

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF THE REGIONAL DIRECTOR

In Re Application of) Appeal No. 94-0008
)
GEORGE M. RAMOS) DECISION ON REVIEW
)
)
_____) AFFIRMED

In Re Application of) Appeal No. 94-0002
)
ROY O. PEDERSON) DECISION ON REVIEW
)
)
_____) AFFIRMED

On September 12, 1994, the Restricted Access Management (RAM) Division, National Marine Fisheries Service (NMFS), denied appellant George M. Ramos's application for Quota Share (QS) under the Individual Fishing Quota (IFQ) program for Pacific halibut and sablefish because it was not filed with the Division by the filing deadline, July 15, 1994.

On August 22, 1994, the RAM Division denied appellant Roy O. Pederson's application for QS under the IFQ program for Pacific halibut and sablefish because it also was not filed with the Division by the filing deadline, July 15, 1994.

Appellants filed timely administrative appeals of the initial decisions pursuant to the provisions of 50 C.F.R. 676.25.

By two decisions dated March 21, 1995, the Appeals Officer affirmed the Initial Decision in each of the above-captioned cases. In the Ramos decision, the Appeals Officer also recommended that:

...the Regional Director exercise his discretion to require the Division to process this Appellant's application as if it had been timely filed.

It is separately recommended that NMFS consider whether any change should be made in the current policy and rule that the late filing of an application permanently bars the applicant from receiving initial Quota Share under the IFQ Program.

George M. Ramos, Appeal No. 94-0008 (March 21, 1995), at 8. In the Pederson decision, the Appeals Officer recommended that:

For reasons explained in George M. Ramos, Appeal No. 94-0008, March 21, 1995, I recommend that NMFS consider whether any change should be made in the current policy and rule that the late filing of an application permanently bars the applicant from receiving initial Quota Share under the IFQ Program.

Roy O. Pederson, Appeal No. 94-0002 (March 21, 1995), at 3.

Pursuant to the provisions of 50 C.F.R. 676.25(o), I hereby AFFIRM the Appeals Officer's Decision, as well as the Initial Decision, and DENY the recommendation that discretionary relief be granted, in each of the above-captioned matters for the reasons set forth below.

I. IFQ Application Period.

The provisions of 50 C.F.R. 676.20 (d) provide, in pertinent part, that:

An application period of no less than 180 days will be specified by notice in the Federal Register and other information sources that the Regional Director deems appropriate.

Id. [Emphasis added]. The IFQ regulations, of which the above-quoted provision is a part, were duly promulgated through notice and comment rulemaking pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. 553. See 58 Fed. Reg. 59375 (1993). In pursuance of this regulatory directive, on January 6, 1994, NMFS established a single 180 day application period through publication of a Notice in the Federal Register. See 59 Fed. Reg. 701 (1994). The Notice provided that the application period began on January 17, 1994, and ended by close of business, July 15, 1994. The Notice also provided that:

Applications for initial allocation of QS received after the close of business on July 15, 1994, will not be considered.

Id. at 702.

¹ For a discussion of the agency's use of "other information sources" other than the Federal Register to publicize the establishment of an application period for qualification under the program, see George M. Ramos, supra at 4.

The fact that the emphasized phrase in the regulation, above, is in the singular demonstrates what would seem obvious - that the North Pacific Fishery Management (Council) and the Secretary of Commerce, in establishing an Individual Fishery Quota system for the halibut and sablefish fisheries in Alaska, intended that qualification for and the establishment of a pool of transferable QS recipients under the program be a one-time event.²

By definition, any one-time application period must end at some specific point in time. Also, it can be reasonably predicted and expected that no matter when the deadline is set, there will be those who file late. Both the agency and previous decisions have applied the application deadline in as liberal a fashion as possible. In each of these situations, however, this has been accomplished by finding that the appellant has complied with the requirements of the regulations as a matter of law through performance of some significant act in furtherance of filing his/her application prior to expiration of the deadline, whether it be the treatment of a timely³-filed Request for Application (RFA) as a timely⁴-filed application, the placing of the⁵ application in the mail, or the acceptance of faxed applications. Neither Mr. Ramos

² This conclusion is confirmed by a comment in the final rule, above, involving the addition of the word "initial" to the last sentence of 50 C.F.R. 676.20(b):

The adjective 'initial' is added before QS in [section] 676.20(b) to emphasize that the modification of QS to accommodate the CDQ program will occur only once with the calculation of the initial QS allocation.

58 Fed. Reg. at 59382. Although the subject of the comment is the calculation of allocations under the CDQ program, it clarifies (if clarification is needed) the meaning of the word "initial" as it is used throughout the provisions of 50 C.F.R. 676.20 in the related terms "initial allocation of quota share," "[c]alculation of initial QS," "[a]pplication for initial QS," etc. The comment thus makes clear that the calculation of the QS pool occurs only once with the establishment of the program. The QS pool will be adjusted in the future only as a result of successful appeals and enforcement actions that sanction QS (58 Fed. Reg. at 59394; 57 Fed. Reg. 57130, 57136 (1992)). These are the only adjustments provided for in the program.

³ See Memorandum of Philip J. Smith, Chief, RAM Div. (July 26, 1994).

⁴ Michael B. White, Appeal No. 94-0009 (Jan. 17, 1995), aff'd by the Regional Director (Jan. 20, 1995).

nor Mr. Pederson have met this liberalized standard. They took no action whatsoever, significant or otherwise, until after expiration of the deadline. The decision of both the RAM Division not to process their applications, and the decision of the Appeals Officer to affirm those initial decisions, are therefore correct and are hereby AFFIRMED.

II. Recommendation For "Discretionary Review."

After correctly applying the application deadline requirement, the Appeals Officer in these matters went on to question - at length - the underlying policies behind both the application deadline and the establishment of the QS pool on a one-time basis. He then recommended that I grant these appellants relief on review through the exercise of my "discretion" to change the "policies" in question.

I wish to take this opportunity to remind the Hearing Officer that the "policies" he questions in his decision are the policies of the Council and the Secretary of Commerce developed during the long enactment process of this program. This process involved numerous opportunities for public input and comment. More to the point, these "policies" were duly implemented through APA notice and comment rulemaking. As duly implemented regulations, it is wholly inappropriate for an administrative appeals officer to pass judgment on either the validity or the wisdom of such policies. It is for the Council and the Secretary to formulate policy. It is the function of administrative hearings officers to interpret and apply those policies as enacted into regulation: nothing more, and nothing less.

⁵ Kenneth F. Tison, Appeal No. 95-0002 (Jan. 30, 1995),¹ aff'd by the Regional Director (Jan. 30, 1995).

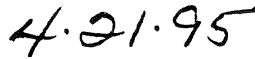
⁶ In point of fact, the policy behind the Council/Secretary's decision to establish the QS pool at a single point in time has to do with the subsequent transfer of such QS. One of the program goals is to establish a market value for QS, and to promote the stability of that value through time. Although there are a number of factors which may affect that value which are beyond the Council/Secretary's control (e.g., natural fluctuations in the stocks of halibut/sablefish), there are some factors which are within their control. The addition of new QS recipients to future quota pools, and with them a diminution in the value of QS already on the market, is just such a factor.

⁷ Passing upon the validity or wisdom of the policy underlying a duly promulgated regulation is not only an inappropriate function for an administrative appeals officer as a matter of general administrative law, it was specifically not

If an appellant is aggrieved by the policy embodied in duly promulgated regulation, his/her remedy is not to be found in the administrative appellate process. It is to found before the Council. If Mr. Ramos or Mr. Pederson, or similarly situated appellants, are aggrieved by either the application deadline or the fact that the application process was established as a one-time occurrence, I recommend that they bring their concern to the Council's attention. The Council and the Secretary can then perform their statutorily authorized function of determining whether these (or other) provisions of the IFQ program should be changed or modified through the promulgation of regulatory amendments. It is wholly inappropriate for an Appeals Officer to recommend that I grant such relief on review. In my role as the ultimate administrative appeal authority for the IFQ program, I have no such "discretion." The "discretion" to which the Appeals Officer refers properly lies with the Council and the Secretary.



For Steven Pennoyer
Don W. Collinsworth
Director, Alaska Regional
Operations Office



Date

intended by the Council. The preamble to the proposed rule for the IFQ program, states:

The Council intended limiting appeals to the issue of initial allocation of QS. For example, questions about the accuracy of catch data in the NMFS unified database or questions about vessel ownership or the existence of a vessel lease during the QS qualifying years could be appealed. The Council did not intend to involve the appeals process with, for example, questions about whether the IFQ program...is good fishery management policy....

57 Fed. Reg. 57130, 57135 (1992). [Emphasis added].

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