

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 06-0014
)
GARY D. COBBAN, JR.,) DECISION
Appellant)
) April 30, 2007
_____)

STATEMENT OF THE CASE

Gary D. Cobban, Jr., 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. Cobban'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. Cobban 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. Cobban'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. Cobban's application for the annual IFQ permit was received by RAM on October 4, 2006, two months past the filing deadline. In his appeal, Mr. Cobban does not dispute that his application was late. Rather, he asks that his lateness be excused because he was unaware of the annual application requirement, he was at sea during the entire period April 16 - September 24, 2006, and he did not receive application forms in the mail before the August 1 deadline.

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, 2005.¹ 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 postcard reminder.² Mr. Cobban asserts that he did not receive an application form before the August 1 deadline. He does not mention whether he did or did not receive RAM's postcard reminder.

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. Therefore, even if Mr. Cobban did not receive an application or a postcard reminder before the filing deadline, and even if RAM did not actually send either of these to Mr. Cobban, his failure to file a timely application would not thereby be excused. 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."³

Mr. Cobban claims that he was at sea every day from April 16 through September 24, 2006, aboard the F/V NEW VENTURE. He also states in his appeal filing that "a wheelhouse fire on July 7 burned the Satphone and computer among other things. I had no working MCC or phone." The gist of Mr. Cobban's argument appears to be that, because he was at sea and, for at least part of that time was unable to communicate with shore, it would have been impossible, or at least impractical, for him to learn of the annual application filing requirement or to take any action regarding the application if he had learned about it.

Yet, Mr. Cobban states that his wife, Elgia Cobban, informed him of the IAD that had arrived at their home via certified mail and which she signed for on August 18, 2006. Although Mr. Cobban does not explicitly say so, from his statement I presume that he and his wife communicated orally, either by phone or radio: "I had her open it and read it to me, then had her forward it to me."

It was reasonable and prudent for Mr. Cobban to rely on his wife to alert him of any business mail he received while he was at sea. It appears from his statements that Mrs. Cobban did notify him when she received the mail from RAM. Thus, the underlying problem in this case was not any lack of communication between Mr. Cobban and his wife; rather, it was Mr. Cobban's failure to become informed about the regulation requiring annual application. As I alluded to earlier, the old adage that "ignorance of the law is no excuse for failure to comply" applies in this instance.

¹Final Rule, 70 Fed. Reg. 10,174, 10,245 (2005).

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

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

Mr. Cobban is, in effect, asking this office to waive the application filing deadline. The record indicates that NMFS has provided the required constructive notice of the application filing requirement and deadline. Mr. Cobban has not stated facts that would trigger application of the equitable tolling doctrine, i.e., he has not stated extraordinary circumstances beyond his control that prevented him from filing the application by the deadline.⁴

Although denying Mr. Cobban an annual IFQ permit because of the missed deadline may have a harsh result, 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.)⁵

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.⁶

Based on all the above, I conclude as a matter of law that Mr. Cobban'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. Cobban's application for the annual IFQ permit was received by RAM on October 4, 2006, two months past the filing deadline.

⁴See, 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).

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

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

2. NMFS published notice of the application filing requirement and deadline in the Federal Register on March 2, 2005, giving Mr. Cobban constructive notice of the requirements.

CONCLUSIONS OF LAW

1. NMFS is not required to provide actual, individualized notice of the application filing requirement and deadline.
2. Mr. Cobban's late application cannot be deemed as having been timely filed.
3. 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 May 30, 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 May 10, 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 Judge, and must be accompanied by a written statement in support of the motion.

Edward H. Hein
Chief Administrative Judge