

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 97-0014
	)	
MAX HULSE, et al,	)	DECISION
F/V WAYWARD WIND	)	
Appellants	)	October 15, 1999
_____	)	

STATEMENT OF THE CASE

An Initial Administrative Determination [IAD] issued by the Restricted Access Management [RAM] program<sup>1</sup> on July 15, 1997, approved the Appellants' application for a Scallop Moratorium Permit for the vessel F/V WAYWARD WIND. The IAD, however, denied the Appellants' claim that the length overall [LOA] of the vessel was either 52 feet or 50.5 feet, and determined that the LOA was only 47 feet. RAM also rejected the Appellants' request to substitute the LOA of a replacement vessel, the F/V LA BRISA.

On appeal, the Appellants do not challenge RAM's determination of the LOA of the F/V WAYWARD WIND. The Appellants only reassert their argument that the permit's LOA should be based on the F/V LA BRISA, which is 13 feet longer than the F/V WAYWARD WIND. They complain that, if RAM's determination is upheld, they will be precluded from using the F/V LA BRISA for scallop fishing.

Because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43.

ISSUE

May the length overall or maximum length overall specified on a Scallop Moratorium Permit be based on the LOA of a vessel other than the qualifying vessel?

DISCUSSION

Under 50 C.F.R. § 679.43(g)(4), all Scallop Moratorium Permits must specify a maximum length overall [MLOA], which is 1.2 times the LOA of the qualifying vessel on January 20, 1993, unless the qualifying vessel was under reconstruction on that date. A person named on a Scallop Moratorium

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<sup>1</sup>The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

Permit may use the permit on any vessel that the person owns or operates, as long as the vessel's LOA does not exceed the MLOA of the qualifying vessel.<sup>2</sup> The purpose of the MLOA requirement is to limit the size of scallop vessels to a maximum of 20 percent longer than the LOA of the original qualifying vessel.

The Appellants' qualifying vessel is the F/V WAYWARD WIND. They do not challenge RAM's determination that the vessel's LOA is 47 feet, which generates an MLOA of 56.4 feet. Their problem is that they sold the F/V WAYWARD WIND in 1989 and replaced it in 1991 with the F/V LA BRISA, which has an LOA of 60 feet.<sup>3</sup> The F/V LA BRISA is 28% longer than the F/V WAYWARD WIND, and exceeds the MLOA by almost four feet. RAM's Official Scallop Moratorium Record does not show that the F/V LA BRISA made the necessary scallop landings to be a qualified vessel in its own right,<sup>4</sup> and the Appellants have neither claimed nor provided evidence that the vessel made qualifying landings. Therefore, as long as the MLOA on the Appellants' permit is based on the LOA of the F/V WAYWARD WIND, they will be precluded from using the F/V LA BRISA for scallop fishing.

To remedy this problem, the Appellants requested that RAM allow the F/V LA BRISA to be substituted for the F/V WAYWARD WIND as the qualifying vessel for their Scallop Moratorium Permit. Doing so would enable them to use their vessel for scallop fishing, but at the same time it would increase the MLOA on their permit to 72 feet, and would allow them to use vessels that are 53% longer than the F/V WAYWARD WIND. The Appellants argue, essentially, that because they built the F/V LA BRISA in 1991 — some four years before the North Pacific Fishery Management Council announced the final qualifying criteria for the scallop moratorium — it should be "grandfathered in" and not subject to the MLOA limit of 20%.<sup>5</sup>

RAM refused to use the F/V LA BRISA to determine the LOA and the MLOA that would appear on the Appellants' permit, on the grounds that federal regulations require that the MLOA on a scallop

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<sup>2</sup>50 C.F.R. § 679.4(g)(1)(iii).

<sup>3</sup>The evidence in the record, including a 1994 marine survey, is that the LOA of the F/V LA BRISA is 59.5 feet, and this fact is uncontested. Under 50 C.F.R. § 679.2, the measured LOA of a vessel is to be rounded to the nearest foot. Using "scientific rounding," RAM rounds a measurement ending in .5 to the nearest even whole foot. [Exhibit 2, E-mail memorandum from Phil Smith, RAM, 14 Oct 99] Therefore, the official LOA of the F/V LA BRISA would be 60 feet.

<sup>4</sup>See Exhibit 1, E-mail memorandum from Tracy Buck, RAM, 13 Oct 99.

<sup>5</sup>For a background of the development and timing of the scallop moratorium, see 61 Fed. Reg. 38,099-38,100 (July 23, 1996).

moratorium permit be based on the LOA of the qualifying vessel.<sup>6</sup> The regulations provide for no exception to this rule. Therefore, the LOA and MLOA specified on a Scallop Moratorium Permit may not be based on the LOA of a vessel other than the qualifying vessel.

Clearly, the qualifying vessel in this case is the F/V WAYWARD WIND. RAM had no choice but to base the permit's MLOA on the LOA of the F/V WAYWARD WIND, which RAM correctly did.

#### FINDINGS OF FACT

1. Federal regulations require that the MLOA on a scallop moratorium permit be based on the LOA of the qualifying vessel, and the regulations provide for no exception to this rule.
2. The F/V LA BRISA is not the qualifying vessel with respect to the Appellants' application for a Scallop Moratorium Permit. The F/V WAYWARD WIND is the qualifying vessel.

#### CONCLUSION OF LAW

1. The length overall or maximum length overall specified on a Scallop Moratorium Permit may not be based on the LOA of a vessel other than the qualifying vessel.
2. RAM correctly determined that the MLOA on the Appellants' Scallop Moratorium Permit must be based on the LOA of the F/V WAYWARD WIND and not on the LOA of the F/V LA BRISA.

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on November 15, 1999, unless by that date the Regional Administrator orders the review of the decision.

Any party, including 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 October 25, 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. A timely Motion for Reconsideration will result in a stay of the effective date of the decision, pending a ruling on the motion or the issuance of a Decision on Reconsideration.

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<sup>6</sup>50 C.F.R. § 679.4(g)(4).

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Edward H. Hein  
Chief Appeals Officer