

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 06-0012  
)  
DAVID E. THOMPSON, ) DECISION  
Appellant )  
) November 20, 2006  
\_\_\_\_\_)

STATEMENT OF THE CASE

David E. Thompson filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management Program (RAM) of the NMFS Alaska Region. The IAD denied Mr. Thompson's annual application for Individual Fishing Quota for the 2006/2007 Bering Sea crab fisheries under the Crab Rationalization Program because it was submitted after the August 1, 2006, deadline provided in regulation. Mr. Thompson has a right to appeal the IAD because he has an interest that is directly and adversely affected by the IAD, as required under 50 C.F.R. §679.43(b).

ISSUE

Shall Mr. Thompson's application be deemed as having been timely filed?

ANALYSIS

Under 50 C.F.R. §680.4(f)(1), holders of crab quota share must apply annually for an Individual Fishing Quota (IFQ) permit for the upcoming crab fishing year. The regulation is straightforward and unambiguous:

- (1) A complete application must be received by NMFS no later than August 1 of the crab fishing year for which a person is applying to receive IFQ or IPQ. If a complete application is not received by NMFS by this date, that person will not receive IFQ or IPQ for that crab fishing year.

The record in this appeal shows that Mr. Thompson's application for the annual IFQ permit was received by RAM on August 15, 2006, two weeks past the filing deadline. In his appeal, Mr. Thompson does not dispute that his application was late. Rather, he asks that his lateness be excused because he did not receive a reminder from RAM until August 15, 2006. With his appeal, Mr. Thompson included a color copy of the reminder card that he received, which shows a postmark of July 11, 2006, from Juneau, Alaska. It also shows that the reminder was forwarded to Mr. Thompson at an address in Prescott, Arizona.

Mr. Thompson states in his appeal that the reminder card was delivered to his post office box in Petersburg, Alaska, on July 15, 2006, and was delivered to his temporary address in Arizona

sometime in late July 2006. Mr. Thompson asserts that when the reminder card was delivered to his Petersburg address, he was in Dutch Harbor, Alaska, preparing to take a vessel, the M/V LABRADOR, to Seattle. He said that he set sail for Seattle on July 22 and arrived there on August 3. He said that he arrived in Arizona and actually received the reminder card on August 10, 2006.

Mr. Thompson argues that RAM sent the reminder card to him too late to provide adequate notice of the filing deadline and denied him a reasonable opportunity to file his application on time. He asserts that RAM should send out the reminders at least 30 days before the August 1 deadline. He says that the July 15, 2006, delivery of the reminder card in Petersburg would have allowed him only 11 business days to file his application, and that this is an insufficient amount of time for fishermen, like him, who are away from home fishing or taking care of other business. Mr. Thompson states that if he is denied an IFQ permit for 2006/2007, he will lose almost \$100,000 that he expected to make from selling his IFQ this fall, and that such a loss constitutes an extreme and unreasonable penalty for a late application.

The Crab Rationalization Program regulations do not provide any exception to the annual filing requirement. Constructive notice of the August 1 annual deadline and requirement was provided in the Federal Register on March 2, 2005.<sup>1</sup> RAM automatically sends the application forms to current crab quota share holders and then, about two weeks before the August 1 deadline, RAM sends the post card reminder.<sup>2</sup> There is no regulation requiring RAM to send the application forms or reminders automatically or unsolicited, nor is there any requirement that RAM provide actual individualized notice.

Nonetheless, in this case RAM did provide actual notice of the application requirement and deadline. The reminder card was sent to Mr. Thompson's address on record with the agency. While it may be anticipated that fishermen will often be away from home fishing or on other business, that fact does not relieve them of the responsibility to take care of their business affairs, or delegate someone else to take care of them in their absence. As we stated in a previous decision, "Fishing is a highly regulated industry. It is a fisherman's responsibility to keep informed of applicable regulations."<sup>3</sup>

Mr. Thompson is, in effect, asking this office to waive the application filing deadline. The record indicates that NMFS has provided the required notice of the application filing requirement and deadline. Mr. Thompson has not stated facts that would trigger application of the equitable tolling doctrine, i.e., he has not stated extraordinary circumstances beyond his

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<sup>1</sup>Final Rule, 70 Fed. Reg. 10,174, 10,245 (2005).

<sup>2</sup>E-mail from Phil Smith, RAM Program Administrator, re: Gary Cobban, October 2, 2006.

<sup>3</sup>*In re application of T. Samuelson and T. Vasileff*, Appeal No. 94-0011, at 5 (Sep. 18, 1995).

control that prevented him from filing the application by the deadline.<sup>4</sup>

Although denying Mr. Thompson an annual IFQ permit because of the missed deadline may have a harsh result in his case, I do not have any authority to waive or stay the filing deadline in this case. NMFS has adequately stated its need to establish the August 1 annual deadline:

This deadline provides NMFS the time necessary to calculate whether, and how much, of the IFQ issued to a person should be designated as Class A or Class B IFQ based on the affidavit of affiliation provided in the application. NMFS would need to know all affiliation information for all persons to calculate the Class A/B IFQ ratios for each person accurately. Without this deadline, NMFS would not have sufficient information on affiliations and could not calculate the Class A/B ratio for a person.

This deadline date of August 1 allows NMFS time to issue the IFQ and IPQ for the Aleutian Islands golden king crab fishery (which typically begins in mid-August) and sufficient time to calculate and issue the IFQ and IPQ for all the other fisheries when the TACs are announced by the State of Alaska (in the Fall.)<sup>5</sup>

It is not the role of this office to question the wisdom or the validity of NMFS's policy choices underlying the agency's duly promulgated regulations.<sup>6</sup>

Based on all the above, I conclude as a matter of law that Mr. Thompson's late application cannot be deemed as having been timely filed. Thus, I conclude that RAM properly denied his application for an annual IFQ permit.

#### FINDINGS OF FACT

I find by a preponderance of the evidence in the record that:

1. Mr. Thompson's application for the annual IFQ permit was received by RAM on August 15, 2006, two weeks past the filing deadline.
2. NMFS published notice of the application filing requirement and deadline in the Federal Register on March 2, 2005, giving Mr. Thompson constructive notice of the requirements.

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<sup>4</sup>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).

<sup>5</sup>Proposed Rule, 69 Fed. Reg. 63,200, 63,222 (Oct. 29, 2004).

<sup>6</sup>*George M. Ramos*, Decision on Review, Appeal No. 94-0008, at 4, n.7 (Apr. 21, 1995).

3. RAM provided Mr. Thompson actual notice of the filing deadline at his address of record on July 15, 2006.

#### CONCLUSIONS OF LAW

1. Mr. Thompson's late application cannot be deemed as having been timely filed.
2. RAM properly denied his application for an annual IFQ permit.

#### DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on December 20, 2006, unless by that date the Regional Administrator take 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 November 30, 2006, 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 Appeals Officers, and must be accompanied by a written statement in support of the motion.

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Edward H. Hein  
Chief Appeals Officer