. In the IAD, RAM notified Appellant it denied Appellant's application for a Charter Halibut Permit (CHP) under the Charter Halibut Limited Access Program (CHLAP).<sup>1</sup> RAM denied Appellant's application, submitted to RAM on November 29, 2011, because it was submitted after the application deadline of April 5, 2010.<sup>2</sup>

In his appeal, Appellant acknowledges his CHP application was not filed by the deadline of April 5, 2010.<sup>3</sup>

Appellant states in his appeal he did not timely file his application for several reasons:

- Due to the nature of his work between 2004 and 2010 he was unable to timely file a CHP application.

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<sup>1</sup> The CHLAP regulations are codified at 50 C.F.R. § 300.67.

<sup>2</sup> Case File, Original File Tab, Revised IAD dated November 30, 2011.

<sup>3</sup> Undated appeal letter stamped received by RAM on December 30, 2011 and appeal letter dated December 27, 2011 stamped received by RAM on December 30, 2011.

- Due to the amount of travel in four different states, involving various post office boxes, he has had trouble with identity theft.
- The application could have been sent to Arkansas, marked with the abbreviation AR instead of the correct address in Texas or Alaska.
- His vessel has been sold to a boat broker.
- In 2008 and 2009 he was awarded a ██████████ award medal as a civilian contractor for the United States Department of Army and United States Department of Defense.

On February 27, 2012, Appellant submitted 13 pages of material in support of his appeal. All but one page were duplicates of documents already in the record. The new document was a copy of a postal return receipt. Below the copy of the receipt is a note written by Appellant. Appellant wrote he had not received his Sport Fishing IFQ and if receipt of it required a signature, he would be glad to provide it.

In rendering my decision, I have read the entire appeal file, including Appellant's most recent submissions.

## 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.

## FINDINGS OF FACT

1. On January 12, 2010, NMFS informed potential applicants of the application period for applying for a charter halibut permit (CHP) by publishing a notice in the Federal Register.<sup>4</sup>
2. In the Notice, NMFS notified potential applicants the deadline for filing applications for CHPs was April 5, 2010.<sup>5</sup>
3. In the Notice, NMFS notified potential applicants that applications received after the filing deadline of April 5, 2010 would be denied.<sup>6</sup>
4. Appellant applied for a charter halibut permit on November 29, 2011.

<sup>4</sup> 75 Fed.Reg. 1595 (January 12, 2010).

<sup>5</sup> 75 Fed.Reg. 1595 (January 12, 2010).

<sup>6</sup> 75 Fed.Reg. 1595 (January 12, 2010).

5. By IAD dated November 30, 2011, RAM denied Appellant's application.

### PRINCIPLES OF LAW

Under the regulations governing the CHLAP, NMFS will issue a CHP if an applicant meets certain requirements. One requirement is the timely filing of an application for a CHP. The filing deadline of April 5, 2010 [s1] was announced in advance of the deadline in the Federal Register.<sup>7</sup> The CHLAP regulations also provide that NMFS will deny any application submitted after the last day of the application period.<sup>8</sup>

In a Federal Register Notice, NMFS 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.<sup>9</sup>

### ANALYSIS

The regulations governing the CHLAP require CHP applications to be submitted within the application period. The application period ended on April 5, 2010. Also under the CHLAP regulations and Federal Register Notice, applications submitted after the application deadline were untimely and were to be denied.<sup>10</sup>

In this appeal, Appellant does not dispute he submitted his CHP application after the April 5, 2010 deadline, namely on around November 29, 2011. Rather, Appellant argues due to the nature of his work between 2004 and 2010 he was unable to timely file a CHP application; due to the amount of travel in four different states, involving various post office boxes, he has had trouble with identity theft; the application could have been sent to Arkansas, marked with the abbreviation AR instead of the correct address in Texas or Alaska; his vessel has been sold to a boat broker, and; in 2008 and 2009 he was awarded a ██████████ award medal as a civilian contractor for the United States Department of Army and United States Department of Defense.

NMFS's publication of the CHLAP regulations and Notice in the Federal Register provided constructive notice to Appellant of charter halibut permit program requirements. Specifically, Appellant was on notice 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 he could obtain an application on the Internet or by requesting an application from NMFS. The CHLAP regulations do not impose a duty on

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<sup>7</sup> 50 C.F.R. §§ 300.67(b)(1)(i) and 300.67(h)(1); 75 Fed.Reg. 1595 (January 12, 2010).

<sup>8</sup> 50 C.F.R. § 300.67(h)(1).

<sup>9</sup> 75 Fed.Reg. 1595 (January 12, 2010).

<sup>10</sup> 50 C.F.R. § 300.67(h)(1); Fed. Reg. 1595 (January 12, 2010).

NMFS to send applications to potential applicants or a duty to ensure an individual actually receives an application sent to him or her by NMFS.

Since NMFS was not under an affirmative duty to personally notify potential appellants about the CHP application deadline, I am not persuaded Appellant's arguments on appeal provide a basis to overturn the IAD. Even if [s2] Appellant's work did adversely affect his ability to file an application, again, the applicable regulations have no exceptions that would allow NMFS to accept late applications. Further, NAO is not authorized to provide equitable relief and allow for the filing of a late application.

For similar reasons, the remainder of Appellant's arguments do not provide a basis under applicable regulations to require NMFS to accept a late-filed application. Regardless of Appellant's moves and problems with identity theft, the sale of his vessel and the award he received, unfortunately for him, Appellant still did not submit a timely application.

Appellant's arguments do not convince me RAM erred in its November 30, 2011 IAD, in which it denied Appellant's application for a CHP. My review of the case record in this matter demonstrates 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.

#### 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 because Appellant's application was filed on November 29, 2011, after the deadline of April 5, 2010.

#### ORDER

The IAD dated November 30, 2011 is AFFIRMED.

This decision is effective thirty (30) days from the date issued<sup>11</sup> 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 reverses, modifies, or remands 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 Daylight Savings Time, on the tenth day after the date of this Decision, March 19, 2012. A motion for reconsideration must be in

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<sup>11</sup> 50 C.F.R. § 679.43(k) and (o).

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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Eileen G. Jones  
Chief Administrative Judge

Date Issued: March 9, 2012