



fulfillment of a regulatory requirement was in error. Third, Representative argues the failure to find that RAM used an incorrect address when it mailed Appellant his application package and official record summary was in error.

With regard to Representative's first argument of error—that the legal conclusion that NAO has no authority to consider the application of the doctrine of equitable tolling for a late-filed CHP application under the CHLAP is erroneous—Representative asserts that NAO's conclusion is inconsistent with agency precedent. In support of this argument, Representative argues that the Office of Administrative Appeals (OAA) has applied the doctrine of equitable tolling to excuse late-filed applications under the Individual Fishing Quota Program for Halibut and Sablefish and under the Bering Sea/Aleutian Islands Crab Rationalization Program.

I considered Representative's arguments on this issue when first presented in Appellant's appeal of RAM's Initial Administrative Determination, as explained in my decision of March 15, 2011, and I have reconsidered Representative's arguments here. Irrespective of OAA's entertainment of equitable arguments raised in other programs, and setting aside questions concerning the legal correctness of such action, the fact remains that the CHLAP regulations do not authorize relief under equitable principles. In the absence of such delegated authority, there is no basis upon which NAO may grant relief for an untimely filed CHP application under the theory of equitable tolling. As opposed to a court of law, in which equitable relief may be an available remedy when there is not a remedy at law, an administrative agency is not presumed to be vested with such authority absent explicitly delegated legislative authority. I note that Representative has not cited legal authority for the proposition that an administrative agency can make law in the form of relief lying in equity. In the absence of such, coupled with the fact that there is no legal authority within the CHLAP to grant relief under equitable principles, I find no error in my decision.

With regard to Representative's second argument of error—that the Restricted Access Management's (RAM's) attempt to mail an application package to Appellant was done as a courtesy and not in fulfillment of a regulatory requirement—Representative argues that “[a] requirement for individual notice is implicit in regulations implementing the CHLAP.” Specifically, Representative refers to a requirement that NMFS offer an applicant the opportunity to prove that the Official Record is not correct and explains that, given its confidential nature, the only way Appellant could avail himself of the opportunity to prove the record was incorrect was by RAM mailing it to Appellant with the application package. Representative argues, alternatively, that even if NAO is correct that the CHLAP regulations did not impose a duty on RAM to provide individual notice to potential applicants, “the fact that RAM undertook to do so voluntarily creates a presumption that it will perform ‘optimally.’” Representative reiterates in his arguments

on this point that the facts of Appellant's case supports the application of the doctrine of equitable tolling.

I considered Representative's arguments on this issue when first presented in Appellant's appeal of RAM's Initial Administrative Determination, as explained in my decision of March 15, 2011, and I have reconsidered those arguments here. I have determined there was no error in my decision on this point. As to the reiteration of the arguments in support of applying equitable principles in the CHLAP, I need not repeat my analysis of that issue, as it is explained above.

With respect to the balance of Representative arguments, I find no support in the CHLAP regulations. Specifically, 50 C.F.R. § 300.67(h)(2) states "[a]n application for a charter halibut permit will be made available by NMFS." 50 C.F.R. § 300.67(h)(1) provides that 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. NMFS published a notice in the Federal Register on January 12, 2010 (Notice) stating "[a]ll persons are hereby notified that they must obtain an application on the Internet or request a charter halibut application from NMFS (see ADDRESSES)." Appellant did neither. 50 C.F.R. § 300.67(h)(3) states:

NMFS will create the official charter halibut record and will accept all application claims that are consistent with the official charter halibut record. If an applicant's claim is not consistent with the official charter halibut record, NMFS will issue non-transferable interim permit(s) for all undisputed permit claims, and will respond to the applicant by letter specifying a 30-day evidentiary period during which the applicant may provide additional information or argument to support the applicant's claim for disputed permit(s).

Thus, contrary to Representative's assertions—that the only way Appellant could challenge the Official Record was to receive a copy of the record from NMFS as part of a CHP application package mailing—the regulatory provisions of the CHLAP outline a distinct process by which an applicant may challenge the Official Record, following the applicant's timely submission of the CHP application. Further, as stated in the decision of March 15, 2011, the CHLAP do not impose a duty on NMFS to mail applications to potential applicants.

With regard to Representative's third argument of error—the failure to find that RAM used an incorrect address when it mailed Appellant his application package and official record summary was erroneous—Representative argues that "the address RAM used [for Appellant] was not the address the [Alaska Department of Fish and Game] had for [Appellant] as of June 24, 2009 and, thus was not the

correct address for purposes of sending him an application package.” Representative argues that the decision of March 15, 2011 “glosses over this fact, and should be corrected to include a finding that an incorrect address was used.”

I have reviewed the findings of fact contained in the decision of March 15, 2011 and find that they are supported by the case record. Representative’s argument that an additional finding of fact is needed stating that RAM used an incorrect address when it mailed Appellant the CHP application package is not persuasive. Such a finding is immaterial to the issues presented in the appeal and the outcome of the case. As stated, NMFS was not under a regulatory duty to mail Appellant a CHP application, making the address used immaterial to the issue of Appellant’s untimely submission of a CHP application. Accordingly, I find no material error in the decision of March 15, 2011.

I have carefully reviewed the Decision in this case and Appellant’s Motion for Reconsideration. Based on the foregoing, I conclude that the Decision does not contain material errors of law or fact. Accordingly, I deny Appellant’s Motion for Reconsideration.

The new effective date of the Decision is August 22, 2011 subject to the Regional Administrator’s review.<sup>2</sup>

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Christine D. Coughlin  
Administrative Judge

Date Issued: July 21, 2011

<sup>2</sup> <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>; 50 C.F.R. § 679.43(o).