NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 96-0010
	)	
SHERRY L. TUTTLE and	)	
LORI WHITMILL	)	DECISION
F/V ROSE	)	
ADF&G # 65124	)	
Appellants	)	December 3, 1999
_____	)	

STATEMENT OF THE CASE

Sherry Tuttle and Lori Whitmill applied for a moratorium qualification and permit for the F/V ROSE in April 1996 under the Vessel Moratorium Program on Groundfish and Crab. On the application Ms. Tuttle indicated that the vessel had not been used to land moratorium crab or moratorium groundfish during the qualifying period, January 1, 1988 through February 9, 1992, but had landed moratorium groundfish species harvested with hook gear during the period February 10, 1992 through December 11, 1994. Because of the lack of landings during the qualifying period, the Restricted Access Management (RAM) program denied the Appellants' application in an Initial Administrative Determination (IAD), issued on April 4, 1996. With the IAD, RAM issued to the Appellants a non-transferable Certificate of Moratorium Qualification and an interim Vessel Moratorium Permit for the F/V ROSE, the latter as required by 50 C.F.R.
§ 679.4(c)(10)(ii). The filing of a timely appeal on May 2, 1996, kept the qualification and permit from expiring, and both are still in effect, pending a final agency action on the Appellants' application.

A fair reading of the appeal is that the Appellants ask that the IAD be reversed, and that they be issued a transferable Certificate of Vessel Moratorium Qualification and a permit for the F/V ROSE. The Appellants did not request a hearing, and because there is not a genuine and substantial issue of adjudicative fact for resolution at a hearing, a hearing has not been ordered.[1] Because the record contains sufficient information from which to render a decision on the record and all procedural requirements have been met, the record is hereby closed.[2]

ISSUE

Are the Appellants entitled to a transferable Vessel Moratorium Qualification certificate and a non-interim Vessel Moratorium Permit for the F/V ROSE?

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[1] 50 C.F.R. § 679.43(g)(3)(i).

[2] 50 C.F.R. § 679.43(k).

DISCUSSION

The Appellants do not assert that their vessel, the F/V ROSE, made any landings of moratorium species during the qualifying period, January 1, 1988 through February 9, 1992. Thus, they do not challenge RAM's determination that the F/V ROSE failed to meet the regulatory requirements to have moratorium qualification and to obtain a Vessel Moratorium Permit. Rather, the Appellants make two arguments on other grounds. First, they assert in their appeal that in 1993, while considering the sale of their old vessel, the F/V JUNE ROSE, and the purchase of a new vessel, the F/V ROSE, Ms. Tuttle contacted (unnamed) NMFS officials and was told "that the moratorium was for halibut and sablefish, and that as soon as those fisheries went IFQ, the moratorium would no longer apply." Therefore, Ms. Tuttle states, she concluded that the F/V ROSE would be unaffected by the upcoming moratorium program, and she would be able to use that vessel to continue fishing for rockfish, as she had been doing with the F/V JUNE ROSE.

The Appellants' second argument is that it is unfair that the vessel moratorium program presumes that moratorium qualification remains with the original qualifying vessel when the vessel is sold, unless the seller specifically retains the qualification and severs it from ownership of the vessel. The Appellants assert that it is unfair that the new owner of the F/V JUNE ROSE gets the benefit of the qualifying landings made from that vessel by the Appellants.

Appellants' first argument is essentially a claim of government estoppel. Under the doctrine of government estoppel, a party who reasonably and detrimentally relies on misinformation or wrong advice provided by a government agency and, as a result, fails to meet or comply with government requirements, may, under certain circumstances, preclude ("estop") the government from asserting the party's noncompliance. Among the circumstances that must be present for the doctrine of government estoppel to apply, is that the government agent must have engaged in affirmative misconduct.[3] Appellants in this case do not allege or provide evidence of affirmative government misconduct.

Furthermore, as this Office stated in Prowler Partnership v. Samuelson, Appeal No. 95-0084, November 8, 1995, at 10, NMFS cannot be bound by statements that were allegedly made before the management program and regulations were adopted. Determinations regarding applications under the moratorium program must be based on the regulations as finally adopted. Appellants allege that they received advice from NMFS officials in 1993, two years before the final rule for the vessel moratorium program was published.[4] Therefore, even assuming *arguendo* that NMFS agents had made the

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[3]*See generally,* Jean F. Rydstrom, Annotation, *Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies,* 27 A.L.R. Fed. 702 (1976).

[4]A proposed rule was published on June 3, 1994 at 59 Fed. Reg. 28,827-28,838. That rule was withdrawn on August 24, 1994 at 59 Fed. Reg. 43,534. A second proposed rule was published on May 12, 1995 at 60 Fed. Reg. 25,677-25,687. The final rule was published on August 10, 1995 at 60 Fed. Reg.

statements alleged by the Appellants, that these statements constituted misadvice, and that the Appellants relied on the statements to their detriment, NMFS cannot be bound by the statements because they would only have been mere speculation about what the final moratorium program regulations would ultimately provide. I find that Appellants' reliance on statements allegedly made by NMFS agents concerning proposed regulations did not constitute reasonable reliance for purposes of the doctrine of governmental estoppel. Therefore, the doctrine does not apply in this instance.

The Appellants' other argument, concerning the unfairness of the moratorium's presumption that moratorium qualification follows the vessel when it is sold, is a matter that is beyond this Office's jurisdiction to decide. It is inappropriate for an administrative appeals officer to pass judgment on the validity or wisdom of the agency's own duly promulgated regulations.[5]

FINDINGS OF FACT

1. Appellants in this case do not allege or provide evidence of affirmative government misconduct.

2. Appellants allege that they received advice from NMFS officials in 1993, two years before the final rule for the vessel moratorium program was published.

3. The alleged statements by NMFS agents would only have been mere speculation about what the final moratorium program regulations would ultimately provide.

4. Appellants' reliance on statements allegedly made by NMFS agents concerning proposed regulations did not constitute reasonable reliance for purposes of the doctrine of governmental estoppel.

CONCLUSIONS OF LAW

1. Under the doctrine of government estoppel, a party who reasonably and detrimentally relies on misinformation or wrong advice provided by a government agency and, as a result, fails to meet or comply with government requirements, may, under certain circumstances, preclude ("estop") the government from asserting the party's noncompliance.

2. Among the circumstances that must be present for the doctrine of government estoppel to apply, is that the government agent must have engaged in affirmative misconduct.

3. NMFS cannot be bound by statements that were allegedly made before the management program

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[5] George M. Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, April 21, 1995, at 4-5.

and regulations were adopted.

4. Determinations regarding applications under the moratorium program must be based on the regulations as finally adopted.

5. The F/V ROSE failed to meet the regulatory requirements to have moratorium qualification and to obtain a Vessel Moratorium Permit.

6. Appellants are not entitled to a transferable Vessel Moratorium Qualification certificate and a non-interim Vessel Moratorium Permit for the F/V ROSE.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on January 3, 2000, unless by that date the Regional Administrator orders review of the Decision. Any party, including 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 December 13, 1999, the tenth day after the date of 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 Appeals Officer, and must be accompanied by a written statement or Points and Authorities in support of the motion.

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Edward H. Hein
Chief Appeals Officer