

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 05-0006
)	
SCOTT C. SPINAK,)	DECISION
Appellant)	
_____)	June 4, 2007

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program of the National Marine Fisheries Service (NMFS) issued an Initial Administrative Determination (IAD) on July 5, 2005, that denied Mr. Spinak's application for catcher vessel crew quota share (QS) under the Bering Sea/Aleutian Islands (BSAI) Crab Rationalization Program (CRP). RAM denied the application because it was received after the CRP application deadline.

Mr. Spinak filed a timely appeal of the IAD. He has standing to file an appeal because his interest in obtaining crab QS is directly and adversely affected by the IAD.¹ Mr. Spinak did not request an oral hearing, and an oral hearing was not held because there are no material factual issues in dispute.²

ISSUE

Shall NMFS treat Mr. Spinak's application for crab quota share as timely filed?

ANALYSIS

NMFS received Mr. Spinak's CRP application for catcher vessel crew quota share on July 1, 2005, almost a month after the filing deadline. The application period ran from April 4, 2005, to June 3, 2005.³ CRP regulations provide that late applications will be denied, and RAM did deny Mr. Spinak's application in an IAD four days after the application was received.⁴

¹ 50 C.F.R. §679.43(b) provides, in part: "Any person whose interest is directly and adversely affected by an initial administrative determination may file a written appeal."

² 50 C.F.R. §679.43(g)(3) provides, in part, that the Appellate Officer may "Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:
(i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law."

³ Notice, 70 Fed. Reg. 11,194-11,195 (Mar. 8, 2005).

⁴ 50 C.F.R. §680.40(f)(1)(iii) provides: "An application that is postmarked, faxed, or hand delivered after the ending date for the application period for the Crab QS Program specified in the

On appeal, Mr. Spinak does not dispute that his application was late. He contends, however, that the sole reason his application was late is that RAM did not send application materials to his current address. He asserts that NMFS was required by its own regulations, and by the Due Process Clause of the United States Constitution, to make a good faith effort to locate him and send him a crab QS application in time to have enabled him to file it before the June 3, 2005, deadline.⁵

Specifically, Mr. Spinak cites federal regulation 50 C.F.R. §680.40(f)(1)(i), which provides:

(i) The Regional Administrator will send application materials to the person identified by NMFS as an eligible applicant based on the official crab rationalization record. An application form may also be obtained from the Internet or requested from the Regional Administrator.

Mr. Spinak asserts that this regulation requires NMFS to make a “legitimate effort” to send applications to qualified individuals, to make a “thorough attempt” to find each individual’s current address, to “exercise due diligence,” and to give timely and proper notice to qualified individuals of their right to apply for crab QS.⁶

Mr. Spinak also argues, in the alternative, that due process requires NMFS to excuse the late filing of applications for “good cause.”⁷

To decide the ultimate issue of whether NMFS shall treat Mr. Spinak’s application for crab quota share as timely filed, and to fully address Mr. Spinak’s arguments, we must answer three questions:

1. Did RAM abuse its discretion when implementing 50 C.F.R. §680.40(f)(1)(i)?
2. Did RAM have a duty to provide actual notice of the CRP and the application filing period to Mr. Spinak?
3. Can Mr. Spinak’s late filing be excused under the doctrine of equitable tolling?

Federal Register will be denied.”

⁵ Spinak Appeal at 1-2 (Sep. 6, 2005).

⁶ *Id.* at 1-2.

⁷ *Id.* at 3.

1. Did RAM abuse its discretion when implementing 50 C.F.R. §680.40(f)(1)(i)?

As a preliminary matter, we wish to point out that the meaning of “eligible applicant” in 50 C.F.R. §680.40(f)(1)(i) is unclear. The regulation states that “[t]he Regional Administrator will send application materials to the person identified by NMFS as an eligible applicant based on the official crab rationalization record.” An “eligible applicant” is defined (in part) as “a qualified person who submitted an application during the application period announced by NMFS”⁸ Thus, a person cannot be an eligible applicant unless the person has filed a timely application. Therefore, strictly speaking, RAM cannot identify eligible applicants until after the application period has closed. Sending application materials at that point would be absurd. Consequently, to avoid an absurd result, we read 50 C.F.R. §680.40(f)(1)(i) as requiring RAM to send application materials to all persons whose fishing history, as shown in the official crab rationalization record, indicates that they would be eligible for QS if they timely apply.

Mr. Spinak does not dispute that RAM properly identified him as an eligible applicant for purposes of implementing 50 C.F.R. §680.40(f)(1)(i). The administrative record in this case shows that RAM mailed application materials on April 4, 2005, the first day of the application filing period, to Mr. Spinak at his address in Newport, Oregon, that was listed in the official crab rationalization record.⁹ The envelope in which the application materials were sent has imprints on the front that show that it was returned to RAM on April 11, 2005. A sticker on the envelope states: “Return To Sender. Not Deliverable as addressed. Unable to forward.”

Mr. Spinak acknowledges that the Newport, Oregon, address that RAM used had been his correct address until June 2002, when he moved his family from Oregon to Hawaii.¹⁰ He states that he filed a change of address form with the United States Postal Service (USPS), and that he received mail forwarded from Alaska for one year thereafter, that is, until June 2003.¹¹ Mr. Spinak states that he moved his fishing vessel, the F/V SWELL RIDER, into the Hawaiian

⁸ This definition of “eligible applicant” appears at 50 C.F.R. §679.2, the definitions section for terms used in Part 679 of Title 50 of the *Code of Federal Regulations*. The CRP regulations are in Part 680 of Title 50, which itself contains no definition of the term “eligible applicant.” The definitions section at 50 C.F.R. §680.2 references §679.2 and, reasonably read, makes the §679.2 definitions applicable to Part 680. However, the definition of “eligible applicant” at 50 C.F.R. §679.2 is, by its terms, limited to the License Limitation Program and arguably does not apply to the crab rationalization program. Thus, if “eligible applicant” is not defined for purposes of the CRP, NMFS must interpret the term reasonably.

⁹ The envelope was postmarked by a postage meter at Juneau, Alaska, on April 1, 2005, and again on April 4, 2005. The earlier postmark showed postage of \$2.44; the latter postmark showed zero amount for postage. We presume from the two postmarks that the envelope was originally prepared for mailing on Friday, April 1, but did not go out on that day, and that it was actually mailed on Monday, April 4.

¹⁰ Spinak Appeal at 1-2 (Sep. 6, 2005).

¹¹ *Id.*

longline fishery because quotas in the Alaska crab fisheries had declined and he was seeking a more viable fishery.¹² The record contains no evidence that Mr. Spinak or his vessel participated in any Alaska fishery after 2002.

The record shows that Mr. Spinak's Newport, Oregon, address is the most current address that NMFS had for him when they initially mailed application materials to him. The record shows that when the crab QS application materials initially mailed to Mr. Spinak were returned by the USPS, RAM contacted the State of Alaska's Commercial Fisheries Entry Commission (CFEC) in Juneau in an attempt to find a more current mailing address for Mr. Spinak.¹³ The CFEC had only the same address for Mr. Spinak that RAM had in its own records. Checking with CFEC for a better address is RAM's routine practice when a mailing of crab application materials is undeliverable as originally addressed.¹⁴ RAM took no further action to locate Mr. Spinak.

On July 17, 2005, Mr. Spinak called RAM for application information and, on the same day, RAM sent application materials to him at his current address in Hawaii.¹⁵ Apparently, that was the first time that Mr. Spinak notified RAM of his new address.

Mr. Spinak asserts that RAM had a duty to look beyond its own records and CFEC records to locate his current address. He says that RAM should have used the Internet to find him, and that a search revealing his current address would have taken only 19 seconds.¹⁶

The CRP regulations do not tell RAM how to determine the mailing address of an eligible applicant, either initially or when the first address proves to be outdated. NMFS, therefore, has discretion to decide which resources to use and how far to go in an attempt to locate eligible applicants, but it must exercise that discretion reasonably. Given that the regulation itself tells RAM to identify eligible applicants "based on the official crab rationalization record," We find that it is reasonable for RAM to begin with the address listed in the official record. We find that it is also reasonable for RAM to consult with the CFEC to find a more recent address. Since the CFEC issues crab licences, it would be the most appropriate official source to locate participants in Alaska's crab fisheries.

Even if RAM could have found Mr. Spinak's current mailing address quickly and easily through

¹² *Id.*

¹³ The CFEC issues the crab permits that applicants used historically to earn their eligibility for crew catcher vessel QS.

¹⁴ IAD at 2.

¹⁵ IAD at 1.

¹⁶ Spinak Appeal at 2.

an Internet search, the same would not necessarily be true for all crab QS applicants.¹⁷ And even after finding an address for “Scott Spinak” over the Internet, RAM still would have had to verify that he was the same person listed in the official record as an eligible applicant and that the internet address was his current address. Although in some instances, such as this one, using the Internet to search for an eligible applicant’s current address may be helpful, we cannot say that 50 C.F.R. §680.40(f)(1)(i) requires RAM to use the Internet or any other particular source of addresses.

When an agency’s regulations do not specify the method or means the agency must use to perform required functions, the agency must exercise discretion in deciding how to allocate its limited resources. RAM chose to limit its searches to the records of the two government agencies primarily responsible for commercial fisheries regulation in Alaska. This practice was reasonably calculated to find most eligible applicants for the CRP. Therefore, we conclude that RAM did not abuse its discretion in implementing 50 C.F.R. §680.40(f)(1)(i).

2. Did RAM have a duty to provide actual notice of the CRP and the application filing period to Mr. Spinak?

Mr. Spinak asserts that RAM was required to give him timely notice of his right to apply for quota share. Under due process principles, and under the federal Administrative Procedure Act (APA), a federal government agency must provide adequate notice of regulatory changes that may affect a person’s ability to earn a livelihood.¹⁸ General notice of proposed and final rule making must be published in the *Federal Register*.¹⁹

NMFS duly published its CRP regulations and notice of the application filing period in the *Federal Register*, in accordance with APA notice-and-comment rule making requirements.²⁰ That publication gave Mr. Spinak, and all other potential applicants, legally sufficient constructive notice of the requirements of the program, even if some individuals did not receive actual notice of the regulatory requirements.²¹ When regulatory requirements are properly published, the law shifts to the affected public the burden of finding out about those

¹⁷ For example, on May 31, 2007, we conducted an Internet search for the common name “William Johnson” on the website www.whitepages.com and found more than 300 entries.

¹⁸ 5 U.S.C. § 551 *et seq.*

¹⁹ 5 U.S.C. § 553.

²⁰ Proposed Rule, 69 Fed. Reg. 63,200-63,316 (Oct. 29, 2004); Final Rule, 70 Fed. Reg. 10,174-10,295 (Mar. 2, 2005); Notice, 70 Fed. Reg. 11,194-11,195 (Mar. 8, 2005).

²¹ See, e.g., *Richard D. Foss*, Appeal No. 95-0003 (Aug. 6, 1996); *David L. Hall*, Appeal No. 95-0014 (Sep. 1, 1998).

requirements.²² As we stated in a previous decision, “[f]ishing is a highly regulated industry. It is a fisherman's responsibility to keep informed of applicable regulations.”²³

Federal regulation 50 C.F.R. §680.40(f)(1)(i) requires NMFS to send CRP application materials to eligible applicants, both unsolicited and upon request. The regulation does not require NMFS to guarantee receipt of those materials.

We conclude that NMFS did not have a duty to provide actual notice of the CRP application filing period to Mr. Spinak, but that NMFS did provide adequate public notice of the CRP and the application filing deadline, through publication in the *Federal Register* and on the NMFS Alaska Region website.

3. Can Mr. Spinak’s late filing be excused under the doctrine of equitable tolling?

Mr. Spinak asserts that due process requires a “good cause” exception for late filing. In fact, the doctrine of equitable tolling provides relief to applicants who were unable to file a timely application due to extraordinary circumstances beyond their control.

This office has granted relief under the equitable tolling doctrine in a few cases after extensive fact-finding hearings.²⁴ On the other hand, in several decisions, this office has denied relief to late applicants whose ignorance of an application deadline was due a lack of attentiveness or a voluntary absence from Alaska fisheries.²⁵ We found that these were not extraordinary circumstances beyond the applicants’ control that prevented them from filing an application in a timely manner.

Mr Spinak has not stated facts that would trigger application of the equitable tolling doctrine. Therefore, we conclude that his late application cannot be excused under that doctrine.

²² Given that Mr. Spinak is familiar with, and has access to, the Internet, he could have kept informed about the CRP by reading the NMFS Alaska Region’s website: www.fakr.noaa.gov. There he could have easily found application forms and all necessary information to apply by the filing deadline. Additionally, the CRP was developed by the North Pacific Fishery Management Council over a six-year period, and Mr. Spinak could have followed the Council’s progress on its website: www.fakr.noaa.gov/npfmc/.

²³ *T. Samuelson and T. Vasileff*, Appeal No. 94-0011 at 5 (Sep. 18, 1995).

²⁴ *See, e.g., John T. Coyne*, Decision on Reconsideration, Appeal No. 94-0012 (May 24, 1996); *Estate of Marvin C. Kinberg*, Appeal No. 95-0035 (Aug. 1, 1997); and *Christopher O. Moore*, Appeal No. 95-0044 (Sep. 5, 1997).

²⁵ *T. Samuelson and T. Vasileff*, Appeal No. 94-0011 (Sep. 18, 1995); *Richard D. Foss*, Appeal No. 95-0003 (Aug. 6, 1996); *David L. Hall*, Appeal No. 95-0014 (Sep. 1, 1998); *Chris R. Opheim, Sr.*, Appeal No. 00-0006, Decision on Reconsideration (Jan. 24, 2003).

Based on all of the above, we conclude that NMFS cannot treat Mr. Spinak's late application for crab QS as timely filed.

FINDINGS OF FACT

We find the following facts by a preponderance of the evidence in the record:

1. RAM mailed application materials on April 4, 2005, to Mr. Spinak at his address in Newport, Oregon, that was listed in the official crab rationalization record.
2. The Newport, Oregon, address that RAM used had been his correct address until June 2002, when he moved his family from Oregon to Hawaii.
3. Neither Mr. Spinak nor his vessel participated in any Alaska fishery after 2002.
4. Mr. Spinak's Newport, Oregon, address is the most current address that NMFS had for him when RAM initially mailed application materials to him.
5. When the crab QS application materials initially mailed to Mr. Spinak were returned by the USPS, RAM contacted the State of Alaska's Commercial Fisheries Entry Commission (CFEC) in Juneau in an attempt to find a more current mailing address for Mr. Spinak.
6. Checking with CFEC for a better address is RAM's routine practice when a mailing of crab application materials is undeliverable as originally addressed.
7. It is reasonable for RAM to begin with an applicant's mailing address that is listed in the official record.
8. It is reasonable for RAM to consult with the CFEC to find a more recent address.
9. RAM's practice of limiting its searches to the records of the two government agencies primarily responsible for commercial fisheries regulation in Alaska was reasonably calculated to find most eligible applicants for the CRP.
10. Mr Spinak has not stated facts that would trigger application of the equitable tolling doctrine.

CONCLUSIONS OF LAW

1. Federal Regulation 50 C.F.R. §680.40(f)(1)(i) requires RAM to send application materials to all persons whose fishing history, as shown in the official crab rationalization record, indicates that they would be eligible for QS if they timely apply.
2. CRP regulations do not tell RAM how to determine the mailing address of an eligible

applicant, either initially or when the first address proves to be outdated.

3. NMFS has discretion to decide which resources to use and how far to go in an attempt to locate eligible applicants, but it must exercise that discretion reasonably.
4. Federal Regulation 50 C.F.R. §680.40(f)(1)(i) does not require RAM to use the Internet or any other particular source of addresses.
5. When an agency's regulations do not specify the method or means the agency must use to perform required functions, the agency must exercise discretion in deciding how to allocate its limited resources.
6. RAM did not abuse its discretion in implementing 50 C.F.R. §680.40(f)(1)(i).
7. NMFS duly published its CRP regulations and notice of the application filing period in the *Federal Register*, in accordance with APA notice-and-comment rule making requirements.
8. NMFS's publication of the CRP regulations in the *Federal Register* gave Mr. Spinak, and all other potential applicants, legally sufficient constructive notice of the requirements of the program.
9. Federal regulation 50 C.F.R. §680.40(f)(1)(i) does not require NMFS to guarantee receipt of application materials.
10. NMFS did not have a duty to provide actual notice of the CRP application filing period to Mr. Spinak.
11. Mr. Spinak's late application cannot be excused under the doctrine of equitable tolling.
12. NMFS cannot treat Mr. Spinak's late application for crab QS as timely filed.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on July 5, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. §679.43(o).

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Time, on June 14, 2007, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Administrative Judges, and must be accompanied by a written statement in support of the motion.

Randall J. Moen
Administrative Judge

Edward H. Hein
Chief Administrative Judge